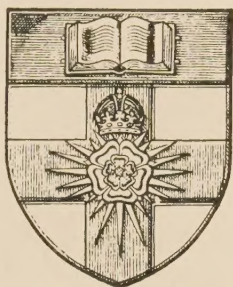


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AND

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CASES REPORTED IN VOLUME 2

	PAGE		PAGE
ABERCONWAY'S SETTLEMENT TRUSTS, <i>Re</i> [CH.D.]	981	BRAITHWAITE, PARKER <i>v.</i> [CH.D.]	837
ADLER <i>v.</i> BLACKMAN [Q.B.D.]	41	BRAUER & Co. (GREAT BRITAIN), LTD. <i>v.</i> CLARK (JAMES) (BRUSH MATERIALS), LTD. [C.A.]	497
—, [C.A.]	945	BREWER <i>v.</i> WESTMINSTER BANK, LTD. [Q.B.D.]	650
AKERROYD, GARDNER <i>v.</i> [Q.B.D. DIVL. CT.]	306	BRIDGES (INSPECTOR OF TAXES) <i>v.</i> WATTERSON [CH.D.]	910
AMALGAMATED BUILDING CONTRACTORS, LTD. <i>v.</i> WALTHAM HOLY CROSS URBAN DISTRICT COUNCIL [C.A.]	452	BRITISH NYLON SPINNERS, LTD. <i>v.</i> IMPERIAL CHEMICAL INDUSTRIES, LTD. [C.A.]	780
ASTON CHARITIES TRUST, LTD. <i>v.</i> STEPNEY BOROUGH COUNCIL [C.A.]	228	BRITISH OVERSEAS AIRWAYS CORPN., HORABIN <i>v.</i> [Q.B.D.]	1016
ASTORIA GARAGE (STREATHAM), LTD., READ <i>v.</i> [C.A.]	292	BRITISH THOMSON-HOUSTON CO., LTD., WATSON <i>v.</i> [C.A.]	851
ATTORNEY-GENERAL, CLEAVE <i>v.</i> HEADLEY, CHANNON AND BARCLAYS BANK, LTD., INTERVENING [PROB.]	283	BROOKFIELD (HAROLD) & SON, LTD., CHIBBETT (INSPECTOR OF TAXES) <i>v.</i> [C.A.]	265
ATTORNEY-GENERAL <i>v.</i> COLCHESTER CORPN. [CH.D.]	297	BROOM <i>v.</i> MORGAN [Q.B.D.]	1007
ATTORNEY-GENERAL, STARKOWSKI <i>v.</i> [C.A.]	616	BUCKMAN (D.), LTD., LEIBO <i>v.</i> [C.A.]	1057
ATTORNEY-GENERAL OF CEYLON <i>v.</i> MACKIE [P.C.]	775	BUZZACOTT (<i>dec'd.</i>), <i>Re</i> [CH.D.]	1011
B.'S SETTLEMENT, <i>Re</i> [CH.D.]	647	CANN, WESTWOOD <i>v.</i> [C.A.]	349
BAHAWALPUR STATE (AMEER), SAYCE <i>v.</i> [C.A.]	64	CENTRAL AIR TRANSPORT CORPN., CIVIL AIR TRANSPORT INCORPORATED <i>v.</i> [P.C.]	733
BAIN, GOLDTHORPE <i>v.</i> [C.A.]	23	CHESHIRE COUNTY COUNCIL, WRIGHT <i>v.</i> [C.A.]	789
BAKER <i>v.</i> BAKER [C.A.]	248	CHIBBETT (INSPECTOR OF TAXES) <i>v.</i> HAROLD BROOKFIELD & SON, LTD. [C.A.]	265
BANK VOOR HANDEL EN SCHEEPVAART N.V. <i>v.</i> SLATFORD (<i>sued as</i> CUSTODIAN OF ENEMY PROPERTY) [C.A.]	956	CHITTENDEN, <i>Ex parte</i> R. <i>v.</i> BATH LICENSING JUSTICES [Q.B.D.]	700
BANKS <i>v.</i> BANKS [C.A.]	232	CHRISTMAS, GENERAL CLEANING CONTRACTORS, LTD. <i>v.</i> [H.L.]	1110
BANQUE INDUSTRIELLE DE MOSCOU, <i>Re</i> [CH.D.]	532	CHURCH <i>v.</i> CHURCH [Div.]	441
BARNARD <i>v.</i> NATIONAL DOCK LABOUR BOARD [Q.B.D.]	424	CITY PERMANENT BUILDING SOCIETY <i>v.</i> MILLER [C.A.]	621
BARON <i>v.</i> BARON [C.A.]	689	CIVIL AIR TRANSPORT INCORPORATED <i>v.</i> CENTRAL AIR TRANSPORT CORPN. [P.C.]	733
BARRON (INSPECTOR OF TAXES) <i>v.</i> LITTMAN [H.L.]	548	CLARK, LEEK & MOORLANDS BUILDING SOCIETY <i>v.</i> [C.A.]	492
BARRY <i>v.</i> HASSELDINE [CH.D.]	317	CLARK (JAMES) (BRUSH MATERIALS), LTD., BRAUER & Co. (GREAT BRITAIN), LTD. <i>v.</i> [C.A.]	497
BARTHOLOMEW <i>v.</i> BARTHOLOMEW [C.A.]	1035	CLEAVE <i>v.</i> ATTORNEY-GENERAL, HEALLEY, CHANNON AND BARCLAYS BANK, LTD., INTERVENING [PROB.]	283
BATES <i>v.</i> PARKER (BIRMINGHAM ASSIZES)	987	COCKRAM (VALUATION OFFICER), R. <i>v.</i> <i>Ex parte</i> EAST MIDLANDS ELECTRICITY BOARD [Q.B.D. DIVL. CT.]	44
BATES, R. <i>v.</i> [C.C.C.]	842	COLCHESTER CORPN., ATTORNEY-GENERAL <i>v.</i> [CH.D.]	297
BATH LICENSING JUSTICES, R. <i>v.</i> <i>Ex parte</i> CHITTENDEN [Q.B.D.]	700	COLIN & SHIELDS <i>v.</i> WEDDEL (W.) & Co., LTD. [C.A.]	337
BATLEY (<i>dec'd.</i>), <i>Re</i> [C.A.]	562	COLLINS <i>v.</i> COLLINS [C.A.]	1133
BAUMAN <i>v.</i> HULTON PRESS, LTD. [Q.B.D.]	1121	COLLYER <i>v.</i> DRING [Q.B.D. DIVL. CT.]	1004
BEADMAN BROTHERS, LTD., DU JARDIN <i>v.</i> [Q.B.D.]	160	CONLON <i>v.</i> CONLONS, LTD. [C.A.]	462
BECK <i>v.</i> NEWBOLD [C.A.]	412	COODEN ENGINEERING CO., LTD. <i>v.</i> STANFORD [C.A.]	915
BEESON (INSPECTOR OF TAXES), BENTLEYS, STOKES AND LOWLESS <i>v.</i> [C.A.]	82	COOPER <i>v.</i> COOPER [Div.]	857
BELL (J. H. W.), LTD., MULREADY <i>v.</i> [MANCHESTER ASSIZES]	663	CORK <i>v.</i> KIRBY McLEAN, LTD. [C.A.]	402
BENARD (C.L.) (1954), LTD., NORDISK INSULIN-LABORATORIUM <i>v.</i> [CH.D.]	1040	COUPE, SAYCE <i>v.</i> [Q.B.D. DIVL. CT.]	715
BENTLEY & Co., JEROME <i>v.</i> [Q.B.D.]	114	CRABTREE, R. <i>v.</i> [C.C.A.]	974
BENTLEYS, STOKES AND LOWLESS <i>v.</i> BEESON (INSPECTOR OF TAXES) [C.A.]	82	CRAWLEY <i>v.</i> PARSONS [Q.B.D. DIVL. CT.]	488
BERENS, BIBERFELD <i>v.</i> [C.A.]	237	CROWHURST <i>v.</i> MAIDMENT [C.A.]	808
BEST <i>v.</i> SAMUEL FOX & Co., LTD. [H.L.]	394	CROYDON CORPN., RAWLENCE <i>v.</i> [C.A.]	535
BIBBY (J.) & SONS, LTD., PENSIONS TRUST DEED, <i>Re</i> [CH.D.]	483	CUSTOMS AND EXCISE COMRS. <i>v.</i> QUEEN'S PARK RANGERS FOOTBALL AND ATHLETIC CLUB, LTD. [Q.B.D.]	575
BIBERFELD <i>v.</i> BERENS [C.A.]	237	CUTHELL, GROUNSELL <i>v.</i> [Q.B.D.]	135
BILLINGTON, MANWARING <i>v.</i> [C.A.]	277	CZARNIKOW (C.), LTD., LOUTHI <i>v.</i> [Q.B.D.]	823
BIRCH <i>v.</i> WIGAN CORPN. [C.A.]	893	D. <i>v.</i> D. [C.A.]	854
BIRMINGHAM COMPENSATION APPEAL TRIBUNAL OF MINISTRY OF LABOUR AND NATIONAL SERVICE, R. <i>v.</i> <i>Ex parte</i> ROAD HAULAGE EXECUTIVE [Q.B.D. DIVL. CT.]	100	D.'S SETTLED ESTATES, <i>Re</i> [CH.D.]	603
BLACKMAN, ADLER <i>v.</i> [Q.B.D.]	41	DALE <i>v.</i> INLAND REVENUE COMRS. [C.A.]	89
—, [C.A.]	945	DALY <i>v.</i> GENERAL MEDICAL COUNCIL [P.C.]	666
BLOOMSTEIN <i>v.</i> RAILWAY EXECUTIVE [Q.B.D.]	418	DAVIES <i>v.</i> DU PAVER [C.A.]	991
BOGUSLAWSKI, GDYNIA AMERYKA LINIE ZEG-LUGOWE SPOLKA AKCYJNA <i>v.</i> [H.L.]	470	DAVIES, JAMES <i>v.</i> [Q.B.D. DIVL. CT.]	758
BOOTS CASH CHEMISTS (SOUTHERN), LTD., PHARMACEUTICAL SOCIETY OF GREAT BRITAIN <i>v.</i> [Q.B.D.]	456	DAVIS (<i>dec'd.</i>), <i>In the Estate of</i> [PROB.]	509
BOWKETT, JAMES <i>v.</i> [Q.B.D. DIVL. CT.]	320	DEAKIN, THOMSON (D. C.) & Co., LTD. <i>v.</i> [C.A.]	361
BOYER <i>v.</i> WARBEY [C.A.]	976	DEANE-FREEMAN, REEVES <i>v.</i> [Q.B.D.]	506
BRADBURY, STROUD <i>v.</i> [Q.B.D. DIVL. CT.]	76	DENTON ROAD, TWICKENHAM, MIDDLESEX, <i>Re</i> 56 [CH.D.]	799
BRADWELL'S WILL TRUSTS, <i>Re</i> [CH.D.]	286	DENTONS (1923), LTD., TURVEY <i>v.</i> [Q.B.D.]	1025

	PAGE		PAGE
DICKINSON v. MINISTER OF PENSIONS [Q.B.D.]	1031	INLAND REVENUE COMRS., RECKNELL v. [CH.D.]	147
DICKSON, STEVENS v. [Q.B.D. DIVL. CT.]	246	IRONBRIDGE METAL WORKS, LTD., MERRINGTON v. [SALOP ASSIZES]	1101
DIRECTOR OF PUBLIC PROSECUTIONS, <i>Ex parte</i> R. v. MIDDLESEX JUSTICES [Q.B.D. DIVL. CT.]	312	ISAACS, HOENIG v. [C.A.]	176
DOBBS v. LINFORD [C.A.]	827	J. (ORSE. B.) (BY HER NEXT FRIEND) v. J. [DIV.]	1129
DOMINANT SITES, LTD. v. HENDON BOROUGH COUNCIL [Q.B.D. DIVL. CT.]	899	JAMES v. BOWKETT [Q.B.D. DIVL. CT.]	320
DONALDSON v. MCNIVEN [C.A.]	691	JAMES v. DAVIES [Q.B.D. DIVL. CT.]	758
DOWELL v. DOWELL [DIV.]	141	JENNINGS' (A BANKRUPT) TRUSTEE v. KING [CH.D.]	608
DRING, COLLYER v. [Q.B.D. DIVL. CT.]	1004	JEROME v. BENTLEY & CO. [Q.B.D.]	114
DU JARDIN v. BEADMAN BROTHERS, LTD. [Q.B.D.]	160	JONES v. MANCHESTER CORPN. [C.A.]	125
DUNCAN GILMOUR AND CO. LTD., <i>Re</i> [CH.D.]	871	JONES, SMITH v. [Q.B.D.]	907
DU PAVER, DAVIES v. [C.A.]	991	JONES, TIDEWAY INVESTMENT AND PROPERTY HOLDINGS, LTD. v. [C.A.]	514
D'VORA, THE. SOCONY BUNKER OIL CO., LTD. v. D'VORA OF HAIFA (OWNERS) [ADM.]	1127	JUDGMENT SUMMONS (NO. 25 OF 1952), <i>Re</i> A. <i>Ex parte</i> HENLYS, LTD. [CH.D.]	772
EALING BOROUGH COUNCIL v. MINISTER OF HOUSING AND LOCAL GOVERNMENT [CH.D.]	639	K (AN INFANT), <i>Re</i> [C.A.]	877
EAST KERRIER JUSTICES, R. v. <i>Ex parte</i> MUNDY [Q.B.D. DIVL. CT.]	144	KAUFMAN, <i>In the Estate of</i> [PROB.]	261
EAST MIDLANDS ELECTRICITY BOARD, <i>Ex parte</i> R. v. COCKRAM (VALUATION OFFICER) [Q.B.D. DIVL. CT.]	44	KEELE ESTATES, <i>Re</i> [C.A.]	164
EBBS v. WHITSON (JAMES) & CO., LTD. [C.A.]	192	KENDALL v. KENDALL [DIV.]	1038
EDWARDS v. RAILWAY EXECUTIVE [H.L.]	430	KENT COUNTY COUNCIL, GILLINGHAM CORPN. v. [CH.D.]	1107
ELLIS, LEEDER v. [P.C.]	814	KENYON, TAYLOR v. [Q.B.D. DIVL. CT.]	726
ENGLAND v. ENGLAND [DIV.]	784	KING, JENNINGS' (A BANKRUPT) TRUSTEE v. [CH.D.]	608
EVANS, LEACH v. [Q.B.D. DIVL. CT.]	264	KING v. KING [H.L.]	584
FACTORS (SUNDRIES), LTD. v. MILLER [C.A.]	630	KING v. PHILLIPS [Q.B.D.]	459
FERRIS v. WEAVER [Q.B.D.]	233	KIRBY MACLEAN, LTD., CORK v. [C.A.]	402
FINE, WIMBOURNE v. [CH.D.]	681	LAMBTON'S MARRIAGE SETTLEMENT, <i>Re</i> [C.A.]	201
FIRESTONE TIRE AND RUBBER CO. (S.S.), LTD. v. SINGAPORE HARBOUR BOARD [P.C.]	219	LAMTMAN v. VALENTINE [Q.B.D. DIVL. CT.]	803
FOX (SAMUEL) & CO., LTD., BEST v. [H.L.]	394	LAWRENCE v. HOWLETT [Q.B.D. DIVL. CT.]	74
FRIEDENTAG, TIDEWAY INVESTMENT AND PROPERTY HOLDINGS, LTD. v. [C.A.]	514	LEACH v. EVANS [Q.B.D. DIVL. CT.]	264
FROST v. FROST [DIV.]	1125	LEAHY (ET CONTRA), HAWKINS (INSPECTOR OF TAXES) v. [CH.D.]	759
GAPPE'S WILL TRUSTS, <i>Re</i> [C.A.]	579	LEEDER v. ELLIS [P.C.]	814
GARDNER v. AKEROYD [Q.B.D. DIVL. CT.]	306	LEEDS CORPN., NORTH-EASTERN GAS BOARD v. [CH.D.]	326
GDYNIA AMERYKA LINIE ZEGUGOWE SPOLEKA AKCYJNA v. BOGUSLAWSKI [H.L.]	470	LEEK & MOORLANDS BUILDING SOCIETY v. CLARK [C.A.]	492
GELBERG v. VIVIAN [C.A.]	746	LEES v. MOTOR INSURERS BUREAU [Q.B.D.]	511
GENERAL CLEANING CONTRACTORS, LTD. v. CHRISTMAS [H.L.]	1110	LEIBO v. BUCKMAN (D.), LTD. [C.A.]	1057
GENERAL MEDICAL COUNCIL, DALY v. [P.C.]	666	LEICESTER v. PEARSON [Q.B.D. DIVL. CT.]	71
GILBERT, STIRLING v. [C.A.]	153	LEIGH'S MARRIAGE SETTLEMENT, <i>Re</i> [CH.D.]	57
GILLINGHAM CORPN. v. KENT COUNTY COUNCIL [CH.D.]	1107	LILLINGSTON (decd.), <i>Re</i> [CH.D.]	184
GLYNN v. SIMMONDS [Q.B.D. DIVL. CT.]	47	LINFORD, DOBBS v. [C.A.]	827
GOLDTHORPE v. BAIN [C.A.]	23	LITTMAN, BARRON (INSPECTOR OF TAXES) v. [H.L.]	548
GOTHAM CO., LTD., MARSHALL v. [C.A.]	1044	LONGBOURNE'S MARRIAGE SETTLEMENT, <i>Re</i> [CH.D.]	933
GRAIN IMPORTERS (EIRE), LTD., A/S SAMMILLING v. [Q.B.D.]	315	LOUTFI v. CZARNIKOW (C.), LTD. [Q.B.D.]	823
GRANGER, RAYMOND & REID v. [Q.B.D. DIVL. CT.]	152	LOWE v. LOWE [DIV.]	671
GREEN v. THAMES LAUNCHES, LTD. [Q.B.D.]	332	LOWRY v. LOWRY [DIV.]	61
GROUNSELL v. CUTHELL [Q.B.D.]	135	LYON v. LYON [C.A.]	831
HADKINSON v. HADKINSON [C.A.]	567	MACAULAY, HASSELL v. [Q.B.D. DIVL. CT.]	825
HARLOW, <i>Ex parte</i> R. v. NOTTINGHAM QUARTER SESSIONS [Q.B.D. DIVL. CT.]	78	MACE, WARDHAUGH (A. F.), LTD. v. [Q.B.D. DIVL. CT.]	28
HARRIS (decd.), <i>Re</i> [PROB.]	409	MCINTOSH (INSPECTOR OF TAXES) v. MANCHESTER CORPN. [C.A.]	444
HAR-SHEFT v. HAR-SHEFT [DIV.]	821	MACKIE, ATTORNEY-GENERAL OF CRYLON v. [P.C.]	775
HASELL v. MACAULAY [Q.B.D. DIVL. CT.]	825	MCNIVEN, DONALDSON v. [C.A.]	691
HASELDINE, BARRY v. [CH.D.]	317	MAIDMENT, CROWHURST v. [C.A.]	808
HAWKINS (INSPECTOR OF TAXES) v. LEAHY (ET CONTRA) [CH.D.]	759	MANCHESTER CORPN., JONES v. [C.A.]	125
HAWKINS (F. T.) & CO., LTD., <i>Re</i> [CH.D.]	467	MANCHESTER CORPN., MCINTOSH (INSPECTOR OF TAXES) v. [C.A.]	444
HAYNES v. HAYNES [DIV.]	439	MANWARING v. BILLINGTON [C.A.]	747
HENDON BOROUGH COUNCIL, DOMINANT SITES, LTD. v. [Q.B.D. DIVL. CT.]	899	MARSHALL v. GOTHAM CO., LTD. [C.A.]	1044
HENLYS, LTD., <i>Ex parte</i> R. v. A JUDGMENT SUMMONS (NO. 25 OF 1952) [CH.D.]	772	MARSHALL (INSPECTOR OF TAXES), THOMAS v. [C.A.]	32
HERMAN, WATSON v. [Q.B.D. DIVL. CT.]	70	MEAD v. PLUMTREE [Q.B.D. DIVL. CT.]	723
HEWITT v. HEWITT [Q.B.D. DIVL. CT.]	250	MERRINGTON v. IRONBRIDGE METAL WORKS, LTD. [SALOP ASSIZES]	1101
HINCKLEY AND LEICESTERSHIRE BUILDING SOCIETY, SMART (J. W.) (MODERN SHOE REPAIRS), LTD. v. [C.A.]	846	METCALF v. WELLS [CH.D.]	889
HITCHCOCK v. W.B. [Q.B.D. DIVL. CT.]	119	MIDDLESEX COUNTY COUNCIL v. MINISTER OF LOCAL GOVERNMENT AND PLANNING [C.A.]	709
HOENIG v. ISAACS [C.A.]	176	MIDDLESEX JUSTICES, R. v. <i>Ex parte</i> DIRECTOR OF PUBLIC PROSECUTIONS [Q.B.D. DIVL. CT.]	312
HOLLAND v. PERRY [Q.B.D. DIVL. CT.]	720	MIDDLETON v. MIDDLETON [DIV.]	693
HOLLINGSWORTH v. HOLLINGSWORTH [DIV.]	284	MILK MARKETING BOARD, THOMPSON v. [C.A.]	344
HORABIN v. BRITISH OVERSEAS AIRWAYS CORPN. [Q.B.D.]	1016	MILLER, CITY PERMANENT BUILDING SOCIETY v. [C.A.]	621
HOWLETT, LAWRENCE v. [Q.B.D. DIVL. CT.]	74	MILLER, FACTORS (SUNDRIES), LTD. v. [C.A.]	630
HULTON PRESS, LTD., BAUMAN v. [Q.B.D.]	1121	MILLER, R. v. [WINCHESTER ASSIZES]	667
HURLL, <i>Re</i> [CH.D.]	322	MINISTER OF HOUSING AND LOCAL GOVERNMENT, EALING BOROUGH COUNCIL v. [CH.D.]	639
HYDE v. PIMLEY [C.A.]	102	MINISTER OF LABOUR AND NATIONAL SERVICE, R. v. <i>Ex parte</i> ROAD HAULAGE EXECUTIVE [Q.B.D. DIVL. CT.]	764
IMPERIAL CHEMICAL INDUSTRIES, LTD., BRITISH NYLON SPINNERS, LTD. v. [C.A.]	780	MINISTER OF LOCAL GOVERNMENT AND PLANNING, MIDDLESEX COUNTY COUNCIL v. [C.A.]	709
INLAND REVENUE COMRS., DALE v. [C.A.]	89	MINISTER OF PENSIONS, DICKINSON v. [Q.B.D.]	1031
INLAND REVENUE COMRS., MUCKLOW (A. & J.), LTD. (IN LIQUIDATION) v. [CH.D.]	1094	MINISTRY OF HEALTH v. STAFFORD CORPN. [C.A.]	386
		MOONEY v. MOONEY [Q.B.D. DIVL. CT.]	812

	PAGE
MOORE, WOOLLEY v. [Q.B.D. DIVL. CT.]	797
MORGAN, BROOM v. [Q.B.D.]	1007
MORGAN, PALLANT v. [CH.D.]	951
MOTOR INSURERS BUREAU, LEES v. [Q.B.D.]	511
MUCKLOW (A. & J.), LTD. (IN LIQUIDATION) v. INLAND REVENUE COMRS. [CH.D.]	1094
MULREADY v. BELL (J. H. W.), LTD. [MANCHESTER ASSIZES]	663
MUNDY, <i>Ex parte</i> . R. v. EAST KERRIER JUSTICES [Q.B.D. DIVL. CT.]	144
MURCUTT v. MURCUTT [Div.]	427
MURRAY, MURRAY, BULL & CO., LTD. v. [Q.B.D.]	1079
MURRAY, BULL & CO., LTD. v. MURRAY [Q.B.D.]	1079
NANA KWASI AGYEMAN, BOAGYAAHENE, NANA OSEI ASSIBYE III, KOKOFUHENE v. [P.C.]	1084
NANA OSEI ASSIBYE III, KOKOFUHENE v. NANA KWASI AGYEMAN, BOAGYAAHENE [P.C.]	1084
NATIONAL ASSISTANCE BOARD (BY J. R. BEATTIE) v. WILKINSON [Q.B.D. DIVL. CT.]	255
NATIONAL DOCK LABOUR BOARD, BARNARD v. [Q.B.D.]	424
NEWBOLD, BECK v. [C.A.]	412
NEWCASTLE-UNDER-LYME JUSTICES, R. v. <i>Ex parte</i> WHITEHOUSE [Q.B.D. DIVL. CT.]	531
NEWSOM v. ROBERTSON (INSPECTOR OF TAXES) [C.A.]	728
NORDISK INSULINLABORATORIUM v. BENCARD (C.L.) (1934), LTD. [CH.D.]	1040
NORTH-EASTERN GAS BOARD v. LEEDS CORPN. [CH.D.]	326
NOTTINGHAM QUARTER SESSIONS, R. v. <i>Ex parte</i> HARLOW [Q.B.D. DIVL. CT.]	78
ORMSBY v. ORMSBY [Div.]	1005
ORTON, TIDEWAY INVESTMENT AND PROPERTY HOLDINGS, LTD. v. [C.A.]	514
PALLANT v. MORGAN [CH.D.]	951
PARKER, BATES v. [BIRMINGHAM ASSIZES]	987
PARKER v. BRAITHWAITE [CH.D.]	837
PARSONS, CRAWLEY v. [Q.B.D. DIVL. CT.]	488
PEARCE, R. v. [C.C.A.]	718
PEARSON, LEICESTER v. [Q.B.D. DIVL. CT.]	71
PEETE (decd.), <i>Re</i> [CH.D.]	599
PENNY v. PENNY [Div.]	938
PERRIRA, <i>Ex parte</i> . R. v. WILSON, ESQ. (METROPOLITAN MAGISTRATE). [Q.B.D. DIVL. CT.]	706
PERRY, HOLLAND v. [Q.B.D. DIVL. CT.]	720
PHARMACEUTICAL SOCIETY OF GREAT BRITAIN v. BOOTS CASH CHEMISTS (SOUTHERN), LTD. [Q.B.D.]	456
PHILLIPS, KING v. [Q.B.D.]	459
PICKAVANCE, <i>Ex parte</i> . R. v. ST. HELENS AND AREA RENT TRIBUNAL [C.A.]	9
PIMLEY, HYDE v. [C.A.]	102
PLUMTREE, MEAD v. [Q.B.D. DIVL. CT.]	723
POYSER v. POYSER [C.A.]	949
QUEEN'S PARK RANGERS FOOTBALL AND ATHLETIC CLUB, LTD., CUSTOMS AND EXCISE COMRS. v. [Q.B.D.]	575
QUESTIER, SPRINGATE v. [Q.B.D. DIVL. CT.]	21
R. v. BATES [C.C.C.]	842
R. v. BATH LICENSING JUSTICES. <i>Ex parte</i> CHITTENDEN [Q.B.D.]	700
R. v. BIRMINGHAM COMPENSATION APPEAL TRIBUNAL OF MINISTRY OF LABOUR AND NATIONAL SERVICE. <i>Ex parte</i> ROAD HAULAGE EXECUTIVE [Q.B.D. DIVL. CT.]	100
R. v. COCKRAM (VALUATION OFFICER). <i>Ex parte</i> EAST MIDLANDS ELECTRICITY BOARD [Q.B.D. DIVL. CT.]	44
R. v. CRABTREE [C.C.A.]	974
R. v. EAST KERRIER JUSTICES. <i>Ex parte</i> MUNDY. [Q.B.D. DIVL. CT.]	144
R. v. MIDDLESEX JUSTICES. <i>Ex parte</i> DIRECTOR OF PUBLIC PROSECUTIONS [Q.B.D. DIVL. CT.]	312
R. v. MILLER [WINCHESTER ASSIZES]	667
R. v. MINISTER OF LABOUR AND NATIONAL SERVICE. <i>Ex parte</i> ROAD HAULAGE EXECUTIVE [Q.B.D. DIVL. CT.]	764
R. v. NEWCASTLE-UNDER-LYME JUSTICES. <i>Ex parte</i> WHITEHOUSE [Q.B.D. DIVL. CT.]	531
R. v. NOTTINGHAM QUARTER SESSIONS. <i>Ex parte</i> HARLOW [Q.B.D. DIVL. CT.]	78
R. v. PEARCE [C.C.A.]	718
R. v. ST. HELENS AND AREA RENT TRIBUNAL. <i>Ex parte</i> PICKAVANCE [C.A.]	9
R. v. STRAFFEN [C.C.A.]	657
REGINAM, TEPER v. [P.C.]	447
R. v. TUCKER [C.-M. A.C.]	1074
R. v. WILSON, ESQ. (METROPOLITAN MAGISTRATE). <i>Ex parte</i> PERRIRA [Q.B.D. DIVL. CT.]	706
R. v. WINDLE [C.C.A.]	1
RAILWAY EXECUTIVE, BLOOMSTEIN v. [Q.B.D.]	418
RAILWAY EXECUTIVE, EDWARDS v. [H.L.]	430
RAWLSON v. CROYDON CORPN. [C.A.]	535

	PAGE
RAYMOND & REID v. GRANGER [Q.B.D. DIVL. CT.]	152
READ v. ASTORIA GARAGE (STREATHAM), LTD. [C.A.]	292
RECKNELL v. INLAND REVENUE COMRS. [CH.D.]	147
REEVES v. DEANE-FREEMAN [Q.B.D.]	506
REISS v. WOOLF [Q.B.D.]	3
—, [C.A.]	112
RICHARDS v. RICHARDS [Div.]	904
RIMMER v. RIMMER [C.A.]	863
ROAD HAULAGE EXECUTIVE, <i>Ex parte</i> . R. v. BIRMINGHAM COMPENSATION APPEAL TRIBUNAL OF MINISTRY OF LABOUR AND NATIONAL SERVICE [Q.B.D. DIVL. CT.]	100
ROAD HAULAGE EXECUTIVE, <i>Ex parte</i> . R. v. MINISTER OF LABOUR AND NATIONAL SERVICE [Q.B.D. DIVL. CT.]	764
ROBERTSON (INSPECTOR OF TAXES), NEWSOM v. [C.A.]	728
ST. HELENS AND AREA RENT TRIBUNAL, R. v. <i>Ex parte</i> PICKAVANCE [C.A.]	9
SALTMARSH v. SALTMARSH [Div.]	6
SAMELING (A/S) v. GRAIN IMPORTERS (EIRE), LTD. [Q.B.D.]	315
SANDERS (ORSE, SAUNDERS) v. SANDERS (ORSE, SAUNDERS) [Div.]	767
SAYCE v. BAHAWALPUR STATE (AMEER) [C.A.]	64
SAYCE v. COUPE [Q.B.D. DIVL. CT.]	715
SCAFFOLDING (GREAT BRITAIN), LTD., SEXTON v. [Q.B.D.]	278
—, [C.A.]	1085
SCOTT v. SCOTT [Div.]	890
SEGALOV (decd.), <i>In the Estate of</i> [PROB.]	107
SEXTON v. SCAFFOLDING (GREAT BRITAIN), LTD. [Q.B.D.]	278
—, [C.A.]	1085
SIMMONDS, GLYNN v. [Q.B.D. DIVL. CT.]	47
SINGAPORE HARBOUR BOARD, FIRESTONE TIRE AND RUBBER CO. (S.S.), LTD. v. [P.C.]	219
SLATFORD (<i>used as</i> CUSTODIAN OF ENEMY PROPERTY), BANK VOOR HANDEL EN SCHEEPVAART N.V. v. [C.A.]	956
SMART (J. W.) (MODERN SHOE REPAIRS), LTD. v. HINCKLEY AND LEICESTERSHIRE BUILDING SOCIETY [C.A.]	846
SMITH v. JONES [Q.B.D.]	907
SMITH'S (JOHN) TADCASTER BREWERY CO., LTD., <i>Re</i> [CH.D.]	751
SNELLING v. SNELLING [Div.]	196
SOCONY BUNKER OIL CO., LTD. v. D'VORA OF HAIFA (OWNERS). THE D'VORA. [ADM.]	1127
SPENSLEY'S WILL TRUST, <i>Re</i> [CH.D.]	49
SPRINGATE v. QUESTIER [Q.B.D. DIVL. CT.]	21
STAFFORD CORPN., MINISTRY OF HEALTH v. [C.A.]	386
STANFORD, CODDEN ENGINEERING CO., LTD. v. [C.A.]	915
STARKOWSKI v. ATTORNEY-GENERAL [C.A.]	616
STEPNEY BOROUGH COUNCIL, ASTON CHARITIES TRUST, LTD. v. [C.A.]	228
STEVENS v. DICKSON [Q.B.D. DIVL. CT.]	246
STIRLING v. GILBERT [C.A.]	153
STONEHAM'S SETTLEMENT TRUSTS, <i>Re</i> [CH.D.]	694
STRAFFEN, R. v. [C.C.A.]	657
STROUD v. BRADBURY [Q.B.D. DIVL. CT.]	76
SWORDS, <i>Re</i> [PROB.]	281
TAYLOR v. KENYON [Q.B.D. DIVL. CT.]	726
TAYLOR, WABE v. [C.A.]	420
TEPER v. REGINAM [P.C.]	447
THAMES LAUNCHES, LTD., GREEN v. [Q.B.D.]	332
THOMAS v. MARSHALL (INSPECTOR OF TAXES) [C.A.]	32
THOMPSON v. MILK MARKETING BOARD [C.A.]	344
THOMSON (D. C.) & CO., LTD. v. DEAKIN [C.A.]	361
THORNLY, TIDEWAY INVESTMENT AND PROPERTY HOLDINGS, LTD. v. [C.A.]	514
TIDEWAY INVESTMENT AND PROPERTY HOLDINGS, LTD. v. WELLWOOD. SAME v. ORTON. SAME v. JONES. SAME v. FRIEDENTAG. SAME v. THORNLY [C.A.]	514
TUCKER, R. v. [C.-M. A.C.]	1074
TURVEY v. DENTONS (1923), LTD. [Q.B.D.]	1025
VALENTINE, LANGMAN v. [Q.B.D. DIVL. CT.]	803
VINCENT v. VINCENT [Div.]	978
VIVIAN, GELBERG v. [C.A.]	746
W. B., HITCHCOCK v. [Q.B.D. DIVL. CT.]	119
WABE v. TAYLOR [C.A.]	420
WAGHT v. WAGHT AND WALKER [Div.]	290
WALKER v. WALKER [C.A.]	138
WALKER, WAGHT AND, WAGHT v. [Div.]	290
WALTHAM HOLY CROSS URBAN DISTRICT COUNCIL, AMALGAMATED BUILDING CONTRACTORS, LTD. v. [C.A.]	452
WARREY, BOYER v. [C.A.]	976

WARDHAUGH (A. F.), LTD. <i>v.</i> MACE [Q.B.D. DIVL. CT.]	28
WATERMAN'S WILL TRUSTS, <i>Re</i> [CH.D.]	1054
WATSON <i>v.</i> BRITISH THOMSON-HOUSTON Co., LTD. [C.A.]	851
WATSON <i>v.</i> HERMAN [Q.B.D. DIVL. CT.]	70
WATERSON, BRIDGES (INSPECTOR OF TAXES) <i>v.</i> [CH.D.]	910
WEAVEN, FERRIS <i>v.</i> [Q.B.D.]	233
WEDDEL (W.) & Co., LTD., COLIN & SHIELDS <i>v.</i> [C.A.]	337
WELLS, METCALF <i>v.</i> [CH.D.]	889
WELLWOOD, TIDEWAY INVESTMENT AND PROPERTY HOLDINGS, LTD. <i>v.</i> [C.A.]	514
WESTMINSTER BANK, LTD., BREWER <i>v.</i> [Q.B.D.]	650
WESTWOOD <i>v.</i> CANN [C.A.]	349
WHARFEDALE BREWERY Co., LTD., <i>Re</i> [CH.D.]	635
WHARTON <i>v.</i> WHARTON [DIV.]	939
WHITEHOUSE, <i>Ex parte</i> . R. <i>v.</i> NEWCASTLE-UNDER-LYME JUSTICES [Q.B.D. DIVL. CT.]..	531

WHITELEY <i>v.</i> WILSON [C.A.]	940
WHITSON (JAMES) & Co., LTD., EBBS <i>v.</i> [C.A.]	192
WICKENS <i>v.</i> WICKENS [C.A.]	98
WIGAN CORPN., BIRCH <i>v.</i> [C.A.]	893
WILKINSON, NATIONAL ASSISTANCE BOARD (BY J. R. BEATTIE) <i>v.</i> [Q.B.D. DIVL. CT.]	255
WILLIAMS' WILL TRUSTS, <i>Re</i> [CH.D.]	502
WILSON, WHITELEY <i>v.</i> [C.A.]	940
WILSON, ESQ. (METROPOLITAN MAGISTRATE), R. <i>v.</i> <i>Ex parte</i> PEREIRA [Q.B.D. DIVL. CT.]..	706
WIMBOURNE <i>v.</i> FINE [CH.D.]	681
WINDLE, R. <i>v.</i> [C.C.A.]	1
WOLFE (<i>decd.</i>), <i>Re</i> [CH.D.]	545
WOODWARD <i>v.</i> WOODWARD [DIV.]	226
WOOLF, REISS <i>v.</i> [Q.B.D.]	3
—, [C.A.]	112
WOOLLEY <i>v.</i> MOORE [Q.B.D. DIVL. CT.]	797
WRIGHT (<i>decd.</i>), <i>Re</i> [CH.D.]	698
WRIGHT <i>v.</i> CHESHIRE COUNTY COUNCIL [C.A.]	789

INDEX

	PAGE
ABATEMENT	
Order for alimony pendente lite— <i>Death of husband</i> [SCOTT v. SCOTT]	890
ACCUMULATIONS	
Accumulation of income of trust fund directed for excessive period— <i>General charitable intent</i> — <i>Rights of next of kin</i> — <i>Law of Property Act</i> , 1925 (c. 20), s. 164 (1) [<i>Re BRADWELL'S WILL</i> TRUSTS]	286
ACQUITTAL	
Application to High Court to quash acquittal at quarter sessions. <i>See</i> CERTIORARI.	
ACTION	
Limitation. <i>See</i> PUBLIC AUTHORITY.	
ADMINISTRATION OF ESTATES	
Grant of, on intestacy. <i>See</i> INTESTACY.	
Sale by court— <i>Auctioneer's commission</i> — <i>Sale at more than £25,000</i> [<i>Re WOLFE (dec'd.)</i>] ..	545
ADOPTION	
Dispensing with consent to order— <i>Consent . . . unreasonably withheld</i> — <i>Adoption conducing</i> <i>to child's welfare</i> — <i>Child having been placed in care of foster-parents</i> — <i>Consent originally</i> <i>given, but later withdrawn</i> — <i>Adoption Act</i> , 1950 (c. 26), s. 3 (1) (c) [<i>Re K (an infant)</i>] ..	877
Matters to be considered— <i>Attitude and wishes of dissenting parent</i> — <i>Relevancy of child's</i> <i>welfare</i> — <i>Adoption Act</i> , 1950 (c. 26), s. 3 (1) (c) [<i>HITCHCOCK v. W.B.</i>]	119
Guardian ad litem— <i>Infant parent</i> — <i>County Court Rules</i> , 1936, Ord. 5, r. 13, r. 14— <i>Adoption</i> <i>of Children (County Court) Rules</i> , 1949 (<i>S.I.</i> , 1949, No. 2396), r. 1, r. 9 [<i>Re K (an infant)</i>] ..	877
ADULTERY	
<i>See</i> DIVORCE.	
ADVERTISEMENT	
<i>See</i> TOWN AND COUNTRY PLANNING.	
AERIAL TRAFFIC	
Carriage by air. <i>See</i> CARRIAGE BY AIR.	
AGENT	
Profit acquired through knowledge obtained in course of agency— <i>Agency terminated by war</i> — <i>Right to transfer property vested in Custodian of Enemy Property</i> — <i>Purchase by agent and</i> <i>re-sale</i> — <i>Duty to account for profit</i> [NORDISK INSULINLABORATORIUM v. C. L. BENICARD (1934), LTD.]	1040
AGRICULTURAL BUILDINGS	
Rating of. <i>See</i> RATES.	
AGRICULTURE	
Agricultural buildings. <i>See</i> AGRICULTURAL BUILDINGS.	
Cultivation control. <i>See</i> CULTIVATION CONTROL.	
AIDING AND ABETTING	
Illegal sale— <i>Aiding and abetting by purchaser</i> — <i>Sale of tobacco by unlicensed person</i> [SAYCE v. COUPE]	715
AIR GUN	
Negligent use by child— <i>Liability of parent</i> [DONALDSON v. McNIVEN].. .. .	691
ALIMONY	
<i>See</i> DIVORCE.	
ANNUITY	
<i>See</i> INCOME TAX.	
APPEAL	
By Case Stated. <i>See</i> CASE STATED (By Justices).	
Court of Appeal, to. <i>See</i> COURT OF APPEAL.	
County court, from. <i>See</i> COUNTY COURT.	
Court of summary jurisdiction, from— <i>Proceedings between husband and wife. See</i> JUSTICES (Husband and wife).	
Interpleader— <i>Order for costs against petitioner in divorce suit</i> — <i>Execution on motor car</i> — <i>Claim to motor car</i> — <i>Appeal against registrar's order</i> — <i>Matrimonial Causes Rules</i> , 1950 (<i>S.I.</i> , 1950, No. 1940), r. 59 [WRIGHT v. WRIGHT AND WALKER]	290
Further evidence— <i>Power in appellate court to receive</i> — <i>Principles on which court will act</i> — <i>Appeal from judge sitting alone</i> — <i>R.S.C.</i> , Ord. 58, r. 4 [LEEDER v. ELLIS].. .. .	814
APPOINTMENT	
Power of. <i>See</i> POWER OF APPOINTMENT.	
ARBITRATION	
Extension of time fixed by agreement— <i>Application to Divisional Court of Queen's Bench</i> <i>Division</i> — <i>Arbitration Act</i> , 1950 (c. 27), s. 27 [RAYMOND & REID v. GRANGER].. .. .	152
ARCHITECT	
Extension of time under building contract. <i>See</i> BUILDING CONTRACT.	
ARMY	
Offences. <i>See</i> MILITARY LAW.	
ARTIFICIAL INSEMINATION	
Of cattle— <i>Rateability of buildings at breeding centre</i> [THOMPSON v. MILK MARKETING BOARD] ..	344
ASSISTED PERSON	
<i>See</i> LEGAL AID.	

+ ATTEMPT

To commit crime—*Sentence* [R. v. PEARCE] 718

AUCTION

Agreement to convey land if plaintiff did not bid at auction—*Failure to perform agreement—Specific performance* [PALLANT v. MORGAN] 951

AUCTIONEER

Commission—*Sale by court in administering estate—Sale at more than £25,000* [Re WOLFE (dec'd.)] 545

BANK

Trustee—*Charging clause—Deposit by bank of trust moneys with itself—Liability to account for profit* [Re WATERMAN'S WILL TRUSTS] 1054

BARRISTER

See COUNSEL.

BASTARDY

Child born abroad of British mother domiciled abroad—*Putative father British subject domiciled in England—Jurisdiction to make affiliation order—Bastardy Laws Amendment Act, 1872 (c. 65), s. 3—Maintenance Orders Act, 1950 (c. 37), s. 27 (2)* [R. v. WILSON, ESQ. (Metropolitan Magistrate). *Ex parte PEREIRA*] 706

"Single woman"—*Child born out of wedlock—Subsequent marriage of parents—Wife now living apart from husband—Bastardy Laws Amendment Act, 1872 (c. 65), s. 3* [MOONEY v. MOONEY] 812

BICYCLE

See CYCLE.

BILL OF DIVORCEMENT

Jewish. See NULLITY.

BILL OF SALE

Pledge of chattel—*Need of registration* [WRIGHT v. WRIGHT AND WALKER] 290

BONA VACANTIA

Company—*Winding-up—Foreign company—Dissolution under laws of incorporation—Crown's claim to assets in England as bona vacantia* [Re BANQUE INDUSTRIELLE DE MOSCOU] .. 582

BREACH OF CONTRACT

See CONTRACT.

BRITISH TRANSPORT COMMISSION

Transferred undertaking—*Compensation to discharged employee—"Right to payment of compensation"—Right to damages for wrongful dismissal—Transferred Undertakings (Compensation to Employees) Regulations, 1950 (S.I., 1950, No. 1083), sched. II, para. 4 (1) (i)* [R. v. MINISTER OF LABOUR AND NATIONAL SERVICE] 764

Compensation to employee—Diminution of emoluments—"Expectation under customary practice to payment of compensation in event of discharge"—Transferred Undertakings (Compensation to Employees) Regulations, 1950 (S.I., 1950, No. 1083), sched. II, para. 8 (1) (i) [R. v. BIRMINGHAM COMPENSATION APPEAL TRIBUNAL OF MINISTRY OF LABOUR AND NATIONAL SERVICE. *Ex parte ROAD HAULAGE EXECUTIVE*] 100

BROADMOOR

Inmate—"Person in custody"—*Questioning by police—Need of caution* [R. v. STRAFFEN] .. 657

BUILDING

Building regulations—*Dismantling of scaffolding—Provision of guard-rail—Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), reg. 24 (1)*. [SEXTON v. SCAFFOLDING (GREAT BRITAIN), LTD.] 278, 1085

See also STATUTORY DUTY.

Closing order of part of building. See HOUSING.

Safety regulations—*Working platform—Inadequate width—Failure to provide guard-rails or toe-boards—Workman's fall through epileptic fit—Onus of proof—Apportionment of liability—Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), reg. 22 (c), reg. 24 (1)* [CORE v. KIRBY MACLEAN, LTD.] 402

BUILDING CONTRACT

Extension of time—*Extension granted by architect after completion of work* [AMALGAMATED BUILDING CONTRACTORS, LTD. v. WALTHAM HOLY CROSS URBAN DISTRICT COUNCIL] .. 452

BUILDING CONTROL

Licence—*Construction with application—House to be sold at price "including cost of roads, sewers and other services"—Cost of making up roads to satisfaction of local authority not included—Public Health Act, 1875 (c. 55), s. 150* [SMITH v. JONES] 907

CARRIAGE BY AIR

Carrier's liability—*Limitation—International carriage—"Wilful misconduct"—Breach of safety rules—Error of judgment—Several acts of carelessness—Carriage by Air Act, 1932 (c. 36), sched. I, art. 25* [HORABIN v. BRITISH OVERSEAS AIRWAYS CORP.] 1016

CARRIAGE OF GOODS

Carriage for hire—*Restriction on area of operation—Exception—Carriage of meat—Fish not included—Transport Act, 1947 (c. 49), s. 52 (1) (a), s. 125 (1)* [A. F. WARDHAUGH, LTD. v. MACE] 28

CASE STATED (BY JUSTICES)

Quarter sessions—*Appeal to High Court—Extension of time for appeal—"Special circumstances"—Solicitor's inadvertence or negligence* [COLLYER v. DRING] 1004

CAUTION

Need to administer—*Questions by police to person in custody. See CRIMINAL LAW (Evidence).*

CERTIFICATE

Firearms. See FIREARMS.

Marriage. See MARRIAGE (Proof).

CERTIORARI

Application to quash acquittal at quarter sessions—*Acquittal before evidence given—Mistrial—Defendant properly arraigned and jury sworn—Views as to possibility of conviction expressed by chairman* [R. v. MIDDLESEX JUSTICES. *Ex parte DIRECTOR OF PUBLIC PROSECUTIONS*] 312

Peremptory order—Irregularity in conviction by justices admitted on affidavit by justices' clerk [R. v. NEWCASTLE-UNDER-LYME JUSTICES. *Ex parte WHITEHOUSE*] 531

CHARGING CLAUSE*See* BANK.**CHARGING ORDER***See* EXECUTION; SOLICITOR.**CHARITY**Accumulations. *See* ACCUMULATIONS.Cy-près doctrine—*Application of trust fund as National Trust may decide—Purposes for which fund applicable* [Re SPENSLEY'S WILL TRUSTS] 49**CHARTERPARTY***See* SHIPPING.**CHEMIST**Poison—*Sale by retail.* *See* POISON.**CHILD**Custody. *See* DIVORCE.Negligence. *See* NEGLIGENCE (Child).Negligent use of air gun—*Liability of parent* [DONALDSON v. McNIVEN] 691**CIRCULAR SAW**Duty to fence. *See* FACTORY (Dangerous machinery).**CLOSING ORDER**Part of a building, of. *See* HOUSING.**CODICIL***See* WILL.**COMMISSION**Auctioneer. *See* AUCTIONEER.**COMMITTAL**For debt. *See* DEBT (Committal).**COMPANY**Alteration of members' rights—*Proposal to increase capital—Increase of ordinary share capital "affecting" rights of preference stockholders* [Re JOHN SMITH'S TADCASTER BREWERY Co., LTD.] 751Director—*Managing director—Removal—Notice required—Companies Act, 1929 (c. 23), Table "A", art. 68* [READ v. ASTORIA GARAGE (STREATHAM), LTD.] 292Estate duty—*Valuation of shares.* *See* ESTATE DUTY.Foreign company—*Winding-up—Dissolution under laws of country of incorporation—Crown's claim to assets in England as bona vacantia* [Re BANQUE INDUSTRIELLE DE MOSCOU] 532Inducement to invest money in company—"Reckless" making of misleading forecast—*Need to prove fraud—Prevention of Fraud (Investments) Act, 1939 (c. 16), s. 12 (1)* [R. v. BATES] 842Payment of money under mistake of fact—*Mistake, owing to ignorance, by assistant secretary and accountant—True facts known to secretary, but other officers of company not informed* [TURVEY v. DENTONS (1923), LTD.] 1025Shares—*Valuation for estate duty.* *See* ESTATE DUTY.Surtax. *See* SURTAX.Vehicle—*Road accident—Notice of intended prosecution—Omission of "limited" from company's name in notice* [SPRINGATE v. QUESTIER] 21Winding-up—*Costs—Profit costs of solicitor to liquidator—Appointment of solicitor by committee of inspection—Clerk employed by solicitor a member of committee—Companies (Winding-up) Rules, 1949 (S.I., 1949, No. 330), r. 163* [Re F. T. HAWKINS & Co., LTD.] 467Foreign company. *See* Foreign company ante.Rights of preference stockholders—*Surplus assets—Articles silent as to distribution* [Re JOHN SMITH'S TADCASTER BREWERY Co., LTD.] 751Surplus assets—*Rights conferred by memorandum of association and special resolution—Variation by articles* [Re DUNCAN GILMOIR AND Co., LTD.] 871**COMPENSATION**Compulsory purchase. *See* COMPULSORY PURCHASE.Transferred undertaking—*Discharged employee.* *See* BRITISH TRANSPORT COMMISSION.Transport—*Transfer of undertaking to British Transport Commission—Compensation to employee.* *See* BRITISH TRANSPORT COMMISSION.**COMPULSORY PURCHASE**Compensation—"Land devoted to a purpose of such a nature that there is no general demand . . . for land for that purpose"—*"Reinstatement in some other place"—Acquisition of Land (Assessment of Compensation) Act, 1919 (c. 57), s. 2, r. (5)—Town and Country Planning Act, 1944 (c. 47), s. 57 (1)* [ASTON CHARITIES TRUST, LTD. v. STEPNEY BOROUGH COUNCIL] 228Land the property of local authority—*Special Parliamentary procedure—Material date of ownership by local authority—Acquisition of Land (Authorisation Procedure) Act, 1946 (c. 49), sched. I, Part III, para. 9* [MIDDLESEX COUNTY COUNCIL v. MINISTER OF LOCAL GOVERNMENT AND PLANNING] 709**CONFLICT OF LAWS**Foreign judgment—*Recognition by English courts—Judgment of American court affecting rights of English company in regard to English patents—English company neither subject to jurisdiction of American court nor party to proceedings therein* [BRITISH NYLON SPINNERS, LTD. v. IMPERIAL CHEMICAL INDUSTRIES, LTD.] 780Nullity. *See* NULLITY.**CONSORTIUM***See* HUSBAND AND WIFE.**CONSPIRACY**Criminal. *See* CRIMINAL LAW.**CONSTRUCTIVE DESERTION***See* DIVORCE (Desertion).

CONTEMPT OF COURT

Divorce—Child—Child taken by petitioner out of jurisdiction in disobedience of order—Application by respondent for enforcement of order—Right of petitioner to be heard [HADKINSON v. HADKINSON] 567

CONTRACT

Breach—Procurement of breach—Trade union action. See TRADE UNION.

Building. See BUILDING CONTRACT.

Lump sum contract—Substantial compliance with contract—Defects and omissions—Right to repudiate—Waiver—Contract to furnish flat—"Net cash as work proceeds and balance on completion"—Use of furniture [HOENIG v. ISAACS] 176

Non-performance—Excuse—"Force majeure"—Delivery of goods "subject to export licence"—Minimum export prices fixed in excess of contract prices [BRAUER & CO. (GREAT BRITAIN), LTD. v. JAMES CLARK (BRUSH MATERIALS), LTD.] 497

Penalty—Hire-purchase agreement—Full balance of unpaid instalments payable and agreement determinable on breach of agreement and other events [COODEN ENGINEERING CO., LTD. v. STANFORD] 915

Sale of goods. See SALE OF GOODS.

Service. See MASTER AND SERVANT.

CONTRIBUTORY NEGLIGENCE

See NEGLIGENCE.

CONTROL OF BUILDING

See BUILDING CONTROL.

CONVERSION

Conversion by agent after termination of authority—Sale to third party acquiring in good faith—Liability of third party to owner [JEROME v. BENTLEY & Co.] 114

COSTS

Assisted person. See LEGAL AID.

Company winding-up. See COMPANY (Winding-up).

Divorce. See DIVORCE.

Legal aid. See LEGAL AID.

Legitimacy—Failure of petition—Costs of Attorney-General and interveners out of estate [CLEAVE v. ATTORNEY-GENERAL, AND OTHERS INTERVENING] 283

Probate action. See PROBATE.

Security for costs—Wife's costs in divorce proceedings—Husband an "assisted person" [VINCENT v. VINCENT] 978

Taxation—Finality of taxation—Probate action—Order for payment by defendant of plaintiff's costs—Subsequent taxation of costs of administrator pendente lite—Accounts of administrator—Right of plaintiff to further order for payment of administrator's costs and accounts [In the Estate of SEGALOV (dec'd.)] 107

COUNSEL

Fees—Legal aid—Need for taxing [SALTMARSH v. SALTMARSH] 6

Income tax—Deduction of expenses—Travelling expenses—Barrister travelling between chambers and home where he did part of his professional work [NEWSOM v. ROBERTSON] 728

COUNTY COURT

Action restrained by Divorce Court. See INJUNCTION.

Appeal—Raising in Court of Appeal of point of law not argued in court below [BOYER v. WARBEY] 976

COURT

Sale by, in administering estate. See ADMINISTRATION OF ESTATES.

COURT OF APPEAL

Appeal—Notice of appeal—Leave to amend—R.S.C., Ord. 58, r. 2 [GELBERG v. VIVIAN] .. 746

County court—Appeal from—Raising of point of law not argued in court below [BOYER v. WARBEY] 976

COURT-MARTIAL

Appeal—Unreasonable finding of court-martial—Finding not supported by evidence—Examination of evidence by court on appeal—Courts-Martial (Appeals) Act, 1951 (c. 46), s. 5 (1) [R. v. TUCKER] 1074

See also MILITARY LAW.

COVENANT

In lease. See LANDLORD AND TENANT; RENT RESTRICTION.

CRIMINAL LAW

+ Conspiracy—Evidence—Question on behalf of one prisoner involving character of another—Separate trials [R. v. MILLER] 667

Evidence—Admissibility—Hearsay—Evidence of identification—Part of res gestae [TEPER v. REGINAM] 447

Evidence before sentence of accused's history—Details to be communicated to defending counsel [R. v. CRABTREE] 974

Evidence tending to show commission of other crimes—Murder—Evidence of previous murders in similar circumstances [R. v. STRAFFEN] 657

Question on behalf of one prisoner involving character of another [R. v. MILLER] .. 667

Prisoner's answers to questions by police—Need of caution—"Person in custody"—Broadmoor patient—"Judges' Rules", r. (3) [R. v. STRAFFEN] 657

Inducement to invest money—"Reckless" making of misleading forecast—Need to prove fraud—Prevention of Fraud (Investments) Act, 1959 (c. 16), s. 12 (1) [R. v. BATES] 842

+ Insanity—Lack of knowledge that act causing death was "wrong"—Belief that act, while legally wrong, was morally right [R. v. WINDLE] 1

Sentence—Attempt to commit crime—Sentence not to exceed that impossible for full offence—Road Traffic Act, 1930 (c. 43), s. 28 (1) (b)—Criminal Justice Act, 1948 (c. 58), s. 21 (1) (a) [R. v. PEARCE] 718

CRIMINAL LAW—continued.

- Separate trials—*Question asked on behalf of one prisoner involving character of another—Charge of conspiracy* [R. v. MILLER] .. 667
- Vagrancy—*Frequenting a "place of public resort" with intent to commit felony—Tattersall's enclosure on racecourse—Charge for admission—Right to refuse admission—Vagrancy Act, 1824 (c. 83), s. 4* [GLYNN v. SIMMONDS] .. 47

CROSS-PRAYER

See DIVORCE (Petition).

CROWN

- Servants—*Custodian of Enemy Property—Liability to income tax—Trading with the Enemy Act, 1939 (c. 89), s. 7 (1)—Trading with the Enemy (Custodian) Order, 1939 (S.R. & O., 1939, No. 1198), art. 3 (i) (ii)* [BANK VOOR HANDEL EN SCHEEPVAART N.V. v. SLATFORD] .. 956

CRUELTY

- Divorce proceedings, in. See DIVORCE.
- Persistent cruelty. See JUSTICES (Husband and wife).

CULTIVATION CONTROL

- Cultivation according to rules of good husbandry—*Termination of owner's occupation of "land"—"Land"—Inclusion of dwelling-house and buildings—Agriculture Act, 1947 (c. 48), s. 17 (1) (b)* [HASELL v. MCAULAY] .. 825

CUSTOM

Port. See SHIPPING (Charterparty).

CUSTOMS

- Keeping uncustomed goods—*Intent to defraud—Use of goods—Customs Consolidation Act, 1876 (c. 36), s. 186* [SAYCE v. COUPE] .. 715

CYCLE

- Auxiliary engine—*Use as pedal cycle after removal of essential parts of engine—Whether "motor vehicle" for purposes of third-party insurance* [LAWRENCE v. HOWLETT] .. 74

CY-PRÈS DOCTRINE

See CHARITY.

DAMAGES

- Mental shock—*Accident to child—Mother hearing scream and seeing something of accident while seventy to eighty yards away* [KING v. PHILLIPS] .. 459

DANGEROUS MACHINERY

See FACTORY.

DEBT

- Committal—*Bar to committal order—Extortion—Creditor requiring payment of costs of bankruptcy notice—Debtors Act, 1869 (c. 62), s. 5* [Re A JUDGMENT SUMMONS (NO. 25 OF 1952). *Ex parte* HENLYS, LTD.] .. 772

DECLARATION

- Illegality of act of statutory body—*Suspension of dock workers* [BARNARD v. NATIONAL DOCK LABOUR BOARD] .. 424
- Joint banking account—*Forgery by one customer of other customer's signature—Action by innocent customer for declaration of bank's liability—Guilty customer joined as defendant—Competency* [BREWER v. WESTMINSTER BANK, LTD.] .. 650

DECLARATORY JUDGMENT

- Jewish bill of divorce—*Declaration sought that marriage dissolved—R.S.C., Ord. 25, r. 5* [HAR-SHEFI v. HAR-SHEFI] .. 821

DEFENCE

Striking out. See PRACTICE.

DELEGATION

Statutory duty, of. See STATUTORY DUTY.

DELIVERY ORDER

Ship's. See SHIPPING.

DESERTION

See DIVORCE; JUSTICES.

DIRECTOR

See COMPANY.

DISCOVERY

- Privilege—*Interrogatory—Communication between solicitor and client—Authority to solicitor to settle claim—Interrogatory as to whether authority given* [CONLON v. CONLONS, LTD.] .. 462

DISQUALIFICATION

Driving licence. See STREET TRAFFIC.

DIVORCE

- Adultery—*Evidence—No evidence given by respondent in disproof of charge of adultery—Matrimonial Causes Act, 1950 (c. 25), s. 32 (3)* [POYSER v. POYSER] .. 949
- Presumption—Inclination and opportunity—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 7* [ENGLAND v. ENGLAND] .. 784
- Alimony—*Pendente lite—Death of husband—Abatement of order for alimony* [SCOTT v. SCOTT] .. 890
- Contempt of court—*Refusal to obey order. See CONTEMPT OF COURT.*
- Costs—*Execution—Interpleader—Appeal from registrar—Jurisdiction of judge in chambers—Pledge of chattel—Need for registration as bill of sale—Bills of Sale Act, 1878 (c. 31), s. 10* [WRIGHT v. WRIGHT AND WALKER] .. 290
- Security for wife's costs—Husband an "assisted person"—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 65 (3)* [VINCENT v. VINCENT] .. 978
- Cruelty—*Nagging—Matters to be taken into consideration* [KING v. KING] .. 584
- Wife's unnatural sexual relations with another woman—Right of other woman to intervene—Matrimonial Causes Act, 1950 (c. 25), s. 31* [D. v. D.] .. 854
- Damages—*Order for investment for benefit of child—Death of child while an infant—Further order regarding application of fund—Form of original order—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 189 (3)* [COLLINS v. COLLINS] .. 1188

DIVORCE—continued.

- Delay—Discretionary bar—Principles to be applied—Matrimonial Causes Act, 1950 (c. 25), s. 4 (2) (i) [LOWE v. LOWE] 671
- Desertion—Confession of adultery by deserted spouse—Effect on deserted spouse's mind—Burden of proof—Continuance of desertion—Petitioner's need to prove desire for return of deserted spouse [CHURCH v. CHURCH] 441
- Constructive desertion—Wife dirty in her person and the matrimonial home—No inference of intention to drive husband away [BARTHOLOMEW v. BARTHOLOMEW] 1035
- Parties living under same roof—House owned by both spouses—No allowance paid to wife—Provision of meals separately—Occupation of separate rooms—Other parts of house shared [BAKER v. BAKER] 248
- Occupation of separate rooms—Wife performing no household duties for husband—No verbal communication [WALKER v. WALKER] 138
- Injunction to restrain county court action. See INJUNCTION.
- Insanity—Guardian ad litem—Official Solicitor—"Person of unsound mind"—Voluntary patient in mental hospital—Power of Official Solicitor to act—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 64 (4) [WICKENS v. WICKENS] 98
- Maintenance of wife—Re-marriage of wife—Application after re-marriage—Matrimonial Causes Act, 1950 (c. 25), s. 19 (2) (3) [SNELLING v. SNELLING] 196
- Petition—Petition within three years of marriage—Leave to present—Cross-prayer in answer—Need to obtain leave to present cross-prayer—Matrimonial Causes Act, 1950 (c. 25), s. 2 (1) [HOLLINGSWORTH v. HOLLINGSWORTH] 284
- Pleading—Petition—"Previous proceedings with reference to the marriage"—Summons issued by wife in court of summary jurisdiction and withdrawn before adjudication—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 4 (1) (h) [PENNY v. PENNY] 938
- Practice—Particulars—Adultery—Allegation that husband not father of wife's child—Need for particulars of facts on which statement based [BANKS v. BANKS] 232
- Re-hearing—Affidavit in support of application—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 36 (1) [MIDDLETON v. MIDDLETON] 693

DOCK LABOUR

Regulation. See EMPLOYMENT.

DOCTOR

See MEDICAL PRACTITIONER.

DOMICIL

Intestacy—Grant of administration—Deceased domiciled abroad—Grant to administrator under law of domicile—Discretion of court [In the Estate of KAUFMAN] 261

DONATIO MORTIS CAUSA

See GIFT.

DRIVING LICENCE

See STREET TRAFFIC.

DRIVING UNINSURED MOTOR VEHICLE

See STREET TRAFFIC.

DRUNK

Driving or having charge of motor vehicle while drunk. See STREET TRAFFIC.

Licensed premises, on. See LICENSING.

DUST

Factory, in. See FACTORY.

DUSTBIN

Provision of. See PUBLIC HEALTH.

DUTY

Statutory. See STATUTORY DUTY.

EARLY TRIAL

See PRACTICE (Trial).

EASEMENT

Right of way—Way of necessity—Land not completely surrounded by grantor's land [BARRY v. HASSELDINE] 317

Right to graze—Prescription—Interruption—Enjoyment as of right—Interval of thirteen months between last letter of protest and issue of summons—Long occupation of servient tenement by tenant—Owner without knowledge of prescriptive user—Prescription Act, 1832 (c. 71), s. 1, s. 5 [DAVIES v. DU PAVER] 991

EDUCATION

Negligence of education authority. See NEGLIGENCE (Schoolmaster).

Transfer of property from "former authority" to county education authority—"Former authority"—Dispute whether property liable to transfer—Question for determination by Minister—Education Act, 1944 (c. 31), s. 6 (3), s. 96 (2), s. 114 (1) [GILLINGHAM CORPN. v. KENT COUNTY COUNCIL] 1107

ELECTRICITY

Rates—Electricity hereditament—Power to amend deleted assessment [R. v. COCKRAM (VALUATION OFFICER). Ex parte EAST MIDLANDS ELECTRICITY BOARD] 44

EMERGENCY LEGISLATION

Act preparatory to the commission of offence under Defence Regulations—Liability of master for act of servant—Sale of meat at excessive price—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927), reg. 55AB, reg. 90 (1) [GARDNER v. AKEROYD] 306

EMPLOYMENT

Regulation—Registration of workers—Suspension of workers—Appeal to statutory body—Confirmation of suspension—Action for declaration and injunctions against suspension—Dock labour—Dock Workers (Regulation of Employment) Order, 1947 (S.R. & O., 1947, No. 1189), sched., cl. 5 (7). [BARNARD v. NATIONAL DOCK LABOUR BOARD] 424

ENFORCEMENT NOTICE

See TOWN AND COUNTRY PLANNING.

ENTERTAINMENT

Of clients by firm of solicitors—*Deduction of cost in assessment of profits to income tax* [BENTLEYS, STOKES AND LOWLESS *v.* BEESON (INSPECTOR OF TAXES)] 82

ENTERTAINMENTS DUTY

"Lump sum paid . . . for the right of admission to a series of entertainments"—*Book of tickets for season's football matches—Sale at price equal to total of prices of individual tickets—Finance (New Duties) Act, 1916 (c. 11), s. 1 (4)* [COMRS. OF CUSTOMS AND EXCISE *v.* QUEEN'S PARK RANGERS FOOTBALL AND ATHLETIC CLUB, LTD.] 575

ENTRY ON PREMISES

Under Public Health Act, 1936. *See* PUBLIC HEALTH.

ESTATE DUTY

Company—Shares—Valuation—Valuation according to value of company's assets as a going concern [ATTORNEY-GENERAL OF CEYLON *v.* MACKIE] 775

Incidence—Portions charged by will on property reversionary at date of testator's death—Duty exigible on death of life tenant—Liability of portioners to be charged with duty—*Finance Act, 1894 (c. 30), s. 14 (1)* [Re KEELE ESTATES] 164

Property not passing to executor as such—Recovery of duty from persons entitled to sum charged on the property—"Provision to the contrary"—*Finance Act, 1894 (c. 30), s. 14 (1)* [Re KEELE ESTATES] 164

Passing—Cesser of life interest—Continuing annuity to spouse—Child entitled absolutely subject to annuity—Allowance for annuity—*Finance Act, 1894 (c. 30), s. 1, s. 2 (1) (b)* [Re LONGBOURNE'S MARRIAGE SETTLEMENT] 933

Cesser of wife's annuity on husband's death—Wife becoming entitled to whole income of trust fund—Allowance for annuity—*Finance Act, 1894 (c. 30), s. 5 (3)* (as amended by *Finance Act, 1938 (c. 46), s. 48*) [Re LAMBTON'S MARRIAGE SETTLEMENT] 201

Property deemed to pass—Pension to widow of employee—Discretion of trustees—"Property"—"Beneficial interest"—"Purchased or provided"—*Finance Act, 1894 (c. 30), s. 2 (1) (d)* [Re J. BIBBY & SONS, LTD. PENSIONS TRUST DEED] 483

ESTOPPEL

Estoppel by record—Previous findings on same subject-matter when not directly in issue—Plea of estoppel raised on appeal—Need for plea to have been raised in court below [SANDERS *v.* SANDERS] 767

EVIDENCE

Further evidence—Power in appellate court to receive. *See* APPEAL.

Hearsay. *See* CRIMINAL LAW (Evidence).

EXCESSIVE SPEED

See STREET TRAFFIC.

EXECUTION

Charging order—Order nisi—Death of judgment debtor—Discharge of order nisi—Judgments Act, 1838 (c. 110), s. 15 [SCOTT *v.* SCOTT] 890

EXECUTOR AND ADMINISTRATOR

Banking account. *See* BANK (Joint account).

Fraud of co-executor. *See* BANK (Joint account).

EXTORTION

See DEBT (Committal).

FACTOR

Mercantile agent—Possession of goods—Possession obtained by trick—Title of innocent purchaser—*Factors Act, 1839 (c. 45), s. 9—Sale of Goods Act, 1893 (c. 71), s. 25 (2)*. [DU JARDIN *v.* BEADMAN BROTHERS, LTD.] 160

FACTORY

Dangerous machinery—Circular saw—Riving knife—Arc of "radius not exceeding radius of largest saw used on bench"—*Woodworking Machinery Regulations, 1922 (S.R. & O., 1922, No. 1196), reg. 10 (b) (i)* [WATSON *v.* BRITISH THOMSON-HOUSTON CO., LTD.] 851

Dust—No failure to ventilate—Dust not of character or extent likely to be injurious—Duty of occupier—*Factories Act, 1937 (c. 67), s. 4 (1), s. 47 (1)* [EBBS *v.* JAMES WHITSON & CO., LTD.] 192

FEES

Of counsel. *See* COUNSEL.

FIRE

Negligence—Fireman injured by explosion—Liability of occupiers—Invitee—Exceptional and unnecessary dangers of fire and explosion created by occupiers—*Volenti non fit injuria* [MERRINGTON *v.* IRONBRIDGE METAL WORKS, LTD.] 1101

FIREARMS

Certificate—Telescopic sight—*Firearms Act, 1937 (c. 12), s. 1, s. 32 (1)* [WATSON *v.* HERMAN] 70

FIREMAN

Injury at fire—Liability of owners of premises. *See* FIRE.

FISH

Not included in meat—*Transport Act, 1947, s. 52 (1), s. 125 (1)* [A. F. WARDHAUGH, LTD. *v.* MACE] 28

FISHING BOAT

See SHIPPING.

FORCE MAJEURE

See CONTRACT (Non-performance).

FOREIGN COMPANY

See COMPANY.

FOREIGN GOVERNMENT

Recognition—Retroactive effect. *See* INTERNATIONAL LAW.

FOREIGN JUDGMENT

Jewish bill of divorcement. *See* NULLITY.

Recognition by English courts. *See* CONFLICT OF LAWS.

FOREIGN STATE	PAGE
Ruler of— <i>Liability to be sued—Partial dependency on another Power—Conclusiveness of certificate of government department—British Nationality Act, 1948 (c. 56), s. 1</i> [SAYCE v. BAHAWALPUR STATE (AMEER)]	64
FORFEITURE	
Lease. See LANDLORD AND TENANT.	
FURTHER EVIDENCE	
Hearing by appellate court. See APPEAL.	
GAS	
Nationalisation— <i>Undertaking formerly maintained by local authority—Expenses and receipts of undertaking to be paid out of and into general rate fund—Authority directed "to show under a separate heading or division" accounts of their undertakings—Power to provide reserve fund in respect of undertaking—Deficit in undertaking's account on date of property vesting in gas board under Gas Act, 1948—Liability of authority to account to gas board for surplus revenue of undertaking transferred in 1947 to general rate fund—Leeds Corporation (Consolidation) Act, 1905 (c. 1), s. 54, s. 337, s. 338</i> [NORTH-EASTERN GAS BOARD v. LEEDS CORPN.]	326
GENERAL MEDICAL PRACTITIONER	
See MEDICAL PRACTITIONER.	
GIFT	
Donatio mortis causa— <i>Delivery—Key to safe deposit containing jewellery—Safe deposit containing key to further safe deposit containing jewellery—Sufficiency of delivery of jewellery</i> [Re LILLINGSTON (decd.)]	184
Reversion of subject-matter to donor in case of recovery— <i>Certainty of imminence of death</i> [Re LILLINGSTON (decd.)].. .. .	184
GOLD PLATE	
See PLATE.	
GOODS	
Carriage of. See CARRIAGE OF GOODS.	
Sale of. See SALE OF GOODS.	
GOODS VEHICLE	
See STREET TRAFFIC.	
GRANT	
Probate of. See PROBATE.	
GRAZING	
Right to graze. See EASEMENT.	
GUARDIAN AD LITEM	
See DIVORCE (Insanity).	
GYPSUM MINE	
See MINE.	
HALLMARK	
See PLATE (Gold plate).	
HARBOUR	
Harbour board— <i>Public authority—Limitation of action—Action under power to carry on trade of wharfingers and warehousemen—Trade not subsidiary to main purpose of managing and controlling harbour</i> [FIRESTONE TIRE AND RUBBER CO. (S.S.), LTD. v. SINGAPORE HARBOUR BOARD]	219
HEARSAY	
See CRIMINAL LAW (Evidence).	
HIRE-PURCHASE	
Penalty— <i>Full balance of unpaid instalments payable and agreement determinable on breach of agreement and on other events</i> [CODDEN ENGINEERING CO., LTD. v. STANFORD].. .. .	915
HOSPITAL	
Bequest to. See NATIONAL HEALTH SERVICE.	
Hospital board. See HOSPITAL BOARD.	
National Health Service, under. See NATIONAL HEALTH SERVICE.	
HOSPITAL BOARD	
Liability for negligence of members of staff— <i>Medical practitioner—Anaesthetist—Negligent administration of anaesthetic</i> [JONES v. MANCHESTER CORPN.]	125
HOUSE	
Purchase price. See BUILDING CONTROL; HOUSING.	
Unfit for human habitation. See HOUSING.	
HOUSING	
Closing order— <i>"Part of a building"—Terrace house unfit for human habitation—Demolition undesirable as likely to render adjoining houses unfit—Power to make closing order—Housing Act, 1936 (c. 51), s. 11 (4), s. 12 (1)</i> [BIRCH v. WIGAN CORPN.].. .. .	893
House unfit for human habitation— <i>Notice to execute works—"Person having control"—Receipt of rack-rent—"Full net annual value" of house—House controlled under Rent Acts—Housing Act, 1936 (c. 51), s. 9 (4)</i> [RAWLENCE v. CROYDON CORPN.].. .. .	535
Purchase price— <i>Limitation—Price to include "cost of roads, sewers and other services"—Cost of making up roads to satisfaction of local authority not included—Public Health Act, 1875 (c. 55), s. 150</i> [SMITH v. JONES].. .. .	907
HUSBAND AND WIFE	
Consortium— <i>Right of consortium—Husband injured and losing sexual capacity owing to defendant's negligence—Defendant's liability to wife</i> [BEST v. SAMUEL FOX & CO.]	394
Deserted wife in occupation of husband's dwelling-house— <i>Licence to occupy—Purchaser acquiring property with notice of licence</i> [FERRIS v. WEAVER]	233
Desertion. See JUSTICES.	
Division of property on separation. See Title to property, post.	

	PAGE
HUSBAND AND WIFE—continued.	
Legal proceedings— <i>Injury to wife due to husband's negligence—Liability of husband's employer</i> [BROOM v. MORGAN] ..	1007
Maintenance— <i>Application to High Court—Jurisdiction—Matrimonial Causes Act, 1950 (c. 25),</i> s. 23 (1) [WOODWARD v. WOODWARD] ..	226
<i>Enforceability of order—Husband returning after interval to live with wife—Residence for more</i> <i>than three months under same roof—No resumption of cohabitation—Summary Jurisdiction</i> <i>(Separation and Maintenance) Act, 1925 (c. 51), s. 1 (4), s. 2 (2) [HEWITT v. HEWITT] ..</i>	250
National assistance given to deserting wife— <i>Liability of husband to National Assistance Board</i> — <i>National Assistance Act, 1948 (c. 29), s. 42 (1) (a) [NATIONAL ASSISTANCE BOARD (by</i> <i>J. R. Beattie) v. WILKINSON] ..</i>	255
Necessaries— <i>Wife independently possessed of means—Liability of husband to repay loans made</i> <i>to her to buy necessities [BIBERFELD v. BERENS] ..</i>	237
Title to property— <i>Matrimonial home—Both parties contributing to purchase—Respective</i> <i>beneficial interests not ascertainable by reference to amounts of contributions—Married</i> <i>Women's Property Act, 1882 (c. 75), s. 17 [RIMMER v. RIMMER] ..</i>	863
INCOME TAX	
Annual payments— <i>Payments made to medical practitioner by Minister of Health towards</i> <i>maintenance of assurance policy [HAWKINS v. LEAHY] ..</i>	759
Annuity— <i>Annuity free of income tax—"Net income of £10 per week"—Annuitant not entitled</i> <i>to £10 free of tax [Re WRIGHT (dec'd.)] ..</i>	698
<i>Reliefs and allowances—Liability to account to trustees—Payment to annuitant of</i> <i>one-third of the total income of a fund after payment of income tax [Re BATLEY (dec'd.)] ..</i>	562
Computation of profits— <i>Deduction—Entertainment of clients—Income Tax Act, 1918 (c. 40),</i> <i>sched. D, Cases I and II, r. 3 (a) [BENTLEYS, STOKES AND LOWLESS v. BEESON</i> <i>(INSPECTOR OF TAXES)] ..</i>	82
Custodian of Enemy Property— <i>Liability for tax on proceeds of property vested in him—Income</i> <i>Tax Act, 1918 (c. 40), sched. D, Miscellaneous Rules, r. 1 [BANK VOOR HANDEL EN SCHEEP-</i> <i>VAART N.V. v. SLATFORD (sued as Custodian of Enemy Property)] ..</i>	956
Deduction against profits— <i>Loss—Set-off against profits—Excess rent of immediate lessor—</i> <i>"Profits"—Leasehold properties sub-let at rents exceeding head rents and net annual values</i> <i>—Other properties sub-let at rents below head rents and not sub-let—Finance Act, 1927</i> <i>(c. 10), s. 27 (1)—Finance Act, 1940 (c. 29), s. 15 (1) [BARRON (INSPECTOR OF TAXES) v.</i> <i>LITTMAN] ..</i>	548
<i>Travelling expenses—Barrister travelling between chambers and home where he did part of</i> <i>his professional work—Income Tax Act, 1918 (c. 40), sched. D, Rules Applicable to Cases</i> <i>I and II, r. 3 (a) [NEWSOM v. ROBERTSON (INSPECTOR OF TAXES)] ..</i>	728
Deduction of tax— <i>Insufficient deduction—Recovery of money overpaid—Payment under mistake of</i> <i>fact—Rent under long lease—Payment without deduction of tax at standard rate—Lessee's</i> <i>erroneous belief that lease for short term—Income Tax Act, 1918 (c. 40), General Rules</i> <i>Applicable to All Schedules, r. 19 (2)—Finance Act, 1940 (c. 29), s. 17 (1) (a), (2) [TURVEY</i> <i>v. DENTONS (1923), LTD.] ..</i>	1025
Industrial building allowances— <i>"Cutting"—Excavation of land by water undertaking—Income</i> <i>Tax Act, 1945 (c. 32), s. 14 (1) (b), and proviso [MCINTOSH (INSPECTOR OF TAXES) v.</i> <i>MANCHESTER CORPN.] ..</i>	444
Pension— <i>Right of personal representative to receive after taxpayer's death difference between</i> <i>amount of sums paid as pension and amount of contributions made by taxpayer—Income</i> <i>Tax Act, 1918 (c. 40), sched. D, Case V, r. 2 [BRIDGES (INSPECTOR OF TAXES) v.</i> <i>WATTERSON] ..</i>	910
Profits— <i>Builder—Sale of house—Mortgage to building society by purchaser—Guarantee of</i> <i>repayment by builder—Deposit with building society of part of sum guaranteed [CHIBBETT</i> <i>(INSPECTOR OF TAXES) v. HAROLD BROOKFIELD & SON, LTD.] ..</i>	265
<i>Profession—Medical practitioner—Annual payments—Payments made by Minister of</i> <i>Health towards maintenance of policy of assurance—Income Tax Act, 1918 (c. 40), sched.</i> <i>D, para. 1 (a) (ii), Case II—Sched. D, Rules Applicable to Case III, r. 1 (a)—National</i> <i>Health Service (Superannuation) Regulations, 1947 (S.R. & O., 1947, No. 1755), reg. 38</i> <i>(3) (m) [HAWKINS (INSPECTOR OF TAXES) v. LEAHY] ..</i>	759
Settlement— <i>Transfer of assets—Absolute gift—Deposits to child's account in Post Office Savings</i> <i>Bank and purchases of Defence Bonds for child—Finance Act, 1936 (c. 34), s. 21 (9) (b)</i> <i>[THOMAS v. MARSHALL (INSPECTOR OF TAXES)] ..</i>	32
Special contribution— <i>"Investment income"—Annuity to trustee conditional on acting as such</i> <i>—Income Tax Act, 1918 (c. 40), s. 14 (3) (a) (b)—Finance Act, 1948 (c. 49), s. 47 (1)</i> <i>[DALE v. INLAND REVENUE COMRS.] ..</i>	89
<i>Dividends on shares acquirable only by employees—Income Tax Act, 1918 (c. 40),</i> <i>s. 14 (3) (b)—Finance Act, 1948 (c. 49), s. 49 (1) [RECKNELL v. INLAND REVENUE</i> <i>COMRS.] ..</i>	147
INDUSTRIAL BUILDING	
Income tax allowance on construction expenditure. <i>See</i> INCOME TAX.	
INFANT	
Maintenance— <i>Investment of divorce damages for benefit of child—Death of child while an infant—</i> <i>Further order regarding application of fund—Form of original order [COLLINS v. COLLINS] ..</i>	1133
INJUNCTION	
Illegal act of statutory body— <i>Injunction to restrain—Suspension of dock workers [BARNARD</i> <i>v. NATIONAL DOCK LABOUR BOARD] ..</i>	424
Restraining county court action— <i>Jurisdiction of Divorce Court—Wife's petition for divorce</i> <i>pending—Application by wife to restrain proceedings against daughters of full age for</i> <i>eviction from matrimonial home [MURCUTT v. MURCUTT] ..</i>	427
+ INSANITY	
As defence to crime. <i>See</i> CRIMINAL LAW.	
INSEMINATION	
Artificial. <i>See</i> ARTIFICIAL INSEMINATION.	
INSURANCE	
Motor insurance— <i>Third party insurance. See</i> STREET TRAFFIC (Driving uninsured motor vehicle).	

	PAGE
INTENDED PROSECUTION	
Notice. See STREET TRAFFIC (Notice of intended prosecution).	
INTERNATIONAL LAW	
Recognition of foreign government— <i>Retroactive government—Ownership of aircraft in Hong Kong—Property of Chinese nationalist government—Sale before recognition by British government of communist government as de jure government of China—Effect of decrees of communist government before recognition</i> [CIVIL AIR TRANSPORT INCORPORATED v. CENTRAL AIR TRANSPORT CORPN.]	733
Payment of compensation to officers and men of Polish merchant navy on their leaving their ships—Offer made in London on July 5, 1945, by Minister of old Polish government, on behalf of Polish shipping company—Recognition by British government of new Polish government from midnight on July 5/6, 1945—Offer accepted and acted on, in England, after recognition of new Polish government [GDYNIA AMERYKA LINIE ŻEGLUGOWE SPOLKA AKCYJNA v. BOGUSLAWSKI]	470
INTERPLEADER	
Costs—Divorce—Execution—Appeal from registrar—Jurisdiction of judge in chambers [WRIGHT v. WRIGHT AND WALKER]	290
INTERROGATORY	
See DISCOVERY.	
INTESTACY	
Grant of administration—Deceased domiciled abroad—Grant to person entitled to administer under law of domicile—Discretion of court—Court of Probate Act, 1857 (c. 77), s. 73—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 162 (1) (as amended by Administration of Justice Act, 1928 (c. 26), s. 9) [In the Estate of KAUFMAN]	261
INTOXICATING LIQUOR	
See LICENSING.	
INVESTMENT	
Inducement to invest money. See CRIMINAL LAW.	
INVITEE	
See NEGLIGENCE; RAILWAY.	
JEWISH BILL OF DIVORCEMENT	
See NULLITY.	
JOINT TENANCY	
Surrender—Surrender by one tenant of rights held jointly [LEEK & MOORLANDS BUILDING SOCIETY v. CLARK]	492
JOINT TORTFEASORS	
See TORT.	
"JUDGES' RULES"	
Question by police to person in custody—Need to administer caution. See CRIMINAL LAW (Evidence).	
JUSTICES	
Clerk—Presence in retiring room while justices consider decision [R. v. EAST KERRIER JUSTICES. <i>Ex parte</i> MUNDY]	144
Husband and wife—Appeal to High Court—Failure of justices to supply to High Court statement of reasons for their decision—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 71 (3) [ORMSBY v. ORMSBY]	1005
Desertion—Decision inconsistent with previous High Court finding—Justices ignorant of previous finding—Order for re-hearing [SANDERS v. SANDERS]	767
Maintenance—Amount of—Considerations to be applied—Desire to effect reconciliation between parties—Conduct of parties—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5 (c) [WHARTON v. WHARTON]	939
Conflict of jurisdiction—Decree of judicial separation—Application to High Court for permanent alimony discharged—Summons for maintenance in court of summary jurisdiction [COOPER v. COOPER]	857
Wilful neglect to maintain—Maintenance agreement—Covenant by wife not to sue providing payments punctually made—No default in payment—Deterioration in wife's financial position [DOWELL v. DOWELL]	141
Maintenance order—Husband resident in Northern Ireland—"Last ordinarily resided together as man and wife in England"—Maintenance Orders Act, 1950 (c. 37), s. 1 (1) [LOWRY v. LOWRY]	61
Persistent cruelty—Res judicata—Dismissal of summons—Fresh summons—Admission of evidence of incidents prior to first summons [RICHARDS v. RICHARDS]	904
Separation order—Variation—Deletion of non-cohabitation clause—Husband's desire to make amends and resume married life—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 7 [HAYNES v. HAYNES]	439
Jurisdiction—Offence in respect of property in or on vehicle—Carriage of goods—Breach of condition of A licence—Summary Jurisdiction Act, 1879 (c. 49), s. 46 (3) [A. F. WARDHAUGH, LTD. v. MACE]	28
Maintenance order—Persistent cruelty—Subsequent inconsistent finding of High Court on same facts—Right of husband to discharge of order [KENDALL v. KENDALL]	1038
Procedure—Retirement—Note from police officer obtained by justices' clerk and taken into retiring room—No statement in court as regards contents—Presence of clerk in retiring room—Certiorari to quash conviction [R. v. KERRIER JUSTICES. <i>Ex parte</i> MUNDY]	144
Summary trial—Offence triable summarily or on indictment—Need of formal application by prosecutor—Criminal Justice Act, 1948 (c. 58), s. 28 (1) [JAMES v. BOWKETT]	320
KEEPING UNCUSTOMED GOODS	
See CUSTOMS.	
LAND	
Compulsory purchase. See COMPULSORY PURCHASE.	
Sale. See SALE OF LAND.	

LANDLORD AND TENANT

- Duration of tenancy—*Weekly tenancy*—*Tenancy for one year at weekly rent*—*Holding over at weekly rent*—*Rebuttal of presumption of yearly tenancy*—*Notice to quit on basis of weekly tenancy*—*Claim for compensation or new lease under Landlord and Tenant Act, 1927 (c. 36), s. 4 (1), s. 5 (1) (2) [ADLER v. BLACKMAN]* 41, 945
- Joint tenancy. *See* JOINT TENANCY.
- Lease—*Forfeiture*—*Breach of covenant*—*Prohibition of use of premises for any purpose other than as a private dwelling-house*—*Sub-lease of part of premises as private residence [DOBBS v. LINFORD]* 827
- New lease—*Shop*—*Premises reasonably required for demolition or re-construction*—*Reasonableness*—*Leasehold Property (Temporary Provisions) Act, 1951 (c. 38), s. 12 (3) (c) [J. W. SMART (MODERN SHOE REPAIRS), LTD. v. HINCKLEY AND LEICESTERSHIRE BUILDING SOCIETY]* 846
- Rent restriction. *See* RENT RESTRICTION.

LEASE

See LANDLORD AND TENANT.

LEGAL AID

- Costs—*Assisted person's liability to pay costs*—*Contribution assessed at nil*—*Order to pay sum equal to party and party costs as condition of relief under Law of Property Act, 1925 (c. 17), s. 146 (4)*—*Legal Aid and Advice Act, 1949 (c. 51), s. 2 (2) (e) [FACTORS (SUNDRIES), LTD. v. MILLER]* 630
- No order made as to costs*—*Settlement by parties during trial*—*No term in settlement as to costs*—*Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), reg. 18 (3) [METCALF v. WELLS]* 889
- Security for costs*—*Application by wife in divorce proceedings*—*Husband an "assisted person"*—*Legal Aid and Advice Act, 1949 (c. 51), s. 12 (2) (b) (ii) [VINCENT v. VINCENT]* 978
- Taxation*—*Costs representing full value of work done allowed on taxation as between party and party*—*No further allowance on solicitor-and-client basis*—*Legal Aid and Advice Act, 1949 (c. 51), sched. III, para. 4 (1) [LYON v. LYON]* 831
- No order made as to costs*—*Power to make order for taxation*—*Legal Aid and Advice Act, 1949 (c. 51), sched. III, para. 4 (1)*—*Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), reg. 18 (3) [FROST v. FROST]* 1125
- Jurisdiction of court*—*Solicitor deprived of costs*—*Counsel's fees*—*Need for taxing*—*Legal Aid and Advice Act, 1949 (c. 51), s. 6 (5), sched. III, paras. 1 (1), 2 (1) [SALTMARSH v. SALTMARSH]* 6

LEGITIMACY

- Costs—*Failure of petition*—*Costs of Attorney-General and interveners out of estate [CLEAVE v. ATTORNEY-GENERAL. HEADLEY, CHANNON AND BARCLAYS BANK, LTD., INTERVENING]* 283

LEGITIMATION

- Legitimation per subsequens matrimonium*—*Father domiciled at child's birth in foreign country in which legitimation by subsequent marriage was permitted by law*—*Legitimacy Act, 1926 (c. 60), s. 8 (1) [Re HURLL]* 322
- Validity of Austrian marriage*—*Retrospective effect of Austrian legislation*—*Determination according to Austrian law [STARKOWSKI (or se. URBANSKI) (or se. JUSZCZKIEWICZ) v. ATTORNEY-GENERAL]* 616

LICENCE

- Driving. *See* STREET TRAFFIC.
- Intoxicating liquor, sale of. *See* LICENSING.
- Licence to occupy premises—*Deserted wife in occupation of husband's dwelling-house. See HUSBAND AND WIFE.*
- Employer and employee*—*Retention by employee of possession of flat by consent after termination of service*—*Work of confidential nature*—*Direct access of flat to offices [MURRAY, BULL & Co., LTD. v. MURRAY]* 1079
- Motor vehicle. *See* STREET TRAFFIC.

LICENSING

- Licence—*Occasional licence*—*Jurisdiction to grant applications for consecutive periods of three days each*—*Applications in respect of events at festival lasting two months*—*Revenue Act, 1862 (c. 22), s. 13*—*Licensing (Consolidation) Act, 1910 (c. 24), s. 64 (1) (2) (4) [R. v. BATH LICENSING JUSTICES. Ex parte CHITTENDEN]* 700
- Offences*—*Found drunk on licensed premises*—*Upper room let to private party*—*Defendants found drunk there*—*Licensing Act, 1872 (c. 94), s. 12 [STEVENS v. DICKSON]* 246
- Passenger vessel*—*Sale not restricted to permitted hours*—*Finance (1909-10) Act, 1910 (c. 8), sched. I, Part D*—*Licensing Act, 1921 (c. 42), s. 1 (1), s. 18 [GREEN v. THAMES LAUNCHES, LTD.]* 332

LIMITATION OF ACTION.

Public authority. *See* PUBLIC AUTHORITY.

LOCAL AUTHORITY

- Land of—*Compulsory purchase order*—*Special Parliamentary procedure*—*Material date of ownership by local authority*—*Persons competent to object to order [MIDDLESEX COUNTY COUNCIL v. MINISTER OF LOCAL GOVERNMENT AND PLANNING]* 709

MACHINERY

Dangerous. *See* FACTORY.

MAINTENANCE

Wife. *See* DIVORCE; HUSBAND AND WIFE; JUSTICES.

MALICIOUS PROSECUTION

- Reasonable and probable cause for prosecution*—*Reasonable cause in respect of part of money alleged to have been stolen*—*Belief of defendant in truth of charge against plaintiff*—*When question for jury [LEIBO v. D. BUCKMAN, LTD.]* 1057

MANAGING DIRECTOR

See COMPANY.

MARKET

- Stallage—*Amount properly chargeable*—*No amount fixed by charter or custom*—*No compulsion to take stalls [ATTORNEY-GENERAL v. COLCHESTER CORPN.]* 297

	PAGE
MASTER AND SERVANT	
Contract of service— <i>Remuneration by retaining fee and payment for work done—Servant's duty to give master first offer of all work—No work to be done for rivals—Availability for work at all reasonable times</i> [BAUMAN v. HULTON PRESS, LTD.]	1121
Duty of master— <i>Provision of safe system of working—Window cleaner—Defective window sash—No safety appliances provided</i> [GENERAL CLEANING CONTRACTORS, LTD. v. CHRISTMAS]	1110
Liability of master— <i>Liability to third person for acts of servant—Act within course of employment—Injury to servant's wife due to servant's negligence</i> [BROOM v. MORGAN]	1007
Contribution by servant— <i>Master himself responsible for damage</i> [JONES v. MANCHESTER CORPN.]	125
MEAT	
Fish not included in "meat"— <i>Transport Act, 1947 (c. 49), s. 52 (1), s. 125 (1)</i> [A. F. WARDHAUGH, LTD. v. MACE]	23
Price control. <i>See</i> PRICE CONTROL.	
MEDICAL PRACTITIONER	
General Medical Council— <i>Disciplinary committee—Erasure of name from register—Discretion of committee to consider evidence of previous offences—Powers of legal assessor</i> [DALY v. GENERAL MEDICAL COUNCIL]	666
Income tax— <i>Payments made by Minister of Health towards maintenance of policy of assurance</i> [HAWKINS v. LEAHY]	759
Negligence— <i>Liability of hospital board.</i> <i>See</i> HOSPITAL BOARD.	
MERCANTILE AGENT	
<i>See</i> FACTOR.	
MILITARY LAW	
Fraudulent misapplication of service property— <i>Burden of proof—Deficiency in mess funds—No explanation given by accused person—Inference of guilt—Army Act, s. 17</i> [R. v. TUCKER]	1074
MINE	
Gypsum mine— <i>Security of roof—Duty of mine owner—"So far as may be reasonably practicable"—Metaliferous Mines Regulation Act, 1872 (c. 77), s. 23—Metaliferous Mines General Regulations, 1938 (S.R. & O., 1938, No. 630), reg. 7 (3)</i> [MARSHALL v. GOTHAM CO., LTD.]	1044
MISAPPLICATION OF SERVICE PROPERTY	
<i>See</i> MILITARY LAW.	
MISTAKE	
Mistake of fact— <i>Money paid under mistake of fact—Long lease—Rent paid without deduction of tax at standard rate—Recovery of overpayments—Income Tax Act, 1918 (c. 40), General Rules Applicable to All Schedules, r. 19 (2)—Finance Act, 1940 (c. 29), s. 17 (1) (a), (2)</i> [TURVEY v. DENTONS (1923), LTD.]	1025
MISTRIAL	
Application to quash acquittal. <i>See</i> CERTIORARI.	
MORTGAGE	
Possession of mortgaged property— <i>Mortgagor not in occupation—Person in occupation under agreement with mortgagor—Mortgagor's power of leasing excluded except with consent of mortgagees—Mortgagees having knowledge of tenancy for eight months prior to notice to quit—Implied confirmation of tenancy</i> [PARKER v. BRAITHWAITE]	837
MOTOR INSURANCE	
<i>See</i> STREET TRAFFIC.	
NAGGING	
<i>See</i> DIVORCE (Cruelty).	
NATIONAL ASSISTANCE	
Wife deserting husband— <i>Grant of national assistance—Liability of husband to National Assistance Board—National Assistance Act, 1948 (c. 29), s. 42 (1) (a)</i> [NATIONAL ASSISTANCE BOARD (by J. R. Beattie) v. WILKINSON]	255
NATIONAL HEALTH SERVICE	
Hospital— <i>Teaching hospital—Gift of share of residue—Gift to lapse if the funds should have come under "government control"—National Health Service Act, 1946 (c. 81), s. 7 (1) (2)</i> [Re BUZZACOTT (decd.)]	1011
Transfer to Minister— <i>"Hospitals vested in a local authority"—Reversionary interest in freehold of hospital premises—National Health Service Act, 1946 (c. 81), s. 6 (2)</i> [MINISTRY OF HEALTH v. STAFFORD CORPN.]	386
NATIONALISATION	
Gas industry. <i>See</i> GAS.	
NECESSARIES	
<i>See</i> HUSBAND AND WIFE.	
NECESSITY	
Way of. <i>See</i> EASEMENT.	
NEGLECT	
Air rifle— <i>Liability of parent</i> [DONALDSON v. McNIVEN]	691
Breach of statutory duty— <i>Delegation of duty to injured employee—What constitutes delegation</i> [MANWARING v. BILLINGTON]	747
Child— <i>Licensee or trespasser—Proof of licence—Onus—Rebuttal of inference—Injury on railway line adjacent to recreation ground—Access to line through hole made by children in fence—Duty of railway executive</i> [EDWARDS v. RAILWAY EXECUTIVE]	430
Contributory negligence— <i>Apportionment of liability—Breach of building regulations—Fatal accident—Employee's fall from platform—Employee failing to disclose liability to epileptic fits—Law Reform (Contributory Negligence) Act, 1945 (c. 28), s. 1 (1)</i> [CORK v. KIRBY MACLEAN, LTD.]	402
Damages— <i>Mental shock.</i> <i>See</i> DAMAGES.	
Dangerous goods— <i>Nut and bolt of weighing machine protruding above path level in railway station—Machine maintained by competent contractors</i> [BLOOMSTEIN v. RAILWAY EXECUTIVE]	418

	PAGE
NEGLIGENCE— <i>continued</i> .	
Fire—Fireman injured by explosion— <i>Liability of occupiers—Invitee—Exceptional and unnecessary dangers of fire and explosion created by occupiers—Volenti non fit injuria</i> [MERRINGTON v. IRONBRIDGE METAL WORKS, LTD.]	1101
Invitee— <i>Duty of occupier—Protection against unusual danger—Window cleaner—Danger created by occupier</i> [BATES v. PARKER]	987
Railway station— <i>Passenger on premises of different executive—Transport Act, 1947 (c. 49), s. 5 (9) (a)</i> [BLOOMSTEIN v. RAILWAY EXECUTIVE]	418
Liability of contractor to servant of sub-contractor— <i>Retention by contractor of control over manner of performance of work—Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), reg. 4, reg. 31</i> [MULREADY v. J. H. W. BELL, LTD.]	663
Remoteness of damage. See DAMAGES (Mental shock).	
Schoolmaster— <i>Physical training—Liability of education authority—Approved system of supervision—Regular and recognised practice</i> [WRIGHT v. CHESHIRE COUNTY COUNCIL]	789
Wife's loss of consortium— <i>Injury to husband causing sexual incapacity—Tortfeasor's liability to wife</i> [BEST v. SAMUEL FOX & Co.]	394
NEW LEASE. See LANDLORD AND TENANT.	
NEXT FRIEND See PRACTICE (Parties).	
NOTICE OF INTENDED PROSECUTION See STREET TRAFFIC.	
NULLITY	
Jewish bill of divorce— <i>Declaratory judgment sought that marriage dissolved—Husband domiciled in Israel—Wife resident in England—R.S.C., Ord. 25, r. 5</i> [HAR-SHEFI v. HAR-SHEFI]	821
Parties— <i>Petitioner by next friend—Petitioner said to be "of unsound mind, not so found by inquisition"—Reasonable ground for thinking petitioner capable of managing affairs—Dismissal of petition</i> [J. (orse. B.) (by her next friend) v. J.]	1129
OCCASIONAL LICENCE See LICENSING.	
OCCUPIER Duty to invitee— <i>Protection against unusual danger. See NEGLIGENCE (Invitee).</i>	
OFFICIAL SOLICITOR Guardian ad litem. See DIVORCE (Insanity).	
OVERRIDING INTEREST Liability of registered land to. See LAND REGISTRATION.	
PARENT Negligent use of air gun by child— <i>Liability of parent</i> [DONALDSON v. MCNIVEN]	691
PARTICULARS See DIVORCE (Practice); PRACTICE.	
PARTIES To action. See PRACTICE.	
PASSENGER VESSEL See LICENSING; SHIP.	
PATENT Foreign judgment affecting rights of English company in regard to English patents— <i>Recognition by English courts—English company neither subject to jurisdiction of foreign court nor party to foreign proceedings</i> [BRITISH NYLON SPINNERS, LTD. v. IMPERIAL CHEMICAL INDUSTRIES, LTD.]	780
PEDESTRIAN CROSSING See STREET TRAFFIC.	
PENSION Estate duty on. See ESTATE DUTY. Income tax— <i>Assessability to. See INCOME TAX.</i> Succession duty on. See SUCCESSION DUTY. War. See WAR PENSION.	
PERPETUITIES Accumulations. See ACCUMULATIONS. Rule in <i>Whitby v. Mitchell—Marriage settlement dated before 1926—Power of appointment under marriage settlement exercised by deed after 1926—Application of rule—Law of Property Act, 1925 (c. 20), s. 161 (2)</i> [Re LEIGH'S MARRIAGE SETTLEMENT]	57
PERSISTENT CRUELTY See JUSTICES (Husband and wife).	
PETITION Divorce. See DIVORCE.	
PHYSICAL TRAINING Liability for accident. See NEGLIGENCE (Schoolmaster).	
PLATE Gold plate— <i>Wedding ring—Need to bear hall-mark—Gold Plate (Standard) Act, 1798 (c. 69), s. 6</i> [WESTWOOD v. CANN]	349
PLATFORM Working platform— <i>Requirements of Building (Safety, Health and Welfare) Regulations, 1948. See BUILDING.</i>	
PLEADING Amendment— <i>Application for leave to amend after close of case but before judgment</i> [LOUTFI v. C. CZARNIKOW, LTD.]	823
Striking out. See PRACTICE.	

	PAGE
POISON	
Sale by retail— <i>Sale by or under supervision of registered pharmacist—Chemist's "self-service" shop—Pharmacist supervising transaction at time of payment—Pharmacy and Poisons Act, 1933 (c. 25), s. 18 (1) (a) (iii) [PHARMACEUTICAL SOCIETY OF GREAT BRITAIN v. BOOTS CASH CHEMISTS (SOUTHERN), LTD.]</i>	456
POLICE	
Questions to person in custody— <i>Need of caution. See CRIMINAL LAW (Evidence).</i>	
PORT	
Custom. <i>See SHIPPING (Charterparty).</i>	
PORTIONS	
Estate duty— <i>Portions charged by will on property reversionary at date of testator's death—Duty exigible on death of life tenant—Liability of portioners to be charged with duty [Re KEELE ESTATES]</i>	164
POSSESSION	
Rights of mortgagee. <i>See MORTGAGE.</i>	
POWER OF APPOINTMENT	
Exercise— <i>Excessive exercise—Power to appoint £25,000—Appointment of £15,000 clear of death duties—Total sum including duties exceeding £25,000 [Re KEELE ESTATES]</i>	164
Special power to appoint— <i>Marriage settlement dated before 1928—Power exercised by deed dated after 1928—"Trusts created by an instrument coming into operation after the commencement of" the Law of Property Act, 1925—Law of Property Act, 1925 (c. 20), s. 161 (2) [Re LEIGH'S MARRIAGE SETTLEMENT]</i>	57
PRACTICE	
Appeal. <i>See APPEAL.</i>	
Case stated— <i>Appeal from quarter sessions—Extension of time for appeal—"Special circumstances"—Solicitor's inadvertence or negligence—R.S.C., Ord. 59, r. 30 (2) [COLLYER v. DRING]</i>	1004
Divorce. <i>See DIVORCE.</i>	
Parties— <i>Foreign sovereign—Liability to be sued—Partial dependency on another Power—State of fact to be taken as at date of decision by court—Conclusiveness of certificate of government department [SAYCE v. BAHAWALPUR STATE (AMEER)]</i>	64
<i>Proceeding by next friend—Party said to be "of unsound mind, not so found by inquisition"—Reasonable ground for thinking party capable of managing affairs—Dismissal of proceeding [J. (orse. B.) (by her next friend) v. J.]</i>	1129
Privy Council. <i>See PRIVY COUNCIL.</i>	
Striking out pleading— <i>Defence—Paragraphs to be struck out in default of further and better particulars within twenty-one days—Imperfect particulars delivered in time—No default warranting striking out of paragraphs—Automatic striking out on default [REISS v. WOOLF]</i>	3, 112
Trial— <i>Early trial—Order for early trial—Date of trial in discretion of judge in charge of list—R.S.C., Ord. 36, r. 1A (1) (c) [BARON v. BARON]</i>	689
PREFERENCE SHAREHOLDERS	
Rights "affected"— <i>Increase of ordinary share capital. See COMPANY (Alteration of members' rights).</i>	
Rights in winding-up. <i>See COMPANY (Winding-up).</i>	
PRESCRIPTION	
<i>See EASEMENT.</i>	
PRICE CONTROL	
Meat priced and marked with customer's name, but not delivered to customer— <i>Act preparatory to commission of offence—Liability of master for act of servant [GARDNER v. AKEROYD]</i>	306
PRIVILEGE	
Discovery. <i>See DISCOVERY.</i>	
PRIVY COUNCIL	
Practice— <i>Need for court from which appeal arises to state reasons for decision—Judicial Committee Rules, 1925 (S.R. & O., 1925, No. 440), r. 16 [NANA OSBI ASSIBEY III, KOKOFUENE v. NANA KWASI AGYEMAN, BOAGYAAHENE]</i>	1084
PROBATE	
Costs— <i>Order for payment by defendant of plaintiff's costs—Taxation of costs of administrator pendente lite—Accounts of administrator—Right of plaintiff to order for payment of administrator's costs and accounts [In the Estate of SEGALOV (dec'd.)]</i>	107
Grant— <i>Exclusion of words in codicil—Carrying out intention of testatrix [Re SWORDS]</i>	281
Signature of will— <i>Place of testator's signature—Wills Act Amendment Act, 1852 (c. 24), s. 1 [Re HARRIS (dec'd.)]</i>	409
PROCUREMENT	
Breach of contract. <i>See TRADE UNION.</i>	
PUBLIC AUTHORITY	
Limitation of action— <i>Harbour board—Action under power to carry on trade of wharfingers and warehousemen—Trade not subsidiary to main purpose of managing and controlling harbour—Straits Settlements Public Authorities Protection Ordinance (Revised Laws, 1936 (c. 14)), s. 2 (2), as amended by Public Authorities Protection (Amendment) Ordinance, 1939, s. 2—Limitation Act, 1939 (c. 21), s. 21 (1) [FIRESTONE TIRE AND RUBBER Co. (S.S.), LTD. v. SINGAPORE HARBOUR BOARD]</i>	219
<i>Soldier on duty—Member of Canadian forces—Visiting Forces (British Commonwealth) Act, 1933 (c. 6), s. 2 (3) (b)—Limitation Act, 1939 (c. 21), s. 21 (1) [REEVES v. DEANE-FREEMAN]</i>	506
PUBLIC HEALTH	
Dustbin— <i>Provision—Owner of building required by local authority to provide—Notice set aside by justices—Right of local authority to appeal to quarter sessions—"Person aggrieved"—Public Health Act, 1936 (c. 49), s. 301 [R. v. NOTTINGHAM QUARTER SESSIONS. Ex parte HARLOW]</i>	78
Entry on premises— <i>"Twenty-four hours' notice of intended entry"—Letter stating intention to "proceed under s. 290 (6) of the Public Health Act, 1936," sent to occupier four months before entry—Public Health Act, 1936 (c. 49), s. 287 (1), proviso [STROUD v. BRADBURY]</i>	76

PURCHASE NOTICE

See TOWN AND COUNTRY PLANNING.

QUARTER SESSIONS

Acquittal—Application to High Court to quash order. See CERTIORARI.

Appeal to—By "person aggrieved" under Public Health Act, 1936. See PUBLIC HEALTH.

Case Stated. See CASE STATED (By Justices).

RAILWAY

Negligence—Invitee—Passenger on premises of different executive [BLOOMSTEIN v. RAILWAY EXECUTIVE].. .. 418

RATES

Agricultural buildings—Bull pens, stores, laboratory, offices—Artificial insemination of cattle—Collection of semen from bulls—Rating and Valuation (Apportionment) Act, 1928 (c. 44), s. 2 (2)—Local Government Act, 1929 (c. 17), s. 67 (1) [THOMPSON v. MILK MARKETING BOARD] 344

Electricity hereditament—Power to amend deleted assessment—Rating and Valuation Act, 1925 (c. 90), s. 20 (1)—Local Government Act, 1948 (c. 26), s. 92 (3), s. 92 (4)—Landlord and Valuation (Transitional) Regulations, 1949 (S.I., 1949, No. 2313), reg. 3 (1) [R. v. COCKRAM (VALUATION OFFICER). Ex parte EAST MIDLANDS ELECTRICITY BOARD] .. 44

REAL PROPERTY

Rule in Shelley's Case—Strict settlement in common form—Limitation to W. for life, with remainder to his sons in tail male and remainders over—Death of testator before Jan. 1, 1926 [Re WILLIAMS' WILL TRUSTS] 502

REGULATION OF EMPLOYMENT

See EMPLOYMENT.

RENT CONTROL

Security of tenure—Power to extend period—Notice to quit given more than three months after decision of tribunal—Furnished Houses (Rent Control) Act, 1946 (c. 34), s. 5—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 11 (2) (b) [R. v. ST. HELENS AND AREA RENT TRIBUNAL. Ex parte PICKAVANCE] 9

RENT RESTRICTION

Costs—Action in High Court—Claim for possession and damages for breach of covenant—Joinder with claim for trespass—Trespass of trifling nature—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 17 (2)—County Courts Act, 1934 (c. 53), s. 40 (1), s. 47 (1) [TIDEWAY INVESTMENT AND PROPERTY HOLDINGS, LTD. v. WELLWOOD. SAME v. ORTON. SAME v. JONES. SAME v. FRIEDENTAG. SAME v. THORNILY] 514

" Dwelling-house "—Premises containing shop and dwelling accommodation—Question of fact—Dominant purpose immaterial—Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 3 (3) [WHITELEY v. WILSON] 940

House unfit for human habitation—Notice to execute works—" Person having control "—Receipt of rack-rent—" Full net annual value " of house—House controlled under Rent Acts—Housing Act, 1936 (c. 51), s. 9 (4) [RAWLENCE v. CROYDON CORPN.] 535

Permitted increase—Transfer of burden—Transfer to landlord of liability to repair previously borne by landlord as tenant—Right of appeal—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 2 (3)—Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), s. 11 (1) [BECK v. NEWBOLD] 412

Possession—Death of landlord after order granted—House required by landlord for herself and family—Order for possession—Death of landlord before execution of order—House devised to daughter—Claim by daughter to enforce order—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), sched. I (h) [GOLDTHORPE v. BAIN] 23

Dwelling-house let to husband—Subsequent desertion by husband—Wife remaining in occupation—Adultery by wife—No step by husband to revoke wife's authority to occupy [WABE v. TAYLOR] 420

Form of order—Possession on failure of tenant to fulfil conditions—Tenant authorised to continue breach of covenant and trespass [TIDEWAY INVESTMENT AND PROPERTY HOLDINGS, LTD. v. WELLWOOD. SAME v. ORTON. SAME v. JONES. SAME v. FRIEDENTAG. SAME v. THORNILY] 514

Sub-letting in breach of covenant—Acceptance by landlord of rent from head lessee after knowledge of breach—Sub-letting with " consent of landlord "—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), sched. I, para. (d) [HYDE v. PIMLEY] 102

Separate dwelling—Two floors sub-let by contractual tenant—Not " self-contained " flats—Expiration of contractual tenancy—Claim by landlord for possession of floors sub-let—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 15 (1) [CROWHURST v. MAIDMENT] 808

Standard rent—House divided into two flats—No evidence of letting of house or flats before 1928—Lower flat let in 1928 for one year at 25s. a week—Lower flat again let in 1937 at 17s. 6d. a week—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (a) (as amended by Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 3 (1), sched. I) [STIRLING v. GILBERT] 153

Statutory tenancy—Breach of covenant during contractual tenancy—Failure to remedy before expiration of tenancy—Tenant continuing in possession [TIDEWAY INVESTMENT AND PROPERTY HOLDINGS, LTD. v. WELLWOOD. SAME v. ORTON. SAME v. JONES. SAME v. FRIEDENTAG. SAME v. THORNILY] 514

Statutory tenant—Retention of possession after termination of contractual tenancy—Tenant employee of landlords—Work of confidential nature—Direct access of flat to offices—Continuance of contractual tenancy [MURRAY, BULL & Co., LTD. v. MURRAY] 1079

RES JUDICATA

Husband and wife—Persistent cruelty—Dismissal of summons—Fresh summons—Admission of evidence of incidents covered by first summons [RICHARDS v. RICHARDS] 904

REVIVAL

Will. See WILL.

REVOCATION

Will. See WILL.

RIGHT OF WAY

See EASEMENT.

RING

Wedding ring—Need to bear hall-mark. See PLATE.

RULE AGAINST PERPETUITIES

See PERPETUITIES.

RULE IN SHELLEY'S CASE

See REAL PROPERTY.

SAFE SYSTEM OF WORKING

See MASTER AND SERVANT.

SALE OF GOODS

"Self-service" shop. See SHOP.

SALE OF LAND

Contract—Purchase price—Price to include "cost of roads, sewers and other services"—Cost of making up roads to satisfaction of local authority not included—Public Health Act, 1875 (c. 55), s. 150. [SMITH v. JONES] 907

Controlled purchase price. See BUILDING CONTROL.

Sale by court in administering estate—Auctioneer's commission—Sale at more than £25,000 [Re WOLFE (dec'd.)] 545

Specific performance. See SPECIFIC PERFORMANCE.

SAW

Circular—Duty to fence. See FACTORY (Dangerous machinery).

SCAFFOLD

Provision of guard-rail [SEXTON v. SCAFFOLDING (GREAT BRITAIN), LTD.] 278

SCHOOLMASTER

Negligence. See NEGLIGENCE (Schoolmaster).

SEAMAN

See SHIPPING.

SECURITY FOR COSTS

Assisted person. See LEGAL AID.

Divorce. See DIVORCE.

SENTENCE

See CRIMINAL LAW.

SEPARATION

Husband and wife—Division of property on separation. See HUSBAND AND WIFE.

SEPARATION ORDER

See JUSTICES (Husband and wife).

SETTLEMENT

Income tax. See INCOME TAX (Settlement).

Powers of tenant for life—Limitation tending to discourage exercise of powers—Application of income under personality settlement for benefit of settled land—Limitation over on land ceasing to be settled—Sale of settled land—Settled Land Act, 1925 (c. 18), s. 106 [Re ABERCONWAY'S SETTLEMENT TRUSTS] 981

Rule in Shelley's Case—Strict settlement in common form—Limitation to W. for life, with remainder to his sons in tail male and remainders over [Re WILLIAMS' WILL TRUSTS] .. 502

SHARE

See COMPANY.

SHELLEY'S CASE, RULE IN

See REAL PROPERTY.

SHIP

"Necessaries"—"Equipping" a ship—Supply of fuel oil—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 22 (1) (a) (vii) (x) [THE D'VORA] 1127

Passenger vessel—Sale of intoxicating liquor—Sale not restricted to permitted hours [GREEN v. THAMES LAUNCHES, LTD.] 332

SHIPPING

Charterparty—Custom of port—Term of charterparty that shipowners' stevedores be employed in discharging grain cargo—Receivers' right by custom to fill into bags or buckets before discharge—Consistency—Debit of half cost to shipowners [A/S SAMELLING v. GRAIN IMPORTERS (EIRE), LTD.] 815

Fishing boat—Seaman—Substitute—Oral engagement—Fishing boat's running agreement not signed—Refusal to proceed to sea—Merchant Shipping Act, 1894 (c. 60), s. 376 (1) (b) (d), s. 401 (3) [CRAWLEY v. PARSONS] 488

"Ship's delivery order"—Request to ship to deliver goods to buyers—Order addressed by shipowner to dock master porter—Shipment of goods to named port—Shipment to different port and transhipment to named port—Buyers' right to reject [COLIN & SHIELDS v. W. WEDDEL & Co., LTD.] 337

SHIP'S DELIVERY ORDER.

See SHIPPING.

SHOCK

Mental shock—Damages. See DAMAGES.

SHOP

New lease. See LANDLORD AND TENANT.

"Self-service" shop—Sale of goods—Transaction completed by acceptance of price [PHARMACEUTICAL SOCIETY OF GREAT BRITAIN v. BOOTS CASH CHEMISTS (SOUTHERN), LTD.].. 456

SOLDIER

Limitation of action against—Act done while on duty [REEVES v. DEANE-FREEMAN] .. 506

SOLICITOR

Charging order—Fund "recovered or preserved" through solicitor's instrumentality—Fund lodged to await trial of action before solicitor retained—Charge limited to client's share of fund—Priority of charge to mortgage of fund arranged by solicitor, but subject to partnership debts—Effect of compromise of action—Solicitors Act, 1932 (c. 37), s. 69 [WIMBOURNE v. FINE] 681

SOLICITOR— <i>continued.</i>	
Income tax— <i>Deduction from profits—Entertainment of clients</i> [BENTLEYS, STOKES & LOWLESS v. BEESON (INSPECTOR OF TAXES)]	82
Legal aid. <i>See</i> LEGAL AID (Costs).	
Official. <i>See</i> DIVORCE (Insanity).	
SPECIAL CONTRIBUTION	
<i>See</i> INCOME TAX (Special contribution).	
SPECIFIC PERFORMANCE	
Sale of land— <i>Uncertainty—Effect of fraud of defendant—Agreement to convey if plaintiff did not bid at auction—Failure to perform agreement</i> [PALLANT v. MORGAN]	951
SPEED LIMIT	
<i>See</i> STREET TRAFFIC.	
SPEEDY TRIAL	
<i>See</i> PRACTICE (Trial).	
STALLAGE	
<i>See</i> MARKET.	
STANDARD RENT	
<i>See</i> RENT RESTRICTION.	
STATUTORY DUTY	
Delegation to employee— <i>What constitutes delegation—Building (Safety, Health and Welfare) Regulations (S.I., 1948, No. 1145), reg. 29 (3) (4)</i> [MANWARING v. BILLINGTON]	747
STREET TRAFFIC	
Charge of motor vehicle while under influence of drink— <i>"In charge"—Driver walking towards vehicle with intention of driving—Road Traffic Act, 1930 (c. 43), s. 15 (1)</i> [LEACH v. EVANS]	264
Driving uninsured motor vehicle— <i>Cycle fitted with auxiliary engine—Use as pedal cycle after removal of essential parts of engine</i> [LAWRENCE v. HOWLETT]	74
<i>Using and permitting vehicle to be used on road without policy of insurance being in force—Learner being taught to drive—Instructor holding steering wheel and handbrake—Learner not insured—Instructor and learner both "drivers"—Use of vehicle by learner covered by instructor's policy—Road Traffic Act, 1930 (c. 43), s. 35 (1)</i> [LANGMAN v. VALENTINE]	803
Driving while disqualified for holding licence— <i>Absolute prohibition—Road Traffic Act, 1930 (c. 43), s. 7 (4)</i> [TAYLOR v. KENYON]	726
Driving without licence— <i>"Driving"—Learner being taught to drive—Sitting in driver's seat and using accelerator and footbrake—Instructor holding steering wheel and handbrake—Road Traffic Act, 1930 (c. 43), s. 4 (1)</i> [LANGMAN v. VALENTINE]	803
Excessive speed— <i>Goods vehicle—Vehicle capable of carrying passengers—Use solely for carrying passengers—Road Traffic Act, 1934 (c. 50), sched. 1, para. 2 (1) (a)</i> [WOOLLEY v. MOORE]	797
Licence— <i>Rate of duty—Goods vehicle—"Used for conveyance of goods"—Vehicle containing no goods—Trailer containing goods—Vehicles (Excise) Act, 1949 (c. 89), s. 27 (1)</i> [JAMES v. DAVIES]	758
<i>Unlicensed vehicle—Minimum penalty—"Amount of duty chargeable"—Rebuttal of presumption—Vehicles (Excise) Act, 1949 (c. 89), s. 15 (1)</i> [HOLLAND v. PERRY]	720
Motor insurance— <i>Compulsory third party insurance—Liability in respect of death of employee—Judgment in favour of widow unsatisfied—Liability of Motor Insurers Bureau—Road Traffic Act, 1930 (c. 43), s. 35 (1), s. 36 (b), proviso (i)</i> [LEES v. MOTOR INSURERS BUREAU]	511
"Motor vehicle"— <i>Dual-purpose vehicle—Bicycle fitted with auxiliary engine—Use as pedal cycle after removal of essential parts of engine—Need for third-party insurance—Road Traffic Act, 1930 (c. 43), s. 1, s. 35 (1)</i> [LAWRENCE v. HOWLETT]	74
Notice of intended prosecution— <i>Limited company registered as owner of vehicle—Omission of "Limited" from company's name in notice—Road Traffic Act, 1930 (c. 43), s. 21 (c)</i> [SPRINGATE v. QUESTIER]	21
Pedestrian crossing— <i>Uncontrolled crossing—Precedence to foot-passenger—Precedence not accorded—Driver not negligent—Liability of driver—Pedestrian Crossings (London) Regulations, 1951 (S.I., 1951, No. 1193), reg. 4</i> [LEICESTER v. PEARSON]	71
STREET TRAFFIC	
Taking motor vehicle without owner's consent— <i>Attempt to take—Sentence</i> [R. v. PEARCE]	718
STRIKING OUT PLEADING	
<i>See</i> PRACTICE.	
SUCCESSION DUTY	
Succession— <i>"Beneficially entitled"—Pension granted to employee's widow—No enforceable right to pension—Succession Duty Act, 1853 (c. 51), s. 2</i> [Re J. BIBBY & SONS, LTD., PENSIONS TRUST DEED]	483
SUMMARY JURISDICTION	
<i>See</i> JUSTICES.	
SURRENDER	
Of tenancy. <i>See</i> JOINT TENANCY.	
SURTAX	
Company— <i>Voluntary liquidation—Undistributed profits—"Available for distribution"—Income for broken period before winding-up resolution—Finance Act, 1927 (c. 10), s. 31 (4)—Finance Act, 1922 (c. 17), s. 21 (1), proviso</i> [A. & J. MUCKLOW, LTD. (In Liquidation) v. INLAND REVENUE COMRS.]	1094
TAXATION OF COSTS	
<i>See</i> COSTS; LEGAL AID.	
TELESCOPIC SIGHT	
Of rifle— <i>Need for firearms certificate</i> [WATSON v. HERMAN]	70
TENANCY	
Weekly. <i>See</i> LANDLORD AND TENANT.	
Yearly. <i>See</i> LANDLORD AND TENANT.	

TENANT FOR LIFE

See SETTLEMENT.

THIRD-PARTY INSURANCE

See STREET TRAFFIC.

TOBACCOSale by unlicensed person—*Aiding and abetting of sale by purchaser—Tobacco Act, 1842 (c. 93), s. 13 [SAYCE v. COUPE]* 715**TORT**Joint tortfeasors—*Contribution—Master's right to contribution by servant—Master himself responsible for damage—Liability of hospital board for negligence of doctor—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6 (2) [JONES v. MANCHESTER CORPN.]* 125**TOWN AND COUNTRY PLANNING**Advertisement—*Advertisement in area to which planning scheme under Town and Country Planning Act, 1932, applied—Display before Aug. 1, 1948—Validity of enforcement notice under Town and Country Planning (Control of Advertisements) Regulations, 1948 (S.I., 1948, No. 1613), reg. 23 [DOMINANT SITES, LTD. v. HENDON BOROUGH COUNCIL]* .. 899Enforcement notice—*Need to specify date on which notice takes effect—Notice invalid—No appeal to justices against notice—Right to question validity on subsequent summons for contravention—Town and Country Planning Act, 1947 (c. 51), s. 23 (3) (4), s. 24 (1) (3) [MEAD v. PLUMTREE]* 723**TRADE UNION**Procuring breach of contract—*No procurement of wrongful act—No evidence of knowledge of contract [D. C. THOMSON & CO., LTD. v. DEAKIN]* 361**TRADING WITH THE ENEMY**Custodian of Enemy Property—*Liability for income tax on proceeds of property vested in him [BANK VOOR HANDEL EN SCHEEPVAART N.V. v. SLATFORD (sued as Custodian of Enemy Property)]* 956**TRANSFERRED UNDERTAKING**

Compensation to discharged employee. See BRITISH TRANSPORT COMMISSION.

TRANSPORT COMMISSION

See BRITISH TRANSPORT COMMISSION.

TRAVELLING EXPENSES

Deduction for assessment to income tax. See INCOME TAX.

TRIAL

See JUSTICES.

TRUST AND TRUSTEEAppointment of new trustee—*Concurrence of continuing trustee—"Retiring trustee"—Trustee compulsorily retired for remaining out of the United Kingdom for more than twelve months—Trustee Act, 1925 (c. 19), s. 36 (1) (8) [Re STONEHAM'S SETTLEMENT TRUSTS]* .. 694Bank—*Charging clause—Deposit by bank of trust moneys with itself—Liability to account for profit [Re WATERMAN'S WILL TRUSTS]* 1054Removal of trustee—*Trustee remaining out of the United Kingdom for more than twelve months—Removal against his will—Trustee Act, 1925 (c. 19), s. 36 (1) [Re STONEHAM'S SETTLEMENT TRUSTS]* 694Trustee—*Annuity to trustee conditional on his acting as such—Assessment to special contribution [DALE v. INLAND REVENUE COMRS.]* 89**UNSOUNDNESS OF MIND**

See DIVORCE (Insanity).

VAGRANCY

See CRIMINAL LAW.

VESSEL

Passenger vessel. See LICENSING: SHIP.

VOLENTI NON FIT INJURIA

See NEGLIGENCE.

WAR DAMAGEPayment in respect of damage—*Notification by War Damage Commission of nature of payment—Notification binding on War Damage Commission—War Damage Act, 1943 (c. 21), s. 7 (1) [Re WAR DAMAGE ACT, 1943: Re 56, DENTON ROAD, TWICKENHAM, MIDDLESEX]* .. 799**WAR PENSION**Burden of proof—*Death more than seven years after termination of war service—Royal Warrant Concerning Retired Pay, Pensions, etc., 1949 (Cmd. 1949, No. 7699), art. 5 (2) [DICKINSON v. MINISTER OF PENSIONS]* 1031**WAY**

Right of way. See EASEMENT.

WEDDING RING

Need to bear hall-mark. See PLATE.

WEEKLY TENANCY

See LANDLORD AND TENANT.

WILLCondition—*Certainty—Condition subsequent—"Take up permanent residence in England" [Re GAPE'S WILL TRUSTS]* 579Gift to hospital—*Teaching hospital—Gift to lapse if the funds should have come under government control—National Health Service Act, 1946 (c. 81), s. 7 (1) (2) [Re BUZZACOTT (dec'd.)]* .. 1011

Probate. See PROBATE.

Revival—*Revival by codicil—Intention appearing on face of codicil—Evidence of surrounding circumstances—Wills Act, 1837 (c. 26), s. 22 [In the Estate of DAVIS (dec'd.)]* .. 509Revocation—*Construction of revocatory clause in codicil—Will "to be read as if the name of [M.B.] did not occur therein"—Gift to children of M.B.—Effect on special power of appointment given to M.B. [Re SPENSLEY'S WILL TRUSTS]* 49

WINDING-UP

Of company. *See* COMPANY.

WINDOW CLEANER

Invitee—*Duty of occupier—Protection against unusual danger—Danger created by occupier*
 [BATES *v.* PARKER] 987

Safe system of working—*Duty of employer to provide* [GENERAL CLEANING CONTRACTORS, LTD.
v. CHRISTMAS] 1110

WORK AND LABOUR

Lump sum contract—*Substantial compliance with contract—Defects and omissions—Right to
 repudiate—Waiver—Contract to furnish flat—"Net cash as work proceeds and balance on
 completion"—Use of furniture* [HOENIG *v.* ISAACS] 176

WORKING PLATFORM

Requirements of Building (Safety, Health and Welfare) Regulations, 1948. *See* BUILDING.

WRIT

Defect in indorsement—*Cure by statement of claim—Summons to set aside service—Statement
 of claim delivered after service, but before hearing, of summons* [GROUNSELL *v.* CUTHELL] 135

YEARLY TENANCY

See LANDLORD AND TENANT.

STATUTES, ETC., REFERRED TO

PUBLIC GENERAL STATUTES

PAGE

Acquisition of Land (Assessment of Compensation) Act, 1919 (c. 57), s. 2, r. (5)...	228
Acquisition of Land (Authorisation Procedure) Act, 1946 (c. 49), <i>sched. I, Part III, para. 9</i>	709
Adoption Act, 1950 (c. 26), s. 3 (1) (c)	119, 877
Agriculture Act, 1947 (c. 48), s. 17 (1) (b)	825
Arbitration Act, 1950 (c. 27), s. 27	152
Army Act, s. 17	1074
Bastardy Laws Amendment Act, 1872 (c. 65), s. 3	706, 812
Bills of Sale Act, 1878 (c. 31), s. 10	290
British Nationality Act, 1948 (c. 56), s. 1	64
Carriage by Air Act, 1932 (c. 36), <i>sched. I, art. 25</i>	1016
Companies Act, 1929 (c. 23), Table "A", <i>art. 68</i>	292
County Courts Act, 1934 (c. 53), <i>ss. 40 (1), 47 (1)</i>	514
Court of Probate Act, 1857 (c. 77), s. 73	261
Courts-Martial (Appeals) Act, 1951 (c. 46), s. 5 (1)	1074
Criminal Justice Act, 1948 (c. 58)—	
s. 21 (1) (a)	718
s. 28 (1)	320
Customs Consolidation Act, 1876 (c. 36), s. 186	715
Debtors Act, 1869 (c. 62), s. 5	772
Education Act, 1944 (c. 31), s. 6 (3), s. 96 (2), s. 114 (1)	1107
Factories Act, 1937 (c. 67), <i>ss. 4 (1), 47 (1)</i>	192
Factors Act, 1889 (c. 45), s. 9	160
Finance Act, 1894 (c. 30)—	
s. 1	933
s. 2 (1) (b)	933
(d)	483
s. 5 (3) (as amended by Finance Act, 1938 (c. 46), s. 48)	201
s. 14 (1)	164
Finance (1909-10) Act, 1910 (c. 8), <i>sched. I, Part D</i>	332
Finance (New Duties) Act, 1916 (c. 11), s. 1 (4)	575
Finance Act, 1922 (c. 17), s. 21 (1), <i>proviso</i>	1094
Finance Act, 1927 (c. 10)—	
s. 27 (1)	548
s. 31 (4)	1094
Finance Act, 1936 (c. 34), s. 21 (9) (b)	32
Finance Act, 1940 (c. 29)—	
s. 15 (1)	548
s. 17 (1) (a), (2)	1025
Finance Act, 1948 (c. 49)—	
s. 47 (1)	89
s. 49 (1)	147
Firearms Act, 1937 (c. 12), <i>ss. 1, 32 (1)</i>	70
Furnished Houses (Rent Control) Act, 1946 (c. 34), s. 5	9
Gold Plate (Standard) Act, 1798 (c. 69), s. 6	349
Housing Act, 1936 (c. 51)—	
s. 9 (4)	535
<i>ss. 11 (4), 12 (1)</i>	893
Income Tax Act, 1918 (c. 40)—	
s. 14 (3) (a)	89
(b)	89, 147
<i>sched. D, para. 1 (a) (ii)</i>	759
<i>Cases I and II, r. 3 (a)</i>	82, 728
<i>Case II</i>	759
<i>Case III, r. 1 (a)</i>	759
<i>Case V, r. 2</i>	910
All Schedules Rules, r. 19 (2)	1025
Income Tax Act, 1945 (c. 32), s. 14 (1) (b), <i>proviso</i>	444
Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17)—	
s. 2 (3)	412
s. 12 (1) (a) (as amended by Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 3 (1), <i>sched. I</i>)	153
s. 15 (1)	808
(3)	630
s. 17 (2)	514
Judgments Act, 1838 (c. 110), s. 15	890
Land Registration Act, 1925 (c. 21), s. 70 (1) (k)	621
Landlord and Tenant Act, 1927 (c. 36), <i>ss. 4 (1), 5 (1) (2)</i>	41, 945
Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 11 (2) (b)	9
Law of Property Act, 1925 (c. 20)—	
s. 146 (4)	630
s. 161 (2)	57
s. 164 (1)	286
Law Reform (Contributory Negligence) Act, 1945 (c. 28), s. 1 (1)	402
Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6 (2)	125
Leasehold Property (Temporary Provisions) Act, 1951 (c. 38), s. 12 (3) (c)	846
Legal Aid and Advice Act, 1949 (c. 51)—	
s. 2 (2) (e)	630
s. 6 (5)	6
s. 12 (2) (b) (ii)	978
<i>sched. III, paras. 1 (1), 2 (1)</i>	6
<i>para. 4 (1)</i>	831, 1125
Legitimacy Act, 1926 (c. 60)—	
s. 1 (1)	616
s. 8 (1)	322
Licensing Act, 1872 (c. 94), s. 12	246
Licensing (Consolidation) Act, 1910 (c. 24), s. 64 (1) (2) (4)	700
Licensing Act, 1921 (c. 42), <i>ss. 1 (1), 18</i>	332
Limitation Act, 1939 (c. 21), s. 21 (1)	219, 506
Local Government Act, 1929 (c. 17), s. 67 (1)	344
Local Government Act, 1948 (c. 26), s. 92 (3) (4)	44

Maintenance Orders Act, 1950 (c. 37)—	
<i>s.</i> 1 (1)	61
<i>s.</i> 27 (2)	706
Married Women's Property Act, 1882 (c. 75), <i>s.</i> 17	863
Matrimonial Causes Act, 1950 (c. 25)—	
<i>s.</i> 2 (1)	284
<i>s.</i> 4 (2) (i)	671
<i>s.</i> 19 (2) (3)	196
<i>s.</i> 23 (1)	226
<i>s.</i> 31	854
<i>s.</i> 32 (3)	949
Merchant Shipping Act, 1894 (c. 60), <i>ss.</i> 376 (1) (b) (d), 401 (3)	488
Metalliferous Mines Regulation Act, 1872 (c. 77), <i>s.</i> 23	1044
National Assistance Act, 1948 (c. 29), <i>s.</i> 42 (1) (a)	255
National Health Service Act, 1946 (c. 81)—	
<i>s.</i> 6 (2)	386
<i>s.</i> 7 (1) (2)	1011
Pharmacy and Poisons Act, 1933 (c. 25), <i>s.</i> 18 (1) (a) (iii)	456
Prescription Act, 1832 (c. 71), <i>ss.</i> 1, 5	991
Prevention of Fraud (Investments) Act, 1939 (c. 16), <i>s.</i> 12 (1)	842
Public Health Act, 1875 (c. 55), <i>s.</i> 150	907
Public Health Act, 1936 (c. 49)—	
<i>s.</i> 287 (1), <i>proviso</i>	76
<i>s.</i> 301	78
Rating and Valuation Act, 1925 (c. 90), <i>s.</i> 20 (1)	44
Rating and Valuation (Apportionment) Act, 1928 (c. 44), <i>s.</i> 2 (2)	344
Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), <i>s.</i> 11 (1)	412
Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32)—	
<i>sched.</i> I (d)	102
(h)	23
Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), <i>s.</i> 3 (3)	940
Revenue Act, 1862 (c. 22), <i>s.</i> 13	700
Road Traffic Act, 1930 (c. 43)—	
<i>s.</i> 1	74
<i>s.</i> 4 (1)	803
<i>s.</i> 7 (4)	726
<i>s.</i> 15 (1)	264
<i>s.</i> 21 (c)	21
<i>s.</i> 23 (1) (b)	718
<i>s.</i> 35 (1)	74, 511, 803
<i>s.</i> 36 (b) (i)	511
Road Traffic Act, 1934 (c. 50), <i>sched.</i> I, <i>para.</i> 2 (1) (a)	797
Sale of Goods Act, 1893 (c. 71), <i>s.</i> 25 (2)	160
Settled Land Act, 1925 (c. 18)—	
<i>s.</i> 64 (1)	603
<i>s.</i> 106	981
Solicitors Act, 1932 (c. 37), <i>s.</i> 69	681
Succession Duty Act, 1853 (c. 51), <i>s.</i> 2	483
Summary Jurisdiction Act, 1879 (c. 49), <i>s.</i> 46 (3)	28
Summary Jurisdiction (Married Women) Act, 1895 (c. 39)—	
<i>s.</i> 5 (c)	939
<i>s.</i> 7	439, 784
Summary Jurisdiction (Separation and Maintenance) Act, 1925 (c. 51), <i>ss.</i> 1 (4), 2 (2)	250
Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49)—	
<i>s.</i> 22 (1) (a) (vii) (x)	1127
<i>s.</i> 162 (1) (as amended by Administration of Justice Act, 1928 (c. 26), <i>s.</i> 9)	261
<i>s.</i> 189 (3)	1133
Tobacco Act, 1842 (c. 93), <i>s.</i> 13	715
Town and Country Planning Act, 1944 (c. 47), <i>s.</i> 57 (1)	228
Town and Country Planning Act, 1947 (c. 51)—	
<i>s.</i> 19 (3) (5)	639
<i>ss.</i> 23 (3) (4), 24 (1) (3)	723
Trading with the Enemy Act, 1939 (c. 89), <i>s.</i> 7 (1)	956
Transport Act, 1947 (c. 49)—	
<i>ss.</i> 5 (9) (a)	418
<i>ss.</i> 52 (1) (a), 125 (1)	28
Trustee Act, 1925 (c. 19)—	
<i>s.</i> 36 (1) (8)	694
<i>s.</i> 57 (1)	603, 647
Vagrancy Act, 1824 (c. 83), <i>s.</i> 4	47
Vehicles (Excise) Act, 1949 (c. 89)—	
<i>s.</i> 15 (1)	720
<i>s.</i> 27 (1)	758
Visiting Forces (British Commonwealth) Act, 1933 (c. 6), <i>s.</i> 2 (3) (b)	506
War Damage Act, 1943 (c. 21), <i>s.</i> 7 (1)	799
Wills Act, 1837 (c. 26), <i>s.</i> 22	509
Wills Act Amendment Act, 1852 (c. 24), <i>s.</i> 1	409

LOCAL STATUTE

Leeds Corporation (Consolidation) Act, 1905 (c. 1), <i>ss.</i> 54, 337, 338	326
---	-----

RULES

Adoption of Children (County Court) Rules, 1949 (S.I., 1949, No. 2396), <i>rr.</i> 1, 9	877
Companies (Winding-Up) Rules, 1949 (S.I., 1949, No. 330), <i>r.</i> 163	467
County Court Rules, 1936, <i>Ord.</i> 5, <i>rr.</i> 13, 14	877
“Judges’ Rules”, <i>r.</i> (3)	657
Judicial Committee Rules, 1925 (S.R. & O., 1925, No. 440), <i>r.</i> 16	1034
Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940)—	
<i>r.</i> 4 (1) (h)	938
<i>r.</i> 36 (1)	693
<i>r.</i> 59	290
<i>r.</i> 64 (4)	98
<i>r.</i> 65 (3)	978
<i>r.</i> 71 (3)	1005

R.S.C.—	
Ord. 25, r. 5	821
Ord. 36, r. 1A (1) (c)	689
Ord. 58, r. 2	746
r. 4	814
Ord. 59, r. 30 (2)	1004

REGULATIONS

Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145)—	
reg. 2 (1)	278
reg. 4	663
reg. 22 (c)	402
reg. 24 (1)	278, 402, 1085
reg. 29 (3) (4)	747
reg. 31	663
Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927), reg. 55AB, reg. 90 (1)	306
Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), reg. 18 (3)	889, 1125
Metalliferous Mines General Regulations, 1938 (S.R. & O., 1938, No. 630), reg. 7 (3)	1044
National Health Service (Superannuation) Regulations, 1947 (S.R. & O., 1947, No. 1755), reg. 38 (3) (m)	759
Pedestrian Crossings (London) Regulations, 1951 (S.I., 1951, No. 1193), reg. 4	71
Rating and Valuation (Transitional) Regulations, 1949 (S.I., 1949, No. 2313), reg. 3 (1)	44
Town and Country Planning (Control of Advertisements) Regulations, 1948 (S.I., 1948, No. 1613), reg. 23	899
Transferred Undertakings (Compensation to Employees) Regulations, 1950 (S.I., 1950, No. 1083)—	
sched. II, para. 4 (1) (i)	764
para. 8 (1) (i)	100
Woodworking Machinery Regulations, 1922 (S.R. & O., 1922, No. 1196), reg. 10 (b) (i)	851

ORDERS

Dock Workers (Regulation of Employment) Order, 1947 (S.R. & O., 1947, No. 1189), sched., cl. 5 (7)	424
Trading with the Enemy (Custodian) Order, 1939 (S.R. & O., 1939, No. 1198), art. 3 (i) (ii)	956

MISCELLANEOUS

Royal Warrant Concerning Retired Pay, Pensions, etc., 1949 (Cmd. 1949, No. 7699), art. 5 (2)	1031
Straits Settlements Public Authorities Protection Ordinance (Revised Laws, 1936 (c. 14)), s. 2 (2), as amended by Public Authorities Protection (Amendment) Ordinance, 1939, s. 2	219

WORDS AND PHRASES

	PAGE
<i>Affecting</i>	751
<i>Amount of duty chargeable</i>	720
<i>Assisted person</i>	978
<i>Available for distribution</i>	1094
<i>Beneficial interest</i>	483
<i>Beneficially entitled</i>	483
<i>Consent of landlord</i>	102
<i>Consent . . . unreasonably withheld</i>	119
<i>Cost of roads, sewers and other services</i>	907
<i>Cutting</i>	444
<i>Drivers</i>	803
<i>Driving</i>	803
<i>Dwelling-house</i>	940
<i>Equipping</i>	1127
<i>Expectation under customary practice to payment of compensation in event of discharge</i>	100
<i>Former authority</i>	1107
<i>Force majeure</i>	497
<i>Full net annual value</i>	535
<i>Government control</i>	1011
<i>Hospitals vested in a local authority</i>	386
<i>In charge</i>	264
<i>Including cost of roads, sewers and other services</i>	907
<i>Investment income</i>	89, 147
<i>Land</i>	825
<i>Land devoted to a purpose of such a nature that there is no general demand . . . for land for that purpose</i>	228
<i>Last ordinarily resided together as man and wife in England</i>	61
<i>Lump sum paid . . . for the right of admission to a series of entertainments</i>	575
<i>Motor vehicle</i>	74
<i>Necessaries</i>	1127
<i>Net cash as work proceeds and balance on completion</i>	176
<i>Net income of £10 per week</i>	698
<i>Of unsound mind, not so found by inquisition</i>	1129
<i>Part of a building</i>	893
<i>Person aggrieved</i>	78
<i>Person having control</i>	535
<i>Person in custody</i>	657
<i>Person of unsound mind</i>	98
<i>Place of public resort</i>	47
<i>Previous proceedings with reference to the marriage</i>	938
<i>Proceed under s. 290 (6) of the Public Health Act, 1936</i>	76
<i>Profits</i>	548
<i>Property</i>	483
<i>Purchased or provided</i>	483
<i>Radius not exceeding radius of largest saw used on bench</i>	851
<i>Reckless</i>	842
<i>Recovered or preserved</i>	681
<i>Reinstatement in some other place</i>	228
<i>Retiring trustee</i>	694
<i>Right to payment of compensation</i>	764
<i>Self-contained</i>	808
<i>Self-service</i>	456
<i>Ship's delivery order</i>	337
<i>Single woman</i>	812
<i>So far as may be reasonably practicable</i>	1044
<i>Special circumstances</i>	1004
<i>Subject to export licence</i>	497
<i>Take up permanent residence in England</i>	579
<i>Time order</i>	3
<i>To show under a separate heading or division</i>	326
<i>Trusts created by an instrument coming into operation after the commencement of</i>	57
<i>Twenty-four hours' notice of intended entry</i>	76
<i>Used for conveyance of goods</i>	752
<i>Wilful misconduct</i>	1016
<i>Wrong</i>	1

CORRIGENDA

- [1949] 2 All E.R.
P. 869. *WELCH v. NAGY*. Case referred to No. 4: for "170 L.T. 1" read "176 L.T. 1."
[1952] 1 All E.R.
P. 1384. *Re GALLOWAY (decd.)*. Solicitors: read "*Buck & Dicksons*, Preston, agents for the *Solicitor for the Affairs of the Duchy of Lancaster* (for the Attorney-General of the Duchy of Lancaster)" instead of as printed.
[1952] 2 All E.R.
P. 220. *FIRESTONE TIRE & RUBBER CO. (S.S.) LTD. v. SINGAPORE HARBOUR BOARD*. Counsel: for "*C. H. Withers Payne* (of the Singapore Bar)", read "*R. Withers Payne*."
P. 290. *WRIGHT v. WRIGHT & WALKER*. Line G.3 and p. 291, line B.2: for "judgment creditor" read "claimant."
P. 331. *NORTH EASTERN GAS BOARD v. LEEDS CORPN.* Solicitors: read "*Sherwood & Co.*, agents for *S. L. Brant*, Leeds (for the gas board)..." instead of as printed.
P. 357. *WESTWOOD v. CANN*. Line F.6: for "committed an offence under s. 5" read "committed no offence under s. 5."
P. 692. *DONALDSON v. MCNIVEN*. Solicitors: for "*J. Trevor Booth & Banfi*, Liverpool," read "*A. D. Abrahamson & Co.*, Liverpool."
P. 764. *R. v. MINISTER OF LABOUR AND NATIONAL SERVICE*. Counsel: read "*Leonard Caplan* for the second respondent" instead of as printed.
P. 940. *WHITELEY v. WILSON*. Line D.5: for "s.8 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920" read s. 2(2) of the Landlord and Tenant (Rent Control) Act, 1949".
P. 1035. *BARTHOLOMEW v. BARTHOLOMEW*. Line B.5: for "interference" read "inference".

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R. v. WINDLE.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Jones and Parker, JJ.),
May 12, 1952.]

*Criminal Law—Insanity—Lack of knowledge that act causing death was “wrong”—
Belief that act, while legally wrong, was morally right.*

Where, in a criminal case, the defence is set up that, owing to disease of the mind, the prisoner did not know that he was doing what was wrong, it must be proved that at the material time he did not know that he was doing what was contrary to the law. It is not sufficient to prove that he believed that, while what he was doing was legally wrong, it was morally right.

AS TO THE DEFENCE OF INSANITY, see HALSBURY, Hailsham Edn., Vol. 9, pp. 20-22, paras. 14-17; and FOR CASES, see DIGEST, Vol. 14, pp. 55-63, Nos. 218-287 and Digest Supps.

E Cases referred to:

(1) *R. v. Rivett*, (1950), 34 Cr. App. Rep. 87; 2nd Digest Supp.

(2) *M'Naghten's Case*, (1843), 10 Cl. & Fin. 200; 8 E.R. 718; *sub nom. McNaghton's Case*, 4 State Tr. N.S. 847; 1 Car. & Kir. 130, n; 174 E.R. 744; 14 Digest 56, 229.

APPEAL against conviction.

The appellant was convicted before DEVLIN, J., at Birmingham Assizes of murdering his wife by administering to her a hundred aspirin tablets. At the trial the defence of insanity was set up, but DEVLIN, J., held that there was no case on this issue to be left to the jury, and the trial proceeded, the appellant being found Guilty and sentenced to death.

C. N. Shawcross, Q.C., and *de Piro* for the appellant.

Marshall, Q.C., and *E. D. Lewis* for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant was convicted before DEVLIN, J., at Birmingham Assizes of the murder of his wife. He is a man of little resolution and weak character who was married to a woman eighteen years older than himself. His married life was very unhappy. His wife, in the opinion of the doctors, though they never saw her, must have been certifiable, and was always talking about committing suicide. The appellant became obsessed with this and discussed it with his workmates until they were tired of hearing him, and on one occasion, just before this crime was committed, one of them said: “Give her a dozen aspirins”. On the day of the crime the appellant seems to have given the woman a hundred aspirin tablets, which was a fatal dose. Later, he told the police that he supposed he would be hanged for it.

The defence at the trial was that he was insane and that the jury should return a special verdict to that effect, but *DEVLIN, J.*, ruled that there was no issue of insanity to be left to the jury. There was some evidence that the prisoner suffered from some defect of reason or disease of the mind. The doctor called for the defence said it was a form of communicated insanity known as *folie á deux* which arises when a person is in constant attendance on a person of unsound mind.

The point we have to decide can be put into a very small compass. We are asked to review—I am not sure we are not asked to make new law—what are known as the *M'Naghten* rules in which, in 1843, the judges agreed were the proper tests to be applied in considering the defence of insanity. All the judges, except *MAULE, J.*, who differed on small points, gave, through the mouth of *TINDAL, C.J.*, these answers to questions put by the House of Lords:

“That the jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.”

The argument in this appeal really has been concerned with what is meant by the word “wrong”. The evidence that was given on the issue of insanity was that of the doctor called by the appellant and that of the prison doctor who was called by the prosecution. Both doctors expressed without hesitation the view that when the appellant was administering this poison to his wife he knew that he was doing an act which the law forbade. I need not put it higher than that. It may well be that in the misery in which he had been living with this nagging and tiresome wife who constantly expressed the desire to commit suicide, he thought she was better out of the world than in it. He may have thought it was a kindly act to put her out of her sufferings or imagined sufferings, but the law does not permit such an act as that. There was some exceedingly vague evidence that the appellant was suffering from a defect of his reason owing to this communicated insanity, and, if the only question in the case had been whether the appellant was suffering from a disease of the mind, that question must have been left to the jury because there was some evidence of it, but that was not the question. The question, as I endeavoured to point out in giving judgment in *R. v. Rivett* (1), in all these cases is one of responsibility. A man may be suffering from a defect of reason, but, if he knows that what he is doing is wrong—and by “wrong” is meant contrary to law—he is responsible. Counsel for the appellant suggested that the word “wrong” as it is used in the *M'Naghten* rules did not mean contrary to law, but had some qualified meaning—morally wrong—and that, if a person was in a state of mind through a defect of reason that he thought that what he was doing, although he knew it was wrong in law, was really beneficial, or kind, or praiseworthy, that would excuse him.

Courts of law, however, can only distinguish between that which is in accordance with law and that which is contrary to law. There are many acts which, we all know, to use an expression to be found in some of the old cases, are contrary to the law of God and man. In the Decalogue are the commandments: “Thou shalt not kill” and “Thou shalt not steal”. Such acts are contrary to the law of man and they are contrary to the law of God. In regard to the Seventh Commandment: “Thou shalt not commit adultery”, it will be found that, so far as the criminal law is concerned, though that act is contrary to the law of God, it is not contrary to the law of man.

The test must be whether an act is contrary to law. In *R. v. Rivett* (1) I referred to the Trial of Lunatics Act, 1883, s. 2 (1) of which provides:

“Where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done or omission made, then, if it appears to the jury before whom such person is tried that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict . . . ”

I emphasise again that the test is responsibility “according to law”.

I am reminded by PARKER, J., that counsel for the appellant argued that the M’Naghten rules only applied to delusions. This court cannot agree with that. It is true that when the judges were summoned by their Lordships the occasion had special reference to M’Naghten’s case (2), but the M’Naghten rules have ever since that date been generally applied to all cases of insanity, whatever the nature of the insanity or disease of the mind from which the offender is suffering.

In the opinion of the court, there is no doubt that the word “wrong” in the M’Naghten rules means contrary to law and does not have some vague meaning which may vary according to the opinion of different persons whether a particular act might or might not be justified. There seems to have been no doubt in this case that it could not be challenged that the appellant knew that what he was doing was contrary to law. In those circumstances what evidence was there that could be left to the jury to suggest that he was entitled to a verdict of Guilty but insane—i.e., insane at the time of the act complained of? DEVLIN, J., was right to withdraw the case from the jury. This appeal fails.

Appeal dismissed.

Solicitors: A. H. Evans, Birmingham (for the appellant); Director of Public Prosecutions (for the Crown).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

id. C.A. post p. 112.

REISS v. WOOLF.

[QUEEN’S BENCH DIVISION (Devlin, J.), May 2, 12, 1952.]

Practice—Striking out pleading—Paragraphs to be struck out in default of further and better particulars within twenty-one days—Imperfect particulars delivered in time—Order to be construed as “time order”—No default warranting automatic striking out of paragraphs.

A plaintiff obtained an order of a master that the defendant deliver “not later than four o’clock in the afternoon of the twenty-first day following the date hereof . . . the undermentioned further and better particulars of his defence and that in default thereof paras. 2 and 3 of the defence be struck out.” Within the time limited the defendant delivered particulars which represented an attempt to comply with the order, but were not a full compliance, the defendant replying in respect of several matters that he could not give particulars until after discovery. On a summons to have the action transferred to the short cause list on the ground that paras. 2 and 3 of the defence had been automatically struck out, leaving one brief issue to be determined,

HELD: an order imposing conditionally a drastic penalty, such as the striking out of a defence, must define with precision the event on which the penalty is to operate, and, if it fails to do so, it will be inoperative: *Abalian v. Innous* ([1936] 2 All E.R. 834), applied; on construction, “default” in the order meant, not default in the sufficiency of one or more of the answers (which the order did not define with precision), but default in delivery within the prescribed time (which was so defined) of a document made in good faith which could fairly be entitled “particulars”; and, as

such particulars had been delivered within the prescribed time, there had been no default, the paragraphs were not automatically struck out, and the transfer of the case to the short cause list must be refused.

AS TO PARTICULARS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 275-277, paras. 465-467; and FOR CASES, see DIGEST, Pleading, pp. 188-193, Nos. 1600-1633.

Cases referred to:

- (1) *Davey v. Bentinck*, [1893] 1 Q.B. 185, 187-188; 62 L.J.Q.B. 114; 67 L.T. 742; Digest, Pleading, 83, 699.
- (2) *Abalian v. Innous*, [1936] 2 All E.R. 834; Digest Supp.
- (3) *Whistler v. Hancock*, (1878), 3 Q.B.D. 83-84; 47 L.J.Q.B. 152; 37 L.T. 639; Digest, Pleading, 133, 1209.

SUMMONS adjourned into court.

The plaintiff appealed against the refusal of a master to order the action to be transferred to the short cause list on the ground that two out of the three paragraphs of the defence were automatically struck out in accordance with the terms of an order for further and better particulars thereof, with which, he said, the defendant had not complied. The defendant contended that, a document containing further and better particulars having been delivered within the time limited by the order, there had been, if not a strict compliance, some compliance therewith and not a default within the meaning of the order. He submitted further that, even if there had been a default, the order did not operate automatically and a further summons was necessary to strike out the paragraphs in accordance with the order.

M. Waters for the appellant.

B. Finlay for the respondent.

May 12. **DEVLIN, J.**, read the following judgment. The plaintiff sues the defendant for £1,000 payable under an agreement made by letters dated June 1 and 6, 1951. By para. 1 the defence denies that the letters constitute an enforceable agreement. Paragraph 2 contends that the agreement, if enforceable, was tainted with illegality arising out of a transaction to purchase utility goods in excess of the controlled price, and para. 3 says that the agreement was to secure the repayment of money lent to pay gambling debts and so was void under the Gaming Act, 1892. The defence was delivered on Oct. 12, 1951, and on Oct. 30 the plaintiff made a detailed request for particulars under paras. 2 and 3. On Dec. 12 a short and most unsatisfactory answer was given to that request, and the plaintiff took out a summons embodying the whole request. On Feb. 8, 1952, the master made an order allowing all the particulars. The order reads:

"It is ordered that the defendant do, not later than four o'clock in the afternoon of the twenty-first day following the date hereof, deliver to the plaintiff's solicitors the undermentioned further and better particulars of his defence and that in default thereof paras. 2 and 3 of the defence be struck out."

The defendant did not appeal from this order at the time. On Feb. 27 the defendant delivered a set of particulars which represents an attempt to comply with the order, but cannot be said to be a full compliance with it. For example, on several of the matters which the defendant was ordered to particularise in twenty-one days he has replied merely that he cannot give the particulars until after discovery. The plaintiff took the view that this was a non-compliance with the order, as a result of which paras. 2 and 3 of the defence were automatically struck out. In this supposed state of the pleadings there is left only a very short issue on enforceability, and, accordingly, on Apr. 25 the plaintiff took out a summons before the master asking for the action to be transferred to the short

cause list. This application was refused, and from this refusal the plaintiff appeals. If either para. 2 or para. 3 of the defence is still effective, the action is obviously unsuitable for a short cause. If they have both gone, it is agreed that the action is a short cause. So the point to be decided is whether or not these paragraphs now form part of the pleading. The defendant takes two points. He says that, although there has not been a strict compliance with the order, there has been some compliance and no "default" within the meaning of the order. He also says that, if there has been a default, the order does not operate automatically, but that there must be a further summons to strike out the paragraphs in accordance with the order before it becomes effective in this respect.

There is no rule providing specifically for an order in the form made by the master. It is made under the general authority given by R.S.C., Ord. 19, r. 7, which provides that particulars may be ordered "upon such terms . . . as may be just". *Davey v. Bentinck* (1) appears to be the only reported case in which the enforcement of an order in this form has been considered. In that case particulars were asked by the defendant of services alleged to have been rendered and of the persons to whom a libel was alleged to have been published. He got no better answer than a repetition of the general allegations. Four orders for particulars were made in all, and two of them were in the form I have to consider. After the second had been unproductive, a summons was taken out to dismiss the action as frivolous and for non-compliance with the earlier orders, and the defendant was successful on both counts.

In my opinion, this order must be interpreted in the light of the fact that it imposes conditionally a drastic penalty. The same principles apply to the striking out of a particular defence as apply to the dismissal of an action. They were formulated in *Abalian v. Innous* (2) by GREENE, L.J., as follows ([1936] 2 All E.R. 838):

" . . . any order dealing with the dismissal of an action unless something is done should be absolutely and perfectly precise in its terms. The dismissal of an action at an interlocutory stage is a very serious matter and may well work serious injustice. If an order is to be made in the form that, unless one party or another party does something, the action will be dismissed, it is imperative that the thing to be done in order to avoid dismissal of the action should be specified in the clearest and most precise language, so that it may be possible for the party on whom the necessity of doing the act lies—which would normally be the plaintiff—to be in no doubt whatsoever as to the steps which he is to take if he is to avoid his action being dismissed."

The event on which the order of Feb. 8 turns is default in the delivery of particulars. If "default" means default in the sufficiency of one or more of the answers, I should not consider that the event was defined with precision. Whether or not it had taken place might be the subject of a genuine conflict of opinion which could only be resolved by further adjudication. If I thought this to be the right construction of the order, I should follow *Abalian v. Innous* (2) and treat it as inoperative. The order can conform with the principle in that case only if it is treated as an order that is dealing with the time of compliance rather than with the mode of compliance. The order does fix a time very precisely, and I think it can and should fairly be construed as a time order. So construed, "default" refers to default in the delivery of a document within the specified time. I do not, of course, mean that any document with writing on it will do. It must be a document made in good faith which can fairly be entitled "Particulars". It must not be illusory. That is the word used by Mr. Banks in argument in *Davey v. Bentinck* (1) ([1893] 1 Q.B. 186). That, in my judgment, is the test, and not, as the plaintiff contends, whether each demand for particulars has been substantially met. Applying that test, I think there has been no default. Of course, any party who receives particulars which he says are insufficient is entitled to pursue the matter by further summons, and, it may be, to have any

paragraph that is not sufficiently particularised struck out as vague and embarrassing. But that is not what I have to consider. I determine no more than that the paragraphs have not been struck out automatically.

The contention that the paragraphs are not struck out until the court, on a fresh summons, declares that they are is, in my judgment, unsound: see *Whistler v. Hancock* (3). A dead man is dead with or without the death certificate, although, of course, a party who tries to conduct the funeral before the death is certified may find his efforts wasted and himself in a difficulty. It is always wise and convenient where there is doubt to have the matter determined. In this type of order I think it could be done in case of controversy at the instance of either side under the liberty to apply. But I cannot hold that it is compulsory. It is usual, for example, to take out a summons to set aside a writ which is a nullity, but the failure to do so does not bring such a writ to life. The appeal is dismissed with costs. There will, therefore, be no order on the summons to transfer.

Appeal dismissed.

Solicitors: *J. De Meza & Co.* (for the appellant); *Mendes da Costa, Greenwood & Co.* (for the respondent).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

SALTMARSH v. SALTMARSH.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Karminski, J.), January 29, March 26, 27, 1952.]

Legal Aid—Costs—Taxation—Jurisdiction of court—Solicitor deprived of costs—Counsel's fees—Need for taxing—Legal Aid and Advice Act, 1949 (c. 51), s. 6 (5), sched. III, paras. 1 (1), 2 (1).

On Oct. 16, 1951, a wife's undefended petition for divorce was heard, and a decree nisi was granted. On Jan. 29, 1952, the court granted, on the husband's motion, a re-hearing of the suit. The wife was an assisted person, and on an application for an order that her solicitor should tax his costs of the hearing of the motion for the purposes of legal aid,

HELD: the jurisdiction of the court over questions of costs, whether under R.S.C., Ord. 65, r. 11 or under the inherent jurisdiction of the court, was in no way impaired either by the Legal Aid and Advice Act, 1949, or by regulations made thereunder, and in the circumstances of the case an order would be made that the wife's solicitor be deprived of his costs of the motion.

Per LORD MERRIMAN, P.: I understand from the argument which counsel for the Queen's Proctor put before us that we have no jurisdiction over counsel's fees. It is, therefore, our duty, if the demand is made, to order a taxation of the costs of this motion so far as counsel is concerned.

FOR THE LEGAL AID AND ADVICE ACT, 1949, s. 6 (5), and sched. III, paras. 1 (1), 2 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 18, pp. 541, 565, 566.

Case referred to:

(1) *Myers v. Elman*, [1939] 4 All E.R. 484; [1940] A.C. 282; 109 L.J.K.B. 105; 162 L.T. 113; 2nd Digest Supp.

APPLICATION on behalf of the wife's solicitor for an order for taxation of his costs on a solicitor and client basis in accordance with the Legal Aid and Advice Act, 1949, sched. III, and the Legal Aid (General) Regulations, 1950, reg. 18 (3).

The wife filed a petition for divorce in June, 1951, and the case was set down as undefended. The husband obtained leave to file an answer out of time, and on Aug. 23, 1951, a summons for an extension of time was adjourned until after the granting of a legal aid certificate. On Aug. 28, 1951, the wife's solicitor

filed in the registry a notice restoring the case to the undefended list, but no notice was given by him to the husband's solicitor. On Oct. 16 the case was heard undefended and a decree nisi granted. On Jan. 29, 1952, the Divisional Court, on the husband's application under the Matrimonial Causes Rules, 1950, r. 36, ordered a re-hearing, but adjourned for argument by the Queen's Proctor and the Law Society the question whether or not the court was bound to make

A an order that the wife's solicitor should tax his costs for the purposes of legal aid. At the adjourned hearing the submissions made by counsel for the Queen's Proctor, with whose views the Law Society were in agreement, were accepted without argument by counsel for the husband and wife. The case is reported solely on the question whether the wife's solicitor was entitled to tax his costs as a matter of course.

B *Colin Duncan* for the Queen's Proctor.

LORD MERRIMAN, P.: On Jan. 29, 1952, we had before us a motion by the husband to set aside a decree nisi obtained by the wife on the ground that the decree had been obtained wrongly, but without any error on the part of the court. At the conclusion of the judgment application was made by both

C sides for an order to tax their costs under the legal aid certificates granted to each of them in connection with the motion. The application was granted without further discussion so far as the husband was concerned, but it was pointed out at the time, in connection with the corresponding application on the part of the wife, which took the form of an application as a matter of course, that such orders were by no means a matter of course if the circumstances were such as to

D require further consideration. We adjourned the case for further consideration, and, in particular, for the assistance of both the Queen's Proctor and the Law Society regarding the nature of our powers. This case shows the necessity for the caution that orders to tax are not automatic or made as a matter of course. It is now plain beyond any doubt, and it is expressly admitted on behalf of the wife, that the jurisdiction of the court over the question of costs, whether under

E R.S.C., Ord. 65, r. 11, or under the inherent jurisdiction of the court, is in no way impaired either by the Legal Aid and Advice Act, 1949, or by the regulations which have been made under it.

We have now to deal with the questions which were left open on Jan. 29. I am reported as having said on that occasion: "Let it be plainly understood that the questions we are adjourning are whether the wife should have an order

F to tax her costs, and, secondly, whether the wife or her solicitors should be ordered to pay anything towards the husband's costs." I added: "You understand that we are only dealing with the costs of the appeal", meaning the motion under the Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 36, to set aside the decree. As the case has developed in argument before us, we have thought it right to indicate, after hearing counsel for the Queen's Proctor, that no

G question would arise in connection with the wife's own rights under her certificate. So far as we could see, she personally had not been guilty of any impropriety which called for further investigation on our part. We indicated, also, that we thought that for practical purposes the matter reduced itself to the question whether the solicitor who acted for her should be deprived of the whole or any part of the costs of the motion, and I propose to deal with the case on that

H footing.

[His LORDSHIP stated the facts and continued:] A formal submission has been made by counsel for the wife that these circumstances did not bring the case within the opinions of their Lordships in *Myers v. Elman* (1) from which I will read only three or four short sentences. LORD ATKIN says ([1939] 4 All E.R. 497):

"The duty owed to the court to conduct litigation before it with due propriety is owed by the solicitors for the respective parties, whether they

be carrying on the profession alone or as a firm . . . Nevertheless, as far as the interests of the court and the other litigants are concerned, it is a matter of no moment whether the work is actually done by the solicitor on the record or by his servant or agent. If the court is deceived or the litigant is improperly delayed or put to unnecessary expense, the solicitor on the record will be held responsible, and will be admonished or visited with such pecuniary penalty as the court thinks necessary, in the circumstances of the case."

Let it be said that there are many other passages in the speeches, all to the same effect. (I am not referring to the dissenting opinion of LORD RUSSELL OF KILLOWEN, but to the majority speeches.) LORD WRIGHT says (*ibid.*, 509):

"It is impossible to enumerate the various contingencies which may call into operation the exercise of this jurisdiction. It need not involve personal obliquity. The term 'professional misconduct' has often been used to describe the ground on which the court acts. It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfil his duty to the court and to realise his duty to aid in promoting, in his own sphere, the cause of justice."

That passage represents a very considerable under-statement of the failure on the part of the solicitor in this case. The order that I propose is that he be deprived of the costs of this motion. I understand from the argument which counsel for the Queen's Proctor so clearly put before us that we have no jurisdiction over counsel's fees. It is, therefore, our duty, if the demand is made, to order a taxation of the costs of this motion so far as counsel is concerned.

KARMINSKI, J.: I agree, both with the conclusions to which my Lord has come and with his reasoning. This case reveals the importance of the fact that costs in assisted cases are not taxed automatically or in any way mechanically. I say that because in this case and others there has been exhibited a belief, apparently quite widely and erroneously held, that an order for solicitor and client taxation must follow if there is a legal aid certificate in existence. Nothing in the Act, as was made clear by the careful argument of counsel for the Queen's Proctor, has taken away from the court either its inherent jurisdiction or its express powers under R.S.C., Ord. 65, r. 11. The powers inherent in the court are not, as was pointed out by VISCOUNT MAUGHAM (*ibid.*, 488) in his speech in *Myers v. Elman* (1) to punish the solicitor, but to protect the client who has suffered and to indemnify the party who has been injured. *Myers v. Elman* (1) was decided some ten years before the Legal Aid and Advice Act, 1949, was passed into law, and, if it were necessary, it might be said that in assisted cases under the Act a further object of the court might be to protect the public purse. I do not think it necessary to decide that in this case, because, as my Lord has pointed out, we have to protect both the wife and the husband, but in the exercise of that jurisdiction these aspects of the matter have to be considered, and, in my view, this is clearly a case where the solicitor who has been in default should not be entitled to tax his costs.

Order accordingly.

Solicitor: *Treasury Solicitor.*

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

R. v. ST. HELENS AND AREA RENT TRIBUNAL.

Ex parte PICKAVANCE.

[COURT OF APPEAL (Somervell, Jenkins and Morris, L.JJ.), May 1, 15, 1952.]

Rent Control—Security of tenure—Power to extend period—Notice to quit given more than three months after decision of tribunal—Furnished Houses (Rent Control) Act, 1946 (c. 34), s. 5—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 11 (2) (b).

On Sept. 8, 1950, a tenant having referred his contract of tenancy of a furnished house to a rent tribunal under the Furnished Houses (Rent Control) Act, 1946, and the Landlord and Tenant (Rent Control) Act, 1949, the tribunal gave a decision approving the rent and giving no direction as to security of tenure. On Dec. 9, 1950 (i.e., three months and one day after the tribunal's decision) the landlord served on the tenant a notice to quit expiring on Dec. 18. On Dec. 9, on being served with the notice, the tenant applied to the tribunal under s. 11 (1) of the Act of 1949 for an extension of his period of tenure, and on Jan. 19, 1951, the tribunal made an order extending that period, and subsequently made further orders granting extension.

HELD (JENKINS, L.J., dissentiente): section 11 (2) (b) of the Act of 1949, being required by s. 11 (5) to be construed as one with the Act of 1946, operated only on notices to quit covered by s. 5 of the Act of 1946, i.e., those served "at any time before the decision of the tribunal is given or within three months thereafter," and, therefore, the notice to quit having been served more than three months after the tribunal's decision, the tribunal had no power to grant any extension of tenure under s. 11 (2) (b).

Decision of DIVISIONAL COURT ([1952] 1 All E.R. 455), affirmed.

FOR THE FURNISHED HOUSES (RENT CONTROL) ACT, 1946, s. 5, see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1089; and for THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 11 (1), see *ibid.*, p. 1107.

Cases referred to:

- (1) *R. v. Folkestone & Area Rent Tribunal. Ex p. Sharkey*, [1951] 2 All E.R. 921; [1952] 1 K.B. 54; 116 J.P. 1.
- (2) *International Bridge Co. v. Canada Southern Ry. Co. Canada Southern Ry. Co. v. International Bridge Co.*, (1883), 8 App. Cas. 723; 42 Digest 664, 745.

APPEAL by the St. Helens and Area Rent Tribunal against an order of certiorari made by the Divisional Court (LORD GODDARD, C.J., JONES and PARKER, JJ.), dated Feb. 12, 1952 (reported [1952] 1 All E.R. 455), and directed to the tribunal to bring up and quash directions given by the tribunal on Sept. 7 and Oct. 16, 1951.

On Aug. 1, 1948, the applicant, Mrs. Ethel Pickavance, let to William John Leyland a furnished house known as No. 51, Rodney Street, St. Helens, on a weekly tenancy. On Aug. 1, 1950, the tenant referred the contract of tenancy to the tribunal under s. 2 (1) of the Furnished Houses (Rent Control) Act, 1946, and on Sept. 8, 1950, the tribunal approved the rent payable under the contract, but gave no directions as to security of tenure. On Dec. 9, 1950, the applicant served on the tenant a notice to quit expiring on Dec. 18, 1950. The tenant thereupon applied to the tribunal under s. 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949, for an extension of the period at the end of which the notice to quit would take effect, and on Jan. 19, 1951, the tribunal, in purported exercise of their powers under s. 11 (2) (b), directed that the notice to quit should not have effect until the end of a period of three months from Dec. 18, 1950. Thereafter successive applications were made by the tenant and extensions were granted by the tribunal. Ultimately, by a direction dated Sept. 7, 1951, the

tribunal extended the period of the notice to quit until Sept. 11, 1951, and on Oct. 16, 1951, pursuant to an application by the tenant on Sept. 9, they further extended it until Dec. 11, 1951.

For the tribunal it was contended that on the true construction of s. 11 of the Act of 1949 the tribunal had power to extend the period of security at any time after the reference and their jurisdiction was not confined to the extension of the period of a notice to quit given within three months of the reference. The applicant contended that s. 11 of the Act of 1949, read with s. 5 of the Act of 1946, should be construed as operating only on a notice to quit served within the limits of time specified in s. 5. The Divisional Court held that the jurisdiction of the tribunal to extend the period of the notice to quit under s. 11 only arose where the notice had been served between the date of the reference and the expiration of three months from the date of the tribunal's decision.

The Attorney-General (Sir Lionel Heald, Q.C.), and J. P. Ashworth for the tribunal.

Fox-Andrews, Q.C., and J. C. D. Harington for the applicant.

Cur. adv. vult.

May 15. The following judgments were read.

SOMERVELL, L.J.: This is an appeal from an order of the Divisional Court that certain directions given by the rent tribunal be quashed on an application for an order of certiorari. It turns on the construction of s. 11 of the Landlord and Tenant (Rent Control) Act, 1949. One has first to refer to the Furnished Houses (Rent Control) Act, 1946, with which that section has to be read and construed. I will set out what appears to me to be relevant in the latter Act.

The Act of 1946 provides under s. 1 (1) for the setting up of tribunals in areas to be specified by the Minister of Health. Section 2 provides that where there is a contract for the letting of furnished premises either the lessor, the lessee, or the local authority may refer the contract to the tribunal. The tribunal are given power (i) to approve the rent, (ii) to reduce the rent, (iii) to dismiss the application. If the rent is approved or reduced it is entered in a register. It is not so entered if the application is dismissed. In relation to a rent so entered in the register either lessor, lessee, or local authority may refer the matter to the tribunal for re-consideration of the rent on the ground of change of circumstances. On such a reference the tribunal have power to increase as well as approve or reduce the rent. The result of their decision will be entered in the register. The section with which we are in the main concerned is s. 5, which reads as follows:

"If, after a contract to which this Act applies has been referred to a tribunal by the lessee or by the local authority (either originally or for re-consideration), a notice to quit the premises to which the contract relates is served by the lessor on the lessee at any time before the decision of the tribunal is given or within three months thereafter, the notice shall not take effect before the expiration of the said three months: Provided that—(a) the tribunal may, if they think fit, direct that a shorter period shall be substituted for the said three months in the application of this section to the contract that is the subject of the reference; and (b) if the reference is withdrawn, the period during which the notice is not to take effect shall end on the expiration of seven days from the withdrawal of the reference."

The main scheme of this is clear. Unless the proviso is applicable the lessee is protected for a period starting with the reference and ending three months after the decision. But for some such provision in the case of a tenancy with a short period of notice the lessee could be dispossessed before the reference was considered. This might well have defeated quoad such tenancies the purpose of the Act. It would not have been worth applying. Similarly, immediately the decision was given the lessor could give under his contract, say, a week's notice.

This also might have been a powerful factor in dissuading lessees from operating the Act.

Before turning to s. 11 of the Act of 1949 I will state the facts. The tenancy was a weekly one. On Aug. 1, 1950, the tenant referred the contract to the tribunal. The tribunal made no reduction in rent and did not direct any shorter period than three months under s. 5, proviso (a). No notice to quit within the period as set out in s. 5 was served. After the three months had elapsed a notice to quit was served. There was admittedly no provision in the Act of 1946 to prevent that notice having its contractual effect. The lessee applied to the tribunal for an extension of her lease and successive orders have been made securing her in possession. The lessor, applicant in these proceedings, maintained, and the Divisional Court have held, that the tribunal had no jurisdiction to make these orders.

Section 11 of the Act of 1949 reads as follows:

“(1) Where a contract to which the Act of 1946 applies has been referred to a tribunal under that Act, and the reference has not been withdrawn, the lessee may, at any time when a notice to quit has been served and the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired, apply to the tribunal for the extension of that period: Provided that an application shall not be made under this section where the tribunal have directed under para. (a) of the proviso to s. 5 of the Act of 1946, that a shorter period shall be substituted for the period of three months specified in that section as the period before the end of which a notice to quit shall not have effect. (2) On an application being made under this section—(a) the notice to quit to which the application relates shall not, unless the application is withdrawn, have effect before the determination of the application; (b) the tribunal, after making such inquiry as they think fit, and giving to each party an opportunity of being heard, or, at his option, of submitting representations in writing, may direct that the notice to quit shall not have effect until the end of such period, not exceeding three months from the date at which the notice to quit would have effect apart from the direction, as may be specified in the direction; (c) if the tribunal refuse a direction under this section, the notice to quit shall not have effect before the expiration of seven days from the determination of the application. (3) On coming to a determination on an application under this section the tribunal shall notify the parties of their determination: (4) Where on an application under this section the tribunal have refused a direction under sub-s. (2) thereof, no subsequent application under this section shall be made in relation to the same notice to quit. (5) This section shall be construed as one with the Act of 1946, and references in this section to that Act shall be construed as references to that Act as extended by s. 6 of this Act.”

The Attorney-General, who argued the case for the rent tribunal, submitted that all the conditions had been fulfilled. The contract had been referred to the tribunal, the reference had not been withdrawn, a notice to quit had been served, the period at the end of which it took effect had not expired, and the tribunal had not shortened the three months' period.

It was submitted by counsel on behalf of the lessor that s. 11 of the Act of 1949 read with s. 5 of the Act of 1946 should be construed as operating only on notices to quit served within the limits of time specified in and covered by s. 5.

LORD GODDARD, C.J., referring to *R. v. Folkestone & Area Rent Tribunal. Ex p. Sharkey* (1), in which the Divisional Court pointed out that the object of s. 11 (1) was to prevent retaliation by the landlord on his tenant because the tenant had referred the tenancy to a tribunal, said ([1952] 1 All E.R. 456):

“We also decided that s. 11 (1) did not give a new power to the tribunal, but only extended the power given by s. 5 of the Act of 1946. Section 5 only

applies where a notice to quit has been served after a reference and before a decision or within three months after it. Otherwise it does not give the tenant a right to apply for an extension of the tenancy. Therefore, before s. 11 (1) can take effect exactly the same circumstances must be shown to exist as are specified in s. 5, because the two sections have to be read together. As pointed out in the course of the argument by PARKER, J., the words were not intended, or, at any rate, are not apt, to give a tenant of a furnished house the protection given by the Rent Restrictions Acts to a tenant of an unfurnished house. They give him only this limited protection in certain circumstances dominated by the fact that they are designed to prevent retaliation by a landlord by serving a notice to quit in consequence of the tenant having referred the matter to the tribunal."

On the construction submitted by the Attorney-General the results are extensive and illogical. On his construction it does not matter at what distance of time the reference was made or what was its result, unless it was withdrawn or the tribunal shortened the period. Assume a reference which is dismissed either for want of prosecution or because it was regarded as unjustified. The lessor may be perfectly content with the lessee so long as the rent is paid and he does not ask for a shortening of the period as he has no immediate intention of serving a notice. Five years later he serves a notice and finds that the lessee is protected by s. 11. One asks oneself on what principle Parliament could have intended to protect lessees whose applications are dismissed or lessees who applied unnecessarily because the rent is approved, but to withhold the same protection from tenants who were sensible enough not to put themselves and their lessors to trouble and expense from which they derived no advantage. I would also find it difficult to understand why a lessee who fails when a reference is pressed to a decision is put, if there is no shortening, in a better position than a lessee on whom wisdom descends before the hearing and who decides to withdraw the reference. On the other hand, these are all conditions which one would expect to find if the section is operating, as the Divisional Court held, on notices to quit given within the period specified in s. 5. The words in brackets are all required on this more limited construction. The words "by virtue of the contract" are necessary because a notice to quit might be served within the three months to expire, by virtue of the contract, after the three months. That is a notice served within the limits of time covered by s. 5.

The Attorney-General submitted, I think with force, that on the Divisional Court's construction s. 11 (1) is likely to be of very little assistance. Lessors will now not serve notices to quit within the period specified. On the view that Parliament intended to give some power to extend the period of three months from a decision, they do not seem to have effectively achieved that purpose. I will turn to the words used. The opening words of s. 11 (1) themselves indicate to me that the section will be dealing with what has happened in the course of a reference. Section 5 extends that "course" by the period of three months after the decision. If it had been intended to make s. 11 operate if there had been a reference at any time, one would, I think, have found this made clear by the words "at any time" being inserted before the word "referred". The extravagant illogicalities which I have stated, I think, emphasise the need for these words. Sometimes, of course, the words "at any time" are unnecessary. The context implies them. I agree with PARKER, J., that the words "at any time" where they occur do not assist the Attorney-General's argument. The fact that they are where they are and not where they would be if his argument is right is, if anything, against it. They are related to the lessee's application to the tribunal. When a notice to quit has been served and not expired he may "at any time" apply to the tribunal. That is how I read them, and I do not think they assist in deciding whether the section is dealing with what I will call s. 5 notices or all notices in future after there has been a reference. The distinction which the

section draws between cases where the reference has been withdrawn and other cases also, I think, supports the Divisional Court's decision. The period of protection in the former case was fixed by s. 5 and it was not desired to interfere with it. But, as I have indicated, if the section was dealing with all notices in futuro, it would be illogical not to put in the same category references which were dismissed but where, possibly per incuriam, the tribunal had not shortened the period. It was pointed out that, if a notice has been served within the s. 5 period, the tribunal has power to extend indefinitely if successive applications were made. This is true, but their approach to the problem would or should be that they were being asked to extend a protection which Parliament had, *prima facie*, thought should end after three months. On the Attorney-General's argument they are given no guidance of any kind as to how they are to approach or deal with applications in respect of notices when the s. 5 period has elapsed. It gives a discretionary protection analogous to that given by the Rent Acts without any conditions, or limitations, or guidance. For these reasons, I think, the decision of the Divisional Court was right.

I should, perhaps, add that the Attorney-General stated that the Crown had, of course, no interest as between lessor and lessee, but desired a decision of this court on the construction of the section. Appearing for the rent tribunal, he put, if I may say so, every argument for the view which they had taken of their powers very cogently before us. I would dismiss the appeal.

JENKINS, L.J.: This is an appeal by the St. Helens and Area Rent Tribunal constituted under the Furnished Houses (Rent Control) Act, 1946, from an order of certiorari made by the Queen's Bench Division on Feb. 12, 1952, to bring up and quash certain directions given by the tribunal as being directions which they had no jurisdiction to give. The case concerns the weekly furnished letting by a Mrs. Ethel Pickavance to a Mr. William John Leyland of a dwelling-house known as No. 51 Rodney Street, St. Helens, under a contract of tenancy entered into on or about Aug. 1, 1948, and it is not in dispute that this contract of tenancy is a contract to which the Act of 1946 applies. On Aug. 1, 1950, Mr. Leyland referred the contract to the tribunal under the provisions of s. 2 (1) of the Act of 1946. The tribunal dealt with this reference on Sept. 8, 1950, when they approved the rent payable under the contract, but gave no other directions, and, in particular, did not direct under proviso (a) to s. 5 of the Act of 1946 that any shorter period should be substituted for the period of three months mentioned in that section as the period before the end of which a notice to quit should not have effect. The position, so far as the Act of 1946 was concerned, therefore, was that in the event of Mrs. Pickavance serving a notice to quit on Mr. Leyland within three months after Sept. 8, 1950 (the date of the tribunal's decision) such notice could only take effect on the expiration of such period of three months or on the expiration of the contractual period of notice whichever was the later. On Dec. 9, 1950 (i.e., one day after the expiration of the aforesaid period of three months) Mrs. Pickavance served on Mr. Leyland a notice to quit expiring on Dec. 18, 1950, and thus allowing for the full week's notice appropriate to the contract of tenancy.

If the matter had rested merely on s. 5 of the Act of 1946, Mr. Leyland would plainly have had no answer to a claim for immediate possession on the expiration of this notice. But on Dec. 9, 1950 (that is to say, immediately after the service of the notice to quit) Mr. Leyland applied to the tribunal in reliance on s. 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949, for an extension of the period at the end of which the notice to quit of that date would by virtue of the contract take effect (i.e., the period until Dec. 18, 1950, when possession would have to be given up according to the terms of the notice), and on Jan. 19, 1951, the tribunal, in exercise or purported exercise of their powers under sub-s. (2) (b) of that section, directed that the notice to quit should not have effect until a specified later date, being the end of a period not exceeding three months

from the date (i.e., Dec. 18, 1950) at which the notice to quit would have had effect apart from the direction. Thereafter, similar successive applications (in each case before the expiration of the extension last previously granted) were from time to time made by Mr. Leyland and granted by the tribunal, and ultimately, by a direction dated Sept. 7, 1951, the tribunal extended the period of the notice to quit until Sept. 11, 1951, and by a direction dated Oct. 16, 1951 (pursuant to an application made by Mr. Leyland on Sept. 9, 1951) the tribunal directed

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“ that the notice to quit should not take effect until Dec. 11, 1951, being the end of a period not exceeding three months from the date at which the notice to quit would have had effect apart from this direction.”

The order of certiorari under appeal relates to these two last-mentioned directions.

The contention which prevailed before the Divisional Court was to the effect that, on the true construction of s. 11 of the Act of 1949, read in conjunction with s. 5 of the Act of 1946, the jurisdiction of the tribunal to extend the period of a notice to quit under s. 11 only arises where a notice to quit has been served between the date of the reference and the expiration of a period of three months from the date of the tribunal's decision. If this contention is well founded, then, of course, it follows that the directions here called in question were made without jurisdiction, inasmuch as the notice to quit was not served until after (albeit only one day after) the expiration of the aforesaid period of three months. On the other hand, if on its true construction s. 11 enables the tribunal to direct the extension of the period of a notice to quit given at any time after the reference to the tribunal, provided only that the application for extension is made before the expiration of the period at the end of which the notice to quit would otherwise take effect, then it was within the jurisdiction of the tribunal to give the two directions with which the present appeal is concerned, and the order of the Divisional Court cannot stand.

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In order to appreciate the effect of s. 5 of the Act of 1946 and s. 11 of the Act of 1949 (on the construction of which two sections (and, primarily, of the latter) the case ultimately depends) it is necessary to refer briefly to some of the other provisions of the earlier enactment. Section 1 of the Act of 1946 provides for the application of the Act by order of the Minister of Health to districts consisting of the whole or parts of the respective areas of local authorities and the constitution of a tribunal for each district in which the Act is in force. Section 2, by sub-s. (1), enables “ contracts to which this Act applies”, which may be compendiously described as “ contracts for furnished letting”, to be referred by the lessor or the lessee or the local authority to the tribunal for the relevant district. Sub-ss. (2) and (3) of s. 2 are in these terms:

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“(2) Where any contract to which this Act applies is referred to a tribunal, then, unless at any time before the tribunal have entered upon consideration of the reference it is withdrawn by the person or authority by whom it was made, the tribunal shall consider it and, after making such inquiry as they think fit, and giving to each party (and, if the house is one the general management whereof is vested in and exercisable by a housing authority, to that authority) an opportunity of being heard, or, in his option, of submitting representations in writing, shall approve the rent payable under the contract or reduce it to such sum as they may, in all the circumstances, think reasonable, or may, if they think fit in all the circumstances, dismiss the reference, and shall notify the parties and the local authority of their decision in each case. (3) Where the rent payable for any premises has been entered in the register in accordance with the provisions hereinafter contained, it shall be lawful for the lessor or the lessee or the local authority to refer the case to the tribunal for re-consideration of the rent so entered on the ground of change of circumstances, and the provisions of sub-s. (2) of this section shall apply on any such reference in like manner as they apply

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on a reference under sub-s. (1) of this section subject to the modification that the tribunal shall have power to increase the rent payable."

Section 3 provides for the keeping by the local authority of a register which is to contain prescribed particulars of any contract under which a rent is payable which has been approved, reduced or increased under s. 2, and s. 4 (1) makes it unlawful to require or receive rent in excess of the registered rent in respect of any premises.

Then comes s. 5 itself [HIS LORDSHIP read the section and continued:] I do not think there are any other provisions of the Act of 1946 to which reference is necessary for the present purpose.

Pausing there, I would observe that in the present case, by virtue of s. 5 and in view of the absence of any direction by the tribunal to the contrary, Mr. Leyland, having referred the contract to the tribunal and having maintained the reference to a decision as distinct from withdrawing it before the tribunal had entered on its consideration, became entitled to remain in undisturbed possession of the premises for a minimum period of three months from the date of the decision, notwithstanding any notice to quit given in conformity with the terms of the contract and purporting to take effect before the expiration of that period. Any notice to quit so given and purporting to take effect before such expiration would operate as a notice to quit taking effect on such expiration, while any notice to quit given in accordance with the terms of the contract so as to take effect on or after the expiration of the aforesaid period of three months would (so far as s. 5 was concerned) take effect according to its terms, even though given (as a notice to take effect on such expiration would obviously have to be given) during such period of three months.

Finally, there is s. 11 of the Act of 1949. The section having been just read in full by my Lord I will not take up time by reading it again. Now this section seems to me to provide in reasonably clear terms (by sub-s. (1)) that where the following three conditions are satisfied, that is to say, where (a) a contract to which the Act of 1946 applies has been referred to a tribunal, and (b) the reference has not been withdrawn, and (c) the tribunal has not directed under s. 5 of the Act of 1946 that a shorter period shall be substituted for the period of three months therein specified as the period before the end of which a notice to quit shall not have effect, then at any time when a notice to quit has been served, but the period at the end of which the notice is to take effect has not expired, either (i) "by virtue of the contract" (that is, because, although the period of three months mentioned in s. 5 of the Act of 1946 has expired, the period of notice appropriate to the particular contract has not), or (ii) "by virtue of the Act of 1946" (that is, because the period of three months mentioned in s. 5 of the Act of 1946 has not expired and the notice, though purporting in accordance with the terms of the contract to take effect before the end of that period, is prevented from taking effect until the end of that period by the provisions of s. 5), or (iii) by virtue of s. 11 itself (that is, because in a case falling within (i) or (ii) above the period at the end of which the notice would otherwise have taken effect has already been extended by the tribunal under the provisions of s. 11 pursuant to some previous application or applications under that section and such extended period has not yet expired), the lessee may apply to the tribunal for an extension of the period at the end of which the notice would otherwise take effect, and (by sub-s. (2) (b)) that on such an application being made the tribunal may extend the period at the end of which the notice to quit would otherwise take effect by such period not exceeding three months as may be specified.

The periods which the tribunal is empowered to extend are thus, in case (i) above, the contractual period of notice, in case (ii) above, the statutory period of notice imposed by s. 5 of the Act of 1946, and, in case (iii) above, the statutory period of notice superadded by the previous operation of s. 11 either to the contractual period of notice or to the statutory period of notice imposed by s. 5.

The lessee is in terms empowered to make his application at any time after a notice to quit has been served and before the period at the end of which it would otherwise take effect has expired, whether that period is simply the contractual period unaffected by s. 5, or the statutory period imposed by s. 5, or the statutory period superadded under s. 11 either to the contractual period or to the s. 5 period.

I appreciate that where the relief sought by an application under s. 11 (1) is an extension of the statutory period of notice imposed by s. 5, then, ex hypothesi, the notice to quit must have been served (and must according to the terms of the contract have purported to expire) and the application for such extension (or the first of such applications if more than one) must have been made within the period of three months mentioned in s. 5. But I see no warrant in s. 11, or in s. 11 read in conjunction with s. 5, either as a matter of express provision or as a matter of necessary implication, for holding that where the period sought to be extended is simply the contractual period of notice unaffected by s. 5, the tribunal only has power to direct an extension if the notice to quit was served before the expiration of the period of three months mentioned in s. 5. That section, as pointed out above, has nothing to say to a notice to quit expiring, according to the terms of the contract, with or after the expiration of the three months' period, whether such notice is served before or after the expiration of that period. What is material for the purpose of bringing into operation in any particular case the statutory period of protection afforded by s. 5 is, not the date at which the notice to quit is served (provided, of course, it is served after the contract has been referred), but the date at which it would, according to the terms of the contract and apart from the provisions of the section, take effect. If the latter date is before the end of the three months' period, then s. 5 gives security of tenure until the end of the three months. If it is after the end of the three months' period, then s. 5 does not operate, and, so far as the provisions of that section are concerned, the notice simply takes effect in accordance with the contract.

Accordingly, I find it impossible to escape the conclusion that where the extension of a purely contractual period of notice is in question, the jurisdiction of the tribunal is not limited to cases in which the notice to quit has been served before the expiration of the period of three months mentioned in s. 5, but extends to all cases in which, according to the terms of the contract, the notice to quit would take effect at or after the end of that period, whether the notice was served before or after that date. There is, so far as I can see, nothing whatever in the language of s. 11 to impose any such limitation and nothing in the provisions of s. 5, read in conjunction with s. 11, to require or justify the implication of any such limitation on what appear to me to be the plain terms of s. 11. Moreover, a limitation of this character on the jurisdiction of the tribunal would produce strange anomalies. For instance, if the lessor under a furnished weekly letting gave one week's notice to quit by notice served the day before the expiration of the three months' period mentioned in s. 5, the tribunal would have jurisdiction, on the application of the lessee at any time before the expiration of the contractual period of one week from the service of the notice to grant up to three months' extension of the contractual period, and moreover to grant on the application of the lessee before the expiration of that extension yet another extension of the period at the end of which the notice would otherwise take effect, and so on ad infinitum. If, on the other hand, the lessor under a like letting gave one week's notice to quit by notice served the day after the expiration of the three months' period mentioned in s. 5, the tribunal would have no jurisdiction to grant any extension of the contractual period of notice and at the end of it the lessee would have to go. I cannot attribute to the legislature an intention to produce a result so capricious, and in the absence of clear words constraining me to do so I decline to construe s. 11 as producing it. Furthermore, s. 11 is

clearly designed to give some additional protection to lessees, but if the jurisdiction of the tribunal under it were limited in the way above mentioned the additional protection which it purports to afford would for all practical purposes be illusory, for a lessor could always evade its provisions by the simple expedient of refraining from serving notice to quit until after the expiration of the three months' period mentioned in s. 5.

A The Divisional Court, which took a different view, appears to have based its decision on two grounds, the first being that s. 5 was designed to prevent retaliation by lessors against lessees who referred their contracts to a tribunal by ejecting such lessees within a short time of the tribunal's decision, and the second being that s. 11 of the Act of 1949, which section has to be construed as one with the Act of 1946 (see sub-s. (5)) did not confer a new security of tenure, but merely extended the security of tenure afforded by s. 5 of the Act of 1946.

B As to the first ground, I do not think that the imputation to s. 5 of the object of preventing retaliation by lessors, which is merely a picturesque way of saying that its object is to prevent lessors from deterring applications to the tribunal by their lessees and defeating the tribunal's decisions on such applications when made by ejecting their lessees before the expiration of three months from the dates of such decisions, materially advances the solution of the question of construction arising on s. 11. The object of s. 5 surely was not to punish lessors, but to give some measure of protection, in point of security of tenure, to lessees whose contracts of tenancy have been referred to a tribunal. The object of s. 11 palpably was to give such lessees some additional security of tenure over and above what they had under s. 5, and the question is what on the true construction of s. 11 that additional protection amounts to.

D As to the second ground, I confess I find myself unable to follow it. Section 11, as I have said, purports to give lessees some additional protection in the way of security of tenure over and above what is given them by s. 5. The nature and extent of the additional protection so given must depend on the true construction of s. 11 read, no doubt, in conjunction with s. 5. If, on the true construction of s. 11, so read, the effect of s. 11 is merely to extend the security of tenure afforded by s. 5 in cases in which that security of tenure has in fact become operative, then s. 11 must be accorded that limited effect. But there can be no warrant for thus limiting its construction by reference to a preconceived idea that it should be so limited. As pointed out above, the only case in which the statutory security of tenure afforded by s. 5 in fact becomes operative is the case in which notice to quit is served, and according to the terms of the contract would take effect, before the expiration of the period of three months mentioned in s. 5. Clearly the jurisdiction of the tribunal under s. 11 cannot as a matter of construction be limited to that case, for then the words "by virtue of the contract" in s. 11 (1) would be wholly inappropriate inasmuch as the only periods to which it had reference would be periods at the end of which notices to quit took effect by virtue of s. 5 of the Act of 1946 or of s. 11 itself. The jurisdiction under s. 11 being in terms applicable to periods at the end of which notices to quit take effect "by virtue of the contract", it seems to me that the theory that such jurisdiction is limited to extending the statutory security of tenure afforded by s. 5 in cases in which such security of tenure has in fact become operative falls to the ground, and I can see no justification, whether by reference to that theory or otherwise, for holding that s. 11 gives jurisdiction to extend a purely contractual period of notice if the notice to quit is served before the expiration of the period of three months mentioned in s. 5, but not if the notice to quit is served after such expiration. This seems to me a purely arbitrary distinction unsupported by anything in the terms of s. 11.

H A point was sought to be made for the lessor of the alleged unreasonableness of giving the lessee something in the nature of a perpetual right of renewal merely because his contract had been referred to the tribunal and the reference

had not been withdrawn. But this unreasonableness, if such it be, would not be mended by according the right to some lessees and not to others on the arbitrary and anomalous basis to which I have already referred. Moreover, it must be remembered that in wholly unmeritorious cases a safeguard is provided in the shape of the tribunal's power under s. 5 to abridge the three months' period and thus exclude the application of s. 11 by virtue of the proviso to sub-s. (1) of that section, and, further, that each application for an extension under s. 11 has to be adjudicated on by the tribunal, who, it must be assumed, will grant or refuse each application on its merits in a reasonable and proper exercise of their discretion. A

It was also argued that s. 11, if construed so as to give the tribunal jurisdiction in such a case as the present, would involve the introduction by what purports to be merely an amending section of a radical alteration in the scope and purpose of the Act of 1946 as originally enacted. The Act of 1946, it is said, was concerned with security of tenure simply as an aid to the effective operation of the control by the statutory tribunals of the rents of furnished dwellings, whereas s. 11 of the Act of 1949, if given the construction contended for on the part of the tribunal in the present case, would make security of tenure per se a substantive and independent object of the legislation. This revolutionary result, it is claimed, should only be accorded to s. 11 if its language clearly and necessarily demands that conclusion. I would answer this argument by saying, first, that, in my view, the language of s. 11 does on examination clearly and necessarily demand the construction contended for on the part of the tribunal, and, secondly, that on either construction the allegedly revolutionary result is produced, the only difference being that its operation is on the one view uniform and on the other view capricious. I would add that legislation for the control of rents is notoriously ineffective in the absence of some degree of security of tenure, and that the degree of security of tenure which it is necessary or desirable to provide in such legislation is essentially a matter for Parliament. I see nothing in s. 11, when construed in the way contended for on the part of the tribunal, which can be properly described as alien to or inconsistent with the general scope and purpose of the Act of 1946. B C D E

I recognise that the words: "Where a contract . . . has been referred . . . and the reference has not been withdrawn" at the beginning of s. 11 (1) do at first sight suggest a limitation of the application of s. 11 to cases in which the reference can be said to be in some sense pending. But reference to the opening words of s. 5—"If, after a contract . . . has been referred . . ." and the special provision made for the case of a withdrawn reference in proviso (b) to the same section, makes it, I think, reasonably plain that the opening words of s. 11 do include every case in which a contract has at any time been referred to the tribunal and such reference is either pending or has been dealt with in any manner by the tribunal, provided only that it has not been withdrawn and thus removed from the tribunal's consideration. I appreciate that this produces a somewhat curious result in that it, apparently, would enable a lessee to claim the benefit of s. 11 even where his application has been dismissed by the tribunal. But s. 5 itself would seem to be open to a similar criticism, and, perhaps (as suggested above in reference to the general argument of unreasonableness), the answer to it is that, if an application were dismissed as being wholly unmeritorious, the tribunal would be likely to give a direction under proviso (a) to s. 5 substituting a shorter, and it may be merely nominal, period for the period of three months mentioned in that section, thus depriving the lessee pro tanto of the protection of s. 5 and excluding him altogether from the benefit of s. 11. In any case I cannot regard this point as justifying the departure from the express terms of s. 11 which, in my view, is involved in the construction placed on it by the Divisional Court, which construction moreover does not, F G H

any more than the construction contended for on the part of the tribunal, disqualify a lessee's application on the ground that his reference has been dismissed.

Another curious feature of s. 11 is that it is not in terms confined, as s. 5 is confined, to notices to quit served by the lessor on the lessee. It may well be that it should by implication be so confined, particularly as the two sections are to be read together. But, whether this is so or not, I cannot regard the omission from s. 11 of words expressly limiting it to lessors' notices to quit as affording any support to the construction placed on s. 11 by the Divisional Court. Nor do I think the circumstance (adverted to by LORD GODDARD, C.J. ([1952] 1 All E.R. 457), in the course of his judgment) that the legislation does not extend to lettings for a fixed term as opposed to "periodic" lettings has any bearing on the question raised in this case. The legislature may well have considered that the great majority of cases calling for protection arose under lettings of the "periodic" type, and that the additional complication and difficulty of bringing in fixed-term lettings (which would obviously have called for a quite different method of treatment) would be out of proportion to the practical utility of doing so.

The decision of the Divisional Court in the present case was to some extent founded on the judgments of the Divisional Court in *R. v. Folkestone & Area Rent Tribunal. Ex p. Sharkey* (1). The question in that case was whether s. 11 applied to a notice to quit which had been served by a lessor on a lessee before the contract had been referred to the tribunal, and the Divisional Court held that it did not. I think the actual decision was clearly right, as the language of s. 11 seems plainly to require that the contract should have been referred before service of the notice to quit with respect to which an extension is sought by the lessee. But in so far as the reasoning on which the decision was based turned on construing s. 11 in the sense in which that section has now been construed by the Divisional Court in the present case (which was, as it seems to me, unnecessary for the purpose of the decision) I find myself unable to agree with it. For these reasons, I would allow this appeal.

MORRIS, L.J.: Among the diverse purposes of the Landlord and Tenant (Rent Control) Act, 1949, as recorded in its heading, was that of amending the Furnished Houses (Rent Control) Act, 1946, as respects security of tenure. The Act of 1946 does not employ the phrase "security of tenure", but it is clear that a reference to the provisions of s. 5 of that Act is denoted. It seems further to be clear that it is by the provisions of s. 11 of the Act of 1949 that the amendment is achieved. The heading of the Act of 1949 does not delimit or define the extent of amendment that is to be enacted. It does not, therefore, provide any pointer which can give guidance in the solution of the problems of construction raised in this appeal. It is to the words and provisions of s. 11 of the Act of 1949 that attention must be directed in order to decide what amendment has been made as respects security of tenure. The inquiry becomes one as to the extent to which there has been modification of the security of tenure given to a lessee by s. 5 of the Act of 1946. In the case of a contract to which the Act of 1946 applied a lessee only had the measure of security given by s. 5 if (a) the contract had been referred to a tribunal by the lessee or by the local authority, and (b) after such a reference the lessor served a notice to quit on the lessee either before the decision of the tribunal was given or within three months thereafter. The Act of 1949 might amend the provisions of s. 5 fundamentally by enacting that in quite different situations than those covered by (a) and (b) above a measure of security should be given, or there might be amendment of the measure of security given, or there might be a combination of these. The contents of s. 11 of the Act of 1949 must furnish the answer to the inquiry raised.

It is enacted that s. 11 is to be construed as one with the Act of 1946. In *International Bridge Co. v. Canada Southern Ry. Co.* *Canada Southern Ry. Co.*

v. *International Bridge Co.* (2), the EARL OF SELBORNE, L.C., referring to two Canadian Acts, said (8 App. Cas. 727):

"It is to be observed that those two Acts are to be read together by the express provision of the seventh and concluding section of the amending Act; and therefore we must construe every part of each of them as if it had been contained in one Act, unless there is some manifest discrepancy, making it necessary to hold that the later Act has to some extent modified something found in the earlier Act."

In the present case it is, in my judgment, appropriate to read s. 5 of the Act of 1946 (which I will refer to as "s. 5"), and then, in relation to that section, to read s. 11 of the Act of 1949 (which I will refer to as "s. 11") and to decide what is the outcome.

If the words of s. 11 (1) are considered in isolation, they are wide enough to cover cases where contracts have been referred to a tribunal by the lessor, or by the lessee, or by the local authority. Section 5 refers to a reference by the lessee or by the local authority only. The words of s. 11 (1) are wide enough to cover a notice to quit served at any time after there has been a reference which has not been withdrawn. Section 5 refers to a notice to quit served before the decision of the tribunal is given or within three months thereafter. The words of s. 11 (1) are wide enough to cover a notice to quit served either by the lessor or by the lessee. Section 5 refers to a notice to quit served by the lessor or the lessee. If, therefore, the words of s. 11 (1) are taken by themselves a very wide jurisdiction would be bestowed. If a contract was referred to a tribunal by a lessor and if no change in the rent payable was ordered and if some years later a notice to quit was served, then, on an application by the lessee, the tribunal would have power, within sub-s. (2), to postpone the date at which the notice to quit would have effect. This is by no means an impossible result even though it might be regarded as a surprising one. The inquiry remains as to what Parliament has enacted. It can with force be submitted that, if a tribunal is being endowed with wide powers to delay the operation in certain events of notices to quit, some statutory conditions would be prescribed to control, or, at least, to guide, the exercise of the jurisdiction. But the absence of any such directions would be of no relevance if by enactment the jurisdiction has been clearly given.

The requirement that s. 11 must be construed as one with the Act of 1946 makes it inappropriate to consider the words of s. 11 (1) in isolation. The phrase "... at any time when a notice to quit has been served and the period at the end of which the notice takes effect ... has not expired" refers, in my judgment, to the period between the serving of a notice to quit and its time of taking effect. But the words "a notice to quit" are not explained. It is not specified by whom the notice is to be given nor is there any mention as to the time of its service. This omission is explained if the reference is to a notice to quit as specified in the Act of 1946. It is only in s. 5 in the Act of 1946 that a notice to quit is referred to. The phrase "a notice to quit" in s. 11 (1), in my judgment, denotes a notice to quit of the particular kind set out in s. 5, that is, a notice to quit served by the lessor on the lessee at any time before the decision of the tribunal is given or within three months thereafter.

The important words of s. 11 (1) are as follows:

"... at any time when a notice to quit has been served and the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired ..."

If the period at the end of which "the notice" takes effect is being fixed by virtue of the Act of 1946—it is plain that "the notice" referred to is a notice to quit served by the lessor on the lessee at any time before the decision of the tribunal is given or within three months thereafter. It is a notice to quit of the same kind which, in my judgment, is referred to if the period at the end of which

the notice takes effect is being fixed by virtue of the contract or by virtue of s. 11. The situation denoted by s. 5 is that following a reference to a tribunal by a lessee or by a local authority a notice to quit is served by the lessor on the lessee at any time before the decision of the tribunal is given or within three months thereafter. In that situation there is, if necessary, an automatic delayed operation of the notice to the expiration of such period of three months unless the tribunal shortens the period. The effect of s. 11 (1), in my judgment, is that in the same situation there may be an application (unless the tribunal has shortened the period) to extend that period and to extend an extension, and also to extend the period of notice if the expiry date of the notice to quit is later than the expiration of three months after the decision of the tribunal. It is in keeping with this view of the matter that s. 11 (1) should contain the words "and the reference has not been withdrawn". Proviso (b) to s. 5 is in these terms:

"if the reference is withdrawn, the period during which the notice is not to take effect shall end on the expiration of seven days from the withdrawal of the reference."

As s. 5 has dealt with the situation where a reference has been withdrawn, no need arises to make any enactment by the terms of s. 11. This reinforces the view that s. 11 is concerned with the situation denoted by s. 5.

I have, therefore, reached the conclusion that the effect of the two sections, read together, is that where a notice to quit has been served in the circumstances laid down in s. 5 and where the reference has not been withdrawn, the lessee may, before the expiry of the three months' period (provided that such period applies), or within the currency of the notice, apply for an extension of the period at the end of which the notice takes effect and may from time to time apply for extensions of a period which has been extended under s. 11. For these reasons I am in agreement with the judgments delivered in the Divisional Court.

Appeal dismissed.

Solicitors: *Solicitor, Ministry of Health* (for the tribunal); *Neve, Beck & Co.*, agents for *Joseph Davies & Son*, St. Helens (for the applicant).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

SPRINGATE v. QUESTIER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Jones and Parker, JJ.), May 15, 1952.]

Street Traffic—Notice of intended prosecution—Limited company registered as owner of vehicle—Omission of "Limited" from company's name in notice—Road Traffic Act, 1930 (c. 43), s. 21 (c).

Q. and Co., Ltd., was the registered owner of a motor car which was involved in a road accident. The police sent a notice of intended prosecution by registered post to "Q. and Co.", at the company's registered address, instead of to "Q. and Co., Ltd." The notice was received and accepted by the company.

Held: notwithstanding the omission of the word "Limited" from the company's name in the notice of intended prosecution, the provisions of s. 21 (c) of the Road Traffic Act, 1930, had been complied with.

Clarke v. Mould ([1945] 2 All E.R. 551), distinguished.

FOR THE ROAD TRAFFIC ACT, 1930, s. 21, see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 594.

Case referred to:

(1) *Clarke v. Mould*, [1945] 2 All E.R. 551; 173 L.T. 370; 109 J.P. 175; 2nd Digest Supp.

CASE STATED by Surrey justices.

On Aug. 20, 1951, a motor car driven by the respondent, George John Henry Questier, was involved in a road accident. The registered owner of the car was Questier and Co., Ltd. On Aug. 29, 1951, under the Road Traffic Act, 1930, s. 21 (c), the police sent a notice of intended prosecution by registered post to "Questier and Co., 54, New Broad Street, E.C.2", and it was received and accepted by Questier and Co., Ltd., at the above-mentioned address, which was its registered office. On Oct. 17, 1951, a summons was served on the respondent at the same address. At a court of summary jurisdiction sitting at Guildford on Nov. 2, 1951, the respondent was charged on an information preferred by the appellant with driving a motor vehicle on a road in a manner dangerous to the public, contrary to the Road Traffic Act, 1930, s. 11 (1). It was contended on his behalf that s. 21 (c) of the Act had not been complied with as the notice of intended prosecution was addressed to "Questier and Co.", and not to "Questier and Co., Ltd.", the registered owner of the vehicle. The justices, being of the opinion that s. 21 (c) had not been complied with, dismissed the information.

Southall for the appellant.

J. E. Williams for the respondent.

LORD GODDARD, C.J.: The only question is whether sufficient notice of prosecution was served on the registered owner of the motor vehicle which was involved in an accident while being driven by the respondent. The registered owner of the vehicle is Questier and Co., Ltd., and, as it is a company registered with limited liability, the word "Limited" forms part of its name: [Companies Act, 1948, s. 389]. The police addressed a notice of the intended prosecution to "Questier and Co., 54, New Broad Street, E.C.2", instead of to "Questier and Co., Ltd.", at the same address. As the word "limited" was omitted from the notice, it was contended on behalf of the respondent that s. 21 (c) of the Road Traffic Act, 1930, had not been complied with. In my opinion, it would be pedantic to the last degree to say that the notice of intended prosecution, required by s. 21 (c) of the Act of 1930, is bad because it does not use the word "limited" after the word "company". A point of that sort does not commend itself to any court, and it is not a point to which the court need give effect. *Clarke v. Mould* (1), which was cited to the justices, is the highest watermark ever likely to be reached. This case is distinguishable from it, and we send this case back to the justices with the intimation that the notice was sufficient.

JONES, J.: I agree.

PARKER, J.: I also agree.

Appeal allowed.

Solicitors: *Wontner & Sons* (for the appellant); *Johnson, Jecks & Landons*, agents for *Down, Scott & Down*, Dorking (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

GOLDTHORPE v. BAIN.

[COURT OF APPEAL (Somervell, Jenkins and Morris, L.JJ.), May 15, 16, 1952.]

Rent Restriction—Possession—Death of landlord after order granted—House required by landlord for herself and family—Order for possession—Death of landlord before execution of order—House devised to daughter—Claim by daughter to enforce order—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), sched. I (h).

On Mar. 8, 1951, an order for possession of a dwelling-house to which the Rent Restrictions Acts applied was made against the tenant on the ground that the house was reasonably required by the landlord for herself and her family within para. (h) of sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. Execution of the order was suspended until Nov. 30, 1951. On Aug. 30, 1951, the landlord died, leaving by her will the house to her daughter. On a claim by the daughter to enforce the order obtained by her mother,

HELD: the order remained valid and enforceable by the landlord's successors in title, and, subject to the tenant's right to apply under s. 5 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, for a reasonable extension of the time of the operation of the order, the daughter was entitled to possession.

R. F. Fuggle, Ltd. v. Gadsden ([1948] 2 All E.R. 160), applied.

FOR THE RENT AND MORTGAGE INTEREST RESTRICTIONS (AMENDMENT) ACT, 1933, sched. I (h), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1060.

Cases referred to:

- (1) *American Economic Laundry, Ltd. v. Little*, [1950] 2 All E.R. 1186; [1951] 1 K.B. 400; 2nd Digest Supp.
- (2) *Fuggle (R. F.), Ltd. v. Gadsden*, [1948] 2 All E.R. 160; [1948] 2 K.B. 236; [1948] L.J.R. 1664; 2nd Digest Supp.

APPEAL by the landlord against an order of His Honour JUDGE BATT, made at Macclesfield County Court on Mar. 20, 1952, in an action for possession.

On Mar. 8, 1951, the landlord's mother obtained an unconditional order for possession under para. (h) of sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, of a dwelling-house known as Hunston, Chester Road, Poynton, the order to be executed on Nov. 30, 1951. On Aug. 30, 1951, the mother died. By her will she left the house to her daughter. On Dec. 15, 1951, the executors under the will executed an assent to the devise thereby vesting the legal estate in the daughter. On a claim by the daughter that she was entitled to the benefit of the order of Mar. 8, 1951, which claim, by agreement between the parties, was tried as an issue under Ord. 25, r. 6 (1) (a) (ii), of the County Court Rules, 1936, the county court judge held that the order was personal to the mother and was not available to the personal representatives, or, on their assent, to the daughter as beneficiary under the will, and, therefore, that the daughter was not entitled to possession.

R. E. Megarry for the landlord.

N. MacDermot for the tenant.

SOMERVELL, L.J., stated the facts and continued: The question as to the position of the order appealed against and the landlord's right to anything under it was treated by agreement between the parties as if it were the trial of an issue or question within Ord. 25, r. 6 (1) (a) (ii). The relevant part of r. 6 (1) reads as follows:

"Where—(a) any change has taken place after judgment, by death, assignment, or otherwise, in the parties entitled to enforce a judgment or order . . . the party claiming to be entitled to enforce the judgment or order

may apply on affidavit to the court for leave to issue the necessary process, and the court may—(i) if satisfied that the party so applying is entitled to issue such process, make an order to that effect; or (ii) if not so satisfied, order that any issue or question necessary to determine the rights of the parties be tried in an action.”

The question arises here because the tenant is saying: “Owing to the nature of the order obtained by your mother and the ground on which it was obtained, you are not entitled to enforce it.” The learned county court judge treated, and, in my opinion, rightly treated, that as a matter which there was jurisdiction to determine under a direction under r. 6 (1) (a) (ii), and he decided that the right acquired by the mother was a personal right and never descended to the personal representatives, or, on their assent, to the landlord as beneficiary under the will. He said:

“It seems to me to offend common sense and justice to say that the personal representatives of the deceased landlord can glean the benefit of an order made because of hardship to the deceased.”

He then referred to *American Economic Laundry, Ltd. v. Little* (1), on which counsel for the landlord relies. That was a case like the present where a final order for possession had been made against the tenant and it was suspended for a time. During the period of that suspension the tenant died. His daughter then claimed that she was entitled to remain in possession as a member of the tenant's family within s. 12 (1) (g) of the Act of 1920. This court held she could not do so, and that the order for possession fundamentally altered the position. It was pointed out that certain incidents of the original contractual tenancy which would have continued when a statutory tenancy was established, still affected the relationship of the parties after an order for possession had been made. The court held, however, that a person in occupation, with an absolute order made against him, was not a tenant within s. 12 (1) (g).

In *R. F. Fuggle, Ltd. v. Gadsden* (2), a case which, I think, is of importance, possession was claimed under para. (g) of sched. I to the Act of 1933 by landlords on the ground that the house was reasonably required for the occupation of a person in their whole-time employment. The main point decided does not assist. The learned county court judge had held that the premises were reasonably required by the landlords for their employee, but that he was bound by an earlier decision not to give possession. This court held that his ground for not giving possession was bad and that the landlords were entitled to possession, but a subsidiary point arose which is of assistance in the present case. By the time the case came to this court the workman for whom the landlords required the house had left their employment. The basis, therefore, in one sense, of their application had disappeared, and counsel brought this to the attention of the court. LORD GREENE, M.R., said ([1948] 2 All E.R. 163):

“What is the position of this court? On the facts as they existed at the hearing and as found by the judge, once the judge's error of law, if I may respectfully say so, is put right, the order would automatically follow, but something happened after the hearing which, if it had happened before the hearing took place, might have led the county court judge to take a different view from that which he did take on the facts. Ought this court to pay regard to some matter which has happened since the hearing which, if it had happened before the hearing, might have affected the judge's findings of fact?”

He held that the court could not proceed on that basis. That case shows that this court will allow an appeal and make an order for possession when, on the facts as they have developed since the hearing, the basis of the application has disappeared, and that is helpful in considering whether the learned county court

judge was right in holding that the effect of the order obtained in the present case ceased on the mother's death.

A I do not think it did. I accept the submission of counsel for the landlord that a landlord of a rent restricted house who applies for possession has a number of obstacles placed in his way by the Rent Acts which he has to overcome if he is to get an order, but if, on the evidence and considering what is reasonable and the various matters proved at the hearing, the county court judge makes an order for possession, that is an order which devolves to the landlord's personal representatives, heirs, or beneficiaries according to the circumstances. It is not an order which ceases on his death. It may be said there is a certain illogicality about that, and there is, of course, force in the consideration which moved the county court judge to come to an opposite conclusion. There must, however, B be finality at some stage. It could never have been suggested that if a landlord, who had obtained an order such as the present, died before he had time to move in, the tenant could claim that the status quo ought to be re-established. I think the conclusion to which I have come is reinforced by the difficulties of applying to circumstances which might arise in other cases the principle on which the learned judge based himself. I do not think it is necessary to illustrate or C elaborate the matter. That being so, on the issue under Ord. 25, r. 6, I would hold that the landlord was entitled to enforce the order.

There remains to be considered the question of the tenant's rights under s. 5 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and the county court judge's jurisdiction under it. I think one can get help with regard to that from *Fuggle's* case (2) where this court made an order under which the D tenant would have time, if so minded, to go back to the county court judge under s. 5 (2). LORD GREENE, M.R., made it clear that the county court judge ought not to proceed, as it were, de novo, disregarding the order originally made, because the employee in respect of whose employment it had been made had left the employment. He indicated that that might be a reason, assuming that the landlords had not engaged another employee, for giving the tenant rather E longer than he would have done if another employee was waiting in readiness to come in. But, in my opinion, he made it clear that, the order having been made, whatever the circumstances the county court judge ought not to give a longer period than what one might describe as the maximum having regard to the difficulty of the tenant himself finding some other place to go to. I think that applies here. In the present case the successor in title wants to live in these F premises herself. It may be that her needs are not as great as those of her mother were, but, in my view, the county court judge would be wrong if he gave an indefinite extension in a case such as this or where the successor in title had no desire to obtain the house for him or herself. Even if she did not want the house for herself, in my view, the order having been obtained, she is entitled to possession within a reasonable time, and in considering a reasonable time the G court should direct its mind to the difficulties, if any, of the tenant finding alternative accommodation. For these reasons I would allow this appeal. I would direct that the landlord is entitled to enforce the order, but its execution should be suspended for a month. Meanwhile, the tenant is not precluded from applying under s. 5 (2) of the Act of 1920.

H JENKINS, L.J.: I agree. Section 3 (1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, provides:

"No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and either—(a) the court has power so to do under the provisions set out in sched. I to this Act, or (b) the court is satisfied that suitable alternative accommodation is available

for the tenant or will be available for him when the order or judgment takes effect."

With the exception of the case where alternative accommodation must be provided under para. (b) the provisions of the section clearly contemplate that the court should consider the situation as it stands when the case comes before the court and judgment is given. Turning to sched. I, one finds it to be introduced by these words:

"A court shall, for the purposes of s. 3 of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if . . ."

Then paras. (a) to (h) are set out. In my view, having regard to the terms of s. 3 (1) and the language of the introductory passage in the schedule, the court has to satisfy itself at the hearing of the reasonableness of making the order and of the existence of one or other of the necessary conditions set out in the schedule. These conditions vary widely in their character. Some of them refer to some default or misconduct on the part of the tenant. Paragraph (a) deals with arrears of rent, para. (b) deals with nuisance or annoyance, para. (e) deals with breaches of a licence where premises are licensed for the sale of intoxicating liquor. On the other hand, certain of the provisions relate to the personal circumstances of the landlord himself. The case in para. (g) is where

"the dwelling-house is reasonably required by the landlord for occupation as a residence for some person engaged in his whole-time employment . . ."

Then by para. (h), which is the paragraph relevant to this case, an order may be made where the landlord requires the premises

" . . . for occupation as a residence for—(i) himself; or (ii) any son or daughter of his over eighteen years of age; or (iii) his father or mother."

But whether the particular condition is one relating to the personal circumstances of the landlord or one concerned with some default on the part of the tenant, all are subject to the overriding condition that the court should be satisfied that it is reasonable to make the order.

In the present case the order was made under para. (h) of sched. I on the ground that the then landlord, Mrs. Goldthorpe, required the premises for occupation as a residence for herself and her family. The question is what effect, if any, her death had on the order which was made between Mar. 8, 1951, the date of the order, and Nov. 30, 1951, the date on which possession was directed to be given up. The argument which commended itself to the learned judge was that in a case of this kind the order for possession, though unqualified in its terms, apart, of course, from stating a future date on which possession is to be given, is personal to the landlord who obtains it, so that, if between the date of the order and the date of its actual execution the landlord dies and thus no longer requires any premises for occupation as a residence on earth, the order becomes a nullity. I find it impossible to accept that conclusion. It was not sought to be maintained in argument before us that every order for possession made under the Act is personal to the particular landlord who obtains it and does not enure for the benefit of his successors in title. I am not surprised at the disclaimer of this extreme position, for I think it would be most unreasonable and regrettable if, for example, in a case where an order was obtained for possession on the ground of non-payment of rent and time was allowed for the tenant to comply with the order, the death of the landlord during the interval between the date of the order and the date fixed for the tenant's compliance with it had the effect of putting the landlord's personal representatives to the

trouble and expense of obtaining a fresh order for possession in new proceedings. Once it is conceded that in cases such, for instance, as that of non-payment of rent the order is not personal to the landlord who obtains it, I think it is impossible to draw a distinction between orders based on a default of the tenant, such as non-payment of rent, and orders based on the personal circumstances of the landlord. In both cases, as it seems to me, the circumstances on the strength of which the landlord is seeking possession, and, indeed, the overriding condition as to the reasonableness of making the order, must be considered with reference to the facts as they stand at the date of the hearing. The order, once made, is an order which, though subject to the special provisions of s. 5 (2) of the Act of 1920 applicable to orders for possession in Rent Act cases, remains, notwithstanding the death of the original plaintiff, a valid order for possession and one capable of enforcement by the successors in title of the original plaintiff on compliance with Ord. 25, r. 6, of the County Court Rules, 1936. In such a case, the judgment being one which concerns a proprietary interest of the deceased landlord which would normally pass to the landlord's personal representatives, those representatives, or a beneficiary claiming through them by means of an assent, on proof to the court of the grant of probate and of the assent, if there is one, would, *prima facie*, be entitled as of right to an order under Ord. 25, r. 6, declaring them entitled to enforce the order for possession.

I am fortified in the conclusion to which I have come by this consideration. At first sight the view is attractive that, if a landlord has been given an order for possession on the ground that he wants the premises for his own occupation as a residence and the landlord dies before possession is actually given up, then, *prima facie*, the order should lapse as the ground for it has lapsed. But, as I have said, I find it impossible so to hold, and I do not think that by so holding the kind of difficulty here in question would be met. There are cases in the schedule to the Act of 1933 where circumstances, personal not merely to the landlord himself, but to somebody else, are in question. One need go no further than para. (h) of the schedule, which includes the case where the landlord requires the premises "as a residence for . . . any son or daughter of his over eighteen years of age; or his father or mother". In a case such as that the landlord might get an order for possession because he wanted the premises as a residence for his father or mother and in the meantime before the date fixed for giving up possession under the order the father or mother might die. In such a case the reasoning which commended itself to the county court judge in the case of the landlord dying would, as it seems to me, require with equal force that, although the landlord was still alive, his order should cease to have effect because the ground on which he had obtained it had ceased to exist. In my view, that is an impossible conclusion. I think the question in the present case is in some degree obscured by the change of parties, brought about by the death of the landlord, but really the view taken by the county court judge amounts, as I think, to this, that the court should satisfy itself that the statutory ground for ordering possession exists and should also satisfy itself on the question of reasonableness, and, where applicable, on the question of greater hardship, not simply at the date when the case is tried and judgment is given, but over again at any time when a tenant against whom an order for possession has been made may apply for an extension of time under s. 5 (2). In my view, that cannot be right. It would prevent any finality in these cases. Issues of greater hardship or reasonableness, or the landlord's need of the premises as a residence for himself or some other qualified person, could be tried over and over again and orders under the Act could thus be varied in their operation without limit or even rescinded after what, in effect, would amount to a re-hearing of the whole case. In my view, therefore, one should adhere to the principle that the conditions required to enable an order for possession to be made should be judged at the date when the

case is heard and judgment is delivered, and that the validity of the order is not to be affected by any subsequent event.

Accordingly, for the reasons stated by my Lord and such additional reasons as I have endeavoured to express, I agree that the proper course in this case will be to direct that the landlord is to be entitled to enforce the order for possession made in the original proceedings, subject to the provisions of s. 5 (2) of the Act of 1920, and that any extension of the time for giving up possession which is granted by this court today should be without prejudice to any further application to the county court judge under s. 5 (2) and that any such application made to him will fall to be dealt with in his discretion as indicated by my Lord. Accordingly, I agree that the order under appeal should be varied in the sense my Lord has stated.

MORRIS, L.J.: I agree so fully with the judgments that my Lords have delivered that, though this is a case in which we are taking a somewhat different view from that taken by the learned county court judge, I do not feel that I desire to add anything to what has been said.

Appeal allowed.

Solicitors: *Pritchard, Englefield & Co.*, agents for *H. F. Langstaff*, Macclesfield (for the landlord); *Leach, Sims & Co.*, agents for *O. Collier Littler & Kilbeg*, Manchester (for the tenant).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

A. F. WARDHAUGH, LTD. v. MACE.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Jones and Parker, JJ.), May 15, 1952.]

Carriage of Goods—Carriage for hire—Restriction on area of operation—Exception—Carriage of meat—Fish not included—Transport Act, 1947 (c. 49), s. 52 (1) (a) s. 125 (1).

Justices—Jurisdiction—Offence in respect of property in or on vehicle—Carriage of goods—Breach of condition of A licence—Summary Jurisdiction Act, 1879 (c. 49), s. 46 (3).

On Feb. 20 and 21, 1951, the appellants, carriers operating from Newcastle under an A licence, carried for hire or reward in an authorised vehicle a load of fish from Newcastle to Fleetwood, Lancashire, i.e., outside a radius of twenty-five miles from their operating centre, without a permit from the Transport Commission granted under s. 52 (1) of the Transport Act, 1947. The vehicle was then driven empty to Liverpool where, on Feb. 22, it was loaded with fruit with which it returned to Newcastle. On an information preferred at Liverpool magistrate's court charging the appellants with an offence against s. 52 (1) relating to the journey from Newcastle to Fleetwood,

HELD: (i) the magistrate had no jurisdiction under s. 46 (3) of the Summary Jurisdiction Act, 1879, to deal with the information since that sub-section, which applied to offences in respect of property in or upon vehicles, contemplated the theft of or malicious damage to such property, and the charge against the appellants related to the use of the vehicle and were not in respect of the property carried in it;

(ii) "meat" in the exemption in s. 52 (1) (a) and in s. 125 (1) of the Act of 1947 did not include fish;

(iii) and, therefore, the appellants were guilty of the offence.

FOR THE SUMMARY JURISDICTION ACT, 1879, s. 46 (3) see HALSBURY'S STATUTES, Second Edn., Vol. 14, p. 881, and FOR THE TRANSPORT ACT, 1947, s. 52 and s. 125, see *ibid.*, Vol. 24, p. 768 and p. 791, respectively.

CASE STATED by the Liverpool stipendiary magistrate.

At a court of summary jurisdiction, sitting at Liverpool, on Oct. 24, 1951, two informations were preferred by the respondent, a solicitor for the licensing authority for goods vehicles, under s. 52 of the Transport Act, 1947, against the appellants charging that on Feb. 21 and 22, 1951, at Liverpool, they failed to comply with the condition of a public carrier's (A) licence in that they carried goods for hire or reward in an authorised vehicle when the vehicle was more than twenty-five miles from its operating centre. The court found both charges proved and imposed fines of £10 and £5 respectively. The appellants carried on business as haulage contractors at Newcastle-upon-Tyne which was their operating centre, and they held a public carrier's (A) licence under which they were authorised to operate the vehicle. On Feb. 20 and 21, 1951, they carried a load of six and a half tons of fish on the vehicle from Newcastle-upon-Tyne to Fleetwood for hire and reward. The journey commenced at Newcastle at 10 p.m. on Feb. 20, the vehicle arrived at Fleetwood at 6.30 a.m. on Feb. 21, and the fish was unloaded. The vehicle was then driven empty to Liverpool where the driver took his statutory rest period. On Feb. 22 he went to a clearing house in Liverpool and undertook to carry a load of oranges from Liverpool to Newcastle for hire and reward. The vehicle was not used between its arrival at Liverpool until the driver went to the clearing house the next day to arrange its return load.

On the part of the appellants it was contended that (i) the condition imposed by s. 52 of the Transport Act, 1947, did not apply to the carrying of fish on the journey from Newcastle to Fleetwood because fish was "meat" within s. 52 (1) (a) and s. 125 of that Act; (ii) the court had no jurisdiction to hear the information relating to Feb. 21 because at no time on that day did the vehicle carry goods for hire and reward within the city of Liverpool, and, alternatively, if the journey from Newcastle to Fleetwood, from Fleetwood to Liverpool, and from Liverpool to Newcastle were one journey, the court had no jurisdiction to deal with the information under s. 46 (3) of the Summary Jurisdiction Act, 1879, as no offence had been committed in respect of any property on the vehicle. It was submitted by the respondent that the contentions of the appellants were not sound. The stipendiary magistrate was of the opinion (i) that fish was not covered by the proviso in s. 52 (1) (a) of the Transport Act, 1947; (ii) that the driver was acting in the interest of his employer in obtaining a return load and came to Liverpool for that purpose; (iii) that the vehicle was engaged on a single journey and an offence had been committed in respect of property on the vehicle; and (iv) that on Feb. 21 and 22, in the city of Liverpool, the appellants had failed to comply with the conditions of their public carriers' licence; and, therefore, he had jurisdiction to deal with the information relating to Feb. 21. Accordingly, he convicted the appellants on each information.

F. A. Stockdale for the appellants.

J. P. Ashworth for the respondent.

LORD GODDARD, C.J.: This is a Case stated by the stipendiary magistrate for Liverpool before whom the appellants were charged with an offence against s. 52 of the Transport Act, 1947. That section allows a carrier under an A licence in respect of a vehicle owned by himself to carry goods for hire or reward only within a radius of twenty-five miles of the place where his vehicle is kept unless he has obtained a permit granted by the Transport Commission. The appellants, who are carriers carrying on business in Newcastle, had a permit which enabled them to go over a large part of the north of England, but did not allow them to go into Lancashire. On the day of the alleged offence they took a load of fish from Newcastle to Fleetwood and there discharged it. The driver then drove to Liverpool where he took what is called his statutory rest, and the next day he loaded the vehicle with oranges and returned to Newcastle. It is not disputed that in respect of that journey from Liverpool to Newcastle an offence was committed. The question is whether there was any offence

committed in carrying the fish to Fleetwood, and, if there was, whether the stipendiary magistrate at Liverpool had any power to deal with it.

I am satisfied that this was what would be described in regard to a ship as a continuous voyage. The lorry went from Newcastle to Fleetwood, from Fleetwood to Liverpool, and from Liverpool back to Newcastle, so that it was a round voyage from Newcastle to Newcastle, but the offence alleged here is using the vehicle for that journey for the carriage of goods for hire or reward without a permit. If no goods are being carried for hire or reward, the owner of the vehicle is entitled to drive where he likes and as far as he likes. In carrying the fish to Fleetwood the appellants were carrying goods for hire or reward, and were guilty of an offence unless they came within one of the exceptions mentioned in s. 52.

The first point taken, and that on which this court is prepared to quash the conviction, is that the stipendiary magistrate at Liverpool had no jurisdiction to try the case. More than six months have gone by since the offence (if it was an offence) was committed, and so no other court has power to deal with it. Between Fleetwood and Liverpool no offence was committed because the lorry was not then carrying any goods. It is true that the driver, having unloaded his goods at Fleetwood, was going to pick up, and he did pick up, another load at Liverpool, but I am unable to see that in driving from Fleetwood to Liverpool any offence was being committed. The stipendiary magistrate has purported to try the appellants for the offence which was committed by carrying goods from Newcastle to Fleetwood. Apparently he relied, as counsel for the respondent has relied, on s. 46 (3) of the Summary Jurisdiction Act, 1879, as giving him jurisdiction. The material words of s. 46 (3) are:

“Where the offence is committed on any person or in respect of any property in or upon any carriage . . . or vehicle whatsoever employed in a journey . . . the person accused of such offence may be tried by any court of summary jurisdiction through whose jurisdiction such . . . vehicle . . . passed in the course of the journey . . . during which the offence was committed.”

This is not a charge in respect of property in or upon the vehicle. What is alleged is an offence against the Transport Act, 1947, s. 52 (1), which provides that it shall be a condition of every A licence that, except under and in accordance with a permit by the Transport Commission, goods shall not be carried for hire or reward in any authorised vehicle if the vehicle, at any time while the goods are being so carried, is more than twenty-five miles from its operating centre. It is obvious that s. 46 (3) of the Summary Jurisdiction Act, 1879, is meant to deal with what may be an assault on, or a robbery of, a person who is travelling in a railway train, in a stage coach, in an omnibus, or in a long-distance coach. If the offence is committed in the course of that journey, the person may be tried before any court having jurisdiction at any place through which the vehicle goes. So, too, if the offence is in respect of property, which, I think, contemplates the theft of or malicious damage to property, or some other offence with regard actually to the cargo or luggage on the vehicle. This is not one of those cases, and, therefore, in my opinion, it is abundantly clear that the stipendiary magistrate at Liverpool had no power to try this information.

The second point taken is more difficult. The merits of the case are said to be these. Section 52 (1) (a) of the Transport Act, 1947, provides that the condition with regard to the twenty-five miles' radius shall not apply in the case of a variety of goods and vehicles therein mentioned, such as tankers and other vehicles carrying liquid, furniture vans, and so forth. Then there is this provision:

“ . . . or the goods carried are meat or livestock.”

According to the definition of “meat” in s. 125 (1):

“ ‘meat’ means carcases of animals, parts of carcases of animals, or offals of animals, being carcases, parts of carcases or offals suitable for human

consumption, whether fresh, chilled or frozen, but not being carcases, parts of carcases or offals which have been cooked or subjected to any process other than skinning, trimming or cleaning."

The question is whether in the expression "meat" is included fish. In the days of Dr. Johnson it was common in the English language to talk about "meat" as meaning food. Certainly not in Stuart times, and probably not even in Dr. Johnson's time, would vegetables necessarily have been excluded. "Meat", I think, meant a meal. If a person was partaking of his "meat", it meant that he was partaking of the solid part of his food, and if he was also partaking (as he generally would be) of drink, that was the liquid part of his food. As is shown by the OXFORD DICTIONARY, that has now become an archaic use of the word "meat". I do not think that anybody would deny that, if people now refer to meat in the ordinary course of conversation or in writing, what is meant is butcher's meat. It may also include such things as hares, rabbits, and possibly poultry, and game. That matter may have to be decided some day. If there is a doubt, it would be a very good thing if it could be cleared up, but one point that has given the court a certain amount of trouble is that, in addition to exempting vehicles carrying meat from the operation of s. 52, Parliament has exempted vehicles carrying livestock. "Livestock" generally means live animals. If the live and dead stock on a farm are advertised for sale, everybody knows what that means. The dead stock are the implements; the livestock are the animals on the farm, and I should think that in the great majority of cases at any rate it would include, and would be thought to include, the poultry on the farm. Although live poultry may be livestock, it does not necessarily follow that dead poultry are "meat".

For myself I prefer not to decide that question, but what I do decide is that in this statute passed in the year 1947 "meat" does not include fish. I think that, for the purpose of this Act, meat and fish must be regarded as two different things. I am fortified to some extent in the opinion that I have formed by two considerations. First, if it was meant to exclude fish from the operation of the section, it would have been extremely easy to say so. Vegetables are clearly not excluded because of the definition that "meat" means carcases of animals. Whatever a scientist may say, looking at the matter purely as one of science—that anything that breathes, moves, and has bones and glands, or whatever it may be, is an animal—I do not think that anyone nowadays talks about a fish lying on a fishmonger's slab as "a carcase of an animal". We need not deal with the difficult question what would be the position if the article were whale meat. A whale is a mammal, but we will leave out exceptions such as that until they arise. I think that when "meat" is defined to mean "carcases of animals, parts of carcases of animals, or offals of animals, being carcases, parts of carcases or offals suitable for human consumption", and the definition then goes on to deal with livestock, "meat" is what in the ordinary acceptance and common parlance would be called "meat". The section is certainly not intending to say that outside the statutory limit vehicles may be used to carry perishable goods (and fish would be perishable goods) because it expressly excludes meat which no one would suggest is highly perishable, namely, "whether fresh, chilled or frozen". Therefore, it is not what may be called an emergency provision. Whatever may be the reason for the omission to exclude fish from the operation of the Act, I am not prepared to hold that for the purpose of the Transport Act, 1947, s. 52, "meat" includes fish, but, for the reasons that I have given, on the other point the conviction must be quashed.

JONES, J.: I agree.

PARKER, J.: I agree.

Appeal allowed.

Solicitors: *Doyle, Devonshire & Co.*, agents for *T. H. Campbell Wardlaw*, Newcastle-upon-Tyne (for the appellants); *Treasury Solicitor* (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

THOMAS v. MARSHALL (INSPECTOR OF TAXES).

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.J.J.), May 12, 13, 1952.]

Income Tax—Settlement—Transfer of assets—Absolute gift—Deposits to child's account in Post Office Savings Bank and purchases of Defence Bonds for child—Finance Act, 1936 (c. 34), s. 21 (9) (b).

A father opened Post Office Savings Bank accounts in the names of his two infant unmarried children, and from time to time paid sums to the credit of those accounts. He also bought holdings of Defence Bonds in the names of the children. On the question whether the deposits and the purchase of the Defence Bonds were "settlements" within the meaning of s. 21 (9) (b) of the Finance Act, 1936, so that the income arising therefrom fell to be treated as the father's income for tax purposes under s. 21 (1),

HELD: an out-and-out gift was a settlement within the meaning of s. 21 (9) (b) of the Finance Act, 1936, and accordingly the income arising from the Post Office Savings Bank accounts and the Defence Bonds fell to be treated as the settlor's income for tax purposes under s. 21 (1).

Hood-Barrs v. Inland Revenue Comrs. ([1946] 2 All E.R. 768), applied. Decision of DONOVAN, J. ([1952] 1 All E.R. 173), affirmed.

FOR THE FINANCE ACT, 1936, s. 21, see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 361.

Cases referred to:

- (1) *Hood-Barrs v. Inland Revenue Comrs.*, [1945] 1 All E.R. 500; *affd.* C.A., [1946] 2 All E.R. 768; 176 L.T. 283; 27 Tax Cas. 385; 2nd Digest Supp.
- (2) *Vestey's Executors v. Inland Revenue Comrs.* *Vestey's Executors v. Colquhoun*, [1949] 1 All E.R. 1108; 31 Tax Cas. 1; 2nd Digest Supp.
- (3) *Inland Revenue Comrs. v. Morton*, 1941 S.C. 467; 24 Tax Cas. 259; 2nd Digest Supp.
- (4) *Chamberlain v. Inland Revenue Comrs.*, [1943] 2 All E.R. 200; 25 Tax Cas. 317; 2nd Digest Supp.
- (5) *St. Aubyn (L.M.) v. A.-G.* (No. 2), [1951] 2 All E.R. 473; [1952] A.C. 15.
- (6) *Re Micklethwait*, (1855), 11 Exch. 452; 25 L.J.Ex. 19; 156 E.R. 908; 21 Digest 110, 824.
- (7) *Yates (Inspector of Taxes) v. Starkey*, [1951] 1 All E.R. 732; [1951] Ch. 465.

APPEAL by the taxpayer from a decision of DONOVAN, J., dated Dec. 20, 1951 (reported [1952] 1 All E.R. 173) that the deposits in the Post Office Savings Bank and the purchase of Defence Bonds were "settlements" within the meaning of s. 21 (9) (b) of the Finance Act, 1936. He also decided that, although each deposit and each purchase were separate settlements, the income arising under all the settlements had to be added together for the purpose of determining whether the aggregate income exceeded £5 a year and was thus disqualified from the exemption conferred by s. 21 (4). The taxpayer appealed against the decision that the deposits and purchases were "settlements," but not against the decision that the aggregate income exceeded £5 a year.

Sir Andrew Clark, Q.C., and *C. Lawson* for the taxpayer.

Pennyuckick, Q.C., *J. H. Stamp*, *Sir Reginald Hills* and *R. A. Watson* for the Crown.

SIR RAYMOND EVERSHERD, M.R.: The short question raised by this appeal may be accurately stated as being whether the facts are such as to give rise to the existence of a "settlement" within the meaning of s. 21 of the Finance Act, 1936.

A In the years 1933 and 1936, the taxpayer made over—I use for the moment a deliberately vague term—by way of absolute gifts to his two children, Michael and Heather, certain moneys which he put into their names in the Post Office Savings Bank. I take, for present purposes as sufficient, the bank account of the boy, Michael. It was opened with a deposit of £50. From time to time thereafter other sums were similarly put to the credit of the account by the taxpayer. There were also from time to time credited in the account sums for interest. In 1939 there was a withdrawal from the account of £375, and that sum was used for the purchase, in the name of the boy, of £500 worth of National Savings Certificates. It also appears that from time to time there were other withdrawals, the sums withdrawn being expended for the boy's benefit or maintenance. The situation in the case of the daughter's account B was in all material respects identical. By the end of 1948 the sums which stood to the credit of the two children in their respective accounts were, within a matter of a very few shillings and pence, the same, about £844. Finally, in 1945, the taxpayer purchased £1,000 worth of three per cent. Defence Bonds for each of his two children in their respective names. The purchase of those bonds was, as it was intended to be, an absolute gift to them of the bonds. I need only add that at all material dates the children were infants.

C The point which is the subject of this appeal is whether these gifts constitute settlements within the meaning of s. 21 of the Act of 1936, for the effect, it is conceded, if they do, is that the father, as the settlor, is liable to be assessed to income tax in respect of the interest or income which the subject-matter of the gifts produced. As a matter of machinery, that sum of income tax, if D the father be liable for it, may be recouped out of the children's moneys, but, for the purposes of assessment, the tax is levied on the footing that the income in question was the settlor's, that is, the father's, income.

E Counsel for the taxpayer has not sought to make any distinction between the gifts which I have described, either between the transfers of sums of money into the Post Office Savings Bank accounts, on the one hand, or the purchase of the Defence Bonds, on the other, nor between the sums deposited in the Post Office Savings Bank and the purchase thereof in the children's names of the National Savings Certificates. For the purposes of this case either all these sums constitute the subject-matter of a "settlement" within the meaning of the Act, or none of them does. Further, counsel has conceded that, if F *Hood-Barrs v. Inland Revenue Comrs.* (1) is good law, we are bound by that case to decide this matter in favour of the Crown. But counsel's main point has been that, having regard particularly to the observations of the noble Lords in *Vestey's Executors v. Inland Revenue Comrs.* *Vestey's Executors v. Colquhoun* (2), the *Hood-Barrs* case (1) ought now to be regarded as no longer good authority or as binding in this court.

G The facts, so far as relevant, in the *Hood-Barrs* case (1) were that the taxpayer had transferred to each of his two infant and unmarried daughters a block of shares as gifts of an absolute character without any restriction or consideration. It was argued that the transfers, being in the nature of absolute out-and-out gifts, were not "settlements" within the comprehension of s. 21 of the Act of 1936. This court held that they were, and construed the section, which is in point here, as covering the case of a gift such as I have described H in the *Hood-Barrs* case (1). From what I have already said it is plain that no distinction in principle can be drawn between the nature and characteristics of the gifts in the *Hood-Barrs* case (1) and the nature and characteristics of the gifts in the present case. Therefore, before I deal further with the judgment of the Master of the Rolls in the *Hood-Barrs* case (1), I will make some further references to the section which is involved.

Sub-section (1) of s. 21 is in these terms:

"Where, by virtue or in consequence of any settlement to which this

section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of assessment, the income shall, if at the commencement of that year the child was an infant and unmarried, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year and not as the income of any other person."

I shall pass over sub-s. (2). Sub-section (3) allows certain reliefs in the case of what is there referred to as "an irrevocable settlement." I pass to sub-s. (9) which contains what may be described as an interpretation, perhaps a definition, perhaps an expansion of the meanings of certain of the words used earlier in the section. Sub-section (9) contains this provision:

"In this section—(b) the expression 'settlement' includes any disposition, trust, covenant, agreement, arrangement or transfer of assets."

It is not in doubt that, according to the ordinary acceptance of language, if a man transfers to somebody else, as Mr. Hood-Barrs did, a block of shares by way of gift, there has been a "transfer of assets." Accordingly, if the word "settlement" in the first sub-section is to be treated as comprehending, by virtue of the language of sub-s. (9) (b), "a transfer of assets," it seems to follow as night follows day that such a "transfer of assets" is a "settlement" to which the section applies. The argument presented in the *Hood-Barrs* case (1), and presented also in this court for our consideration if we should not hold ourselves bound by the *Hood-Barrs* case (1), is in brief this. The expansion to be given to the word "settlement" by the effect of sub-s. (9) (b) is not such as to make the word "settlement" mean, and, therefore, necessarily cover, every transfer of assets. In other words, though counsel for the taxpayer concedes that the effect of sub-s. (9) (b) is to enlarge the meaning which the word "settlement" might otherwise have, and, particularly, to enlarge it beyond the scope of what the word would mean to a conveyancer, still the transactions which the word "settlement" is said to include must be such that they still retain in some way or in some degree the characteristics of a settlement as that word would be understood by persons who have some accurate knowledge of the meaning of words in the English language. Counsel says also that this view is supported by other considerations to be derived from the section itself—for example, the reference to an "irrevocable settlement" in sub-s. (3) which, he argues, is inappropriate to ordinary gifts.

It is not, perhaps, easy to express the extent to which, on this view, that enlargement would go. I think it would be unkind to the argument to suggest that it is fairly to be paraphrased by saying that "settlement" includes transfers of assets provided that they are still something like a settlement, even though they are not, strictly speaking, a settlement at all. The difficulty which that interpretation of sub-s. (9) (b) suggests is a real difficulty, and one which certainly has affected my mind in this matter, and would, if the question were res integra for us, be a matter on which I should certainly want to hear considerably more argument from counsel for the Crown before I expressed a final conclusion, but, as I have already indicated, my view is that the *Hood-Barrs* case (1), which is a direct authority on the very section with which we are concerned, is still to be regarded in this court as a binding authority. If that is right, it follows, as counsel for the taxpayer has conceded, that we must dismiss the appeal.

The way in which counsel has sought to circumvent that very considerable difficulty is this. Before the *Hood-Barrs* case (1) came to the Court of Appeal a similar problem had arisen for consideration, not under this Act, but under s. 38 of the Finance Act, 1938, in Scotland in *Inland Revenue Comrs. v. Morton* (3). The Inner House of the Court of Session decided that case in a way which may be said to be parallel to the decision which was reached in

A the *Hood-Barrs* case (1). I put the matter in those terms to make clear that I do not forget—and I think, indeed, it is most important—that the decision was not on the Act of 1936 at all, but on the Act of 1938. But one of the judges in the Court of Session, LORD MONCRIEFF, dissented from the opinion of the majority and, in the course of his dissent, he expressed a view which has been the real foundation of the argument which counsel for the taxpayer would put forward, if, as I have said, this matter were *res integra* before us. The section there under discussion also referred to settlements and the definition or interpretation section in the Act of 1938 closely corresponds with that with which we are concerned, there being, indeed, this difference and this difference only, that there is absent in the Act of 1938 the words “transfer of assets.” The other transactions which are included in sub-s. (9) (b) of s. 21 of the Act of 1936 also find a place in s. 41 of the Act of 1938, but the words “transfer of assets” are not included. At the beginning of his judgment LORD MONCRIEFF said this (1941 S.C. 480):

C “These deeds and arrangements would, however, appear to be included only in so far as they themselves effectively operate the settlement, (seeing that this remains the dominant word), and not in respect of merely being resorted to as machinery to carry out a settlement which is self-contained . . .”

Later, he uses this language (*ibid.*):

D “As used in the statutory sections which require construction, I interpret ‘settlement,’ in accordance with a familiar use of the term at common law, as meaning a charging of the property of the settlor with rights constituted in favour of others.”

As I follow it, by “common law” he means the common law of Scotland.

E Shortly after that judgment, in *Chamberlain v. Inland Revenue Comrs.* (4) a similar problem came before the House of Lords from the Court of Appeal in England. On that occasion, undoubtedly, the House of Lords preferred the conclusion of LORD MONCRIEFF to that of the majority of the Inner House in *Morton’s* case (3), and they decided *Chamberlain’s* case (4) as LORD MONCRIEFF would have decided *Morton’s* case (3). In the course of his speech in *Chamberlain’s* case (4), LORD MACMILLAN made express reference to the second of the two passages of LORD MONCRIEFF’s judgment, which I have F read, though he did not refer to the first passage and to the phrase that the word “settlement” remained “the dominant word.” LORD MACMILLAN said ([1943] 2 All E.R. 204):

G “I accept the view that the statutory expansion of the term ‘settlement,’ which includes an ‘arrangement,’ justifies and, indeed, requires a broad application of s. 38 of the Act of 1938, but a settlement or arrangement to come within the statute must still be of the type which the language of the section contemplates. I agree with LORD MONCRIEFF that the settlement or arrangement must be one whereby the settlor charges certain property of his with rights in favour of others . . . It must comprise certain property which is the subject of the settlement; it must confer H the income of the comprised property on others, for it is the income so given to others that is to be treated as, nevertheless, the income of the settlor.”

When the *Hood-Barrs* case (1) came before this court, the taxpayer, by his counsel, invoked the passage that I have read from LORD MACMILLAN’s speech, and, indeed, the decision of the House in the *Chamberlain* case (4), in support of the view which counsel for the taxpayer wishes to put forward in the present case, but it was rejected by the Court of Appeal. LORD GREENE, M.R., in his

judgment, explained what he understood was the meaning and effect of the passages from LORD MACMILLAN's speech. He said ([1946] 2 All E.R. 773):

"I cannot find anything in any of the speeches, omitting for the moment the passage in the speech of LORD MACMILLAN which is relied on, which lends any support to the suggestion that an interpretation clause is to be dealt with in the manner suggested by counsel for the taxpayer. On the contrary, the language used appears to me to point in quite the opposite direction. The section under consideration there was s. 38 of the Act of 1938 which used the same word 'settlement'."

He then referred to the interpretation clause, and said (*ibid.*):

"It has not the phrase 'transfer of assets' in it as we have here. LORD THANKERTON, with whose opinion the LORD CHANCELLOR and LORD ATKIN agreed, said ([1943] 2 All E.R. 203): 'Further, it seems to me that, while the word "settlement" is defined in the widest terms, the more crucial point is likely to be the determination of what the "property comprised in the settlement" consists of in the particular case'."

A little later, he said ([1946] 2 All E.R. 774):

"It is only from the speech of LORD MACMILLAN that any kind of support for counsel's interpretation is sought to be extracted."

Then he refers to the passage which I have already read.

"That has been read as though it meant that a settlement or arrangement to come within the statute must still be of the type which the word 'settlement' in the section contemplates. With all respect, I think it cannot mean that. If I may say so with the utmost respect, I cannot bring myself to believe that LORD MACMILLAN intended to make a suggestion as to the meaning and operation of such an interpretation clause so subversive as that for which counsel argues. If by any chance that were the meaning of his words, I hope I shall not be thought disrespectful if I say that I would not, sitting in this court, accept that as binding on me."

LORD GREENE goes on to conclude the case before him by saying that the words of sub-s. (9) (b) must be read in their ordinary sense, and the consequence of doing that is that there must be inserted in sub-s. (1), after the word "settlement," by way of parenthesis, "including any disposition," etc., etc. That stage having been reached and the subject-matter in the *Hood-Barrs* case (1) having been a "transfer of assets," it was decided on those three words that the transaction was caught and the tax became exigible.

Counsel for the taxpayer has said that, whatever may have been the position when the *Hood-Barrs* case (1) was in this court, the situation is fundamentally changed by the decision of the House of Lords in the *Vestey* case (2). It is plain (he says) from that case and the language of the speeches therein that the effect of the *Chamberlain* case (4) was to overrule the *Morton* case (3) and to adopt as authoritative the language of LORD MONCRIEFF of which LORD MACMILLAN had approved in the *Chamberlain* case (4). In other words, the *Vestey* case (2) makes it no longer possible to treat the observations of LORD MACMILLAN as mere dicta; they have now the sanction of all the noble Lords who sat in the *Vestey* case (2), and they are, therefore, binding authority as to the limited meaning or effect to be given to the so-called interpretation provisions of the section of the Act of 1938. It is said that the result is to invalidate the basis on which LORD GREENE was able to dispose of Serjeant Sullivan's argument and his references to the speech of LORD MACMILLAN. I think it will suffice for present purposes if I illustrate the point by one reference to the speech of LORD NORMAND in *Vestey's* case (2). The citation is the more significant since LORD NORMAND was, when the *Morton* case (3) was decided,

Lord President of the Court of Session and was a party to the majority decision which was subsequently held to be erroneous. LORD NORMAND said ([1949] 1 All E.R. 1119):

A “In *Chamberlain’s* case (4) the Court of Appeal took the same view, as I read the judgment, as the majority of the Court of Session had taken in *Morton’s* case (3), but this House reversed the decision and construed ‘settlement’ in relation to the words ‘property comprised in the settlement’ as LORD MONCRIEFF had construed it in *Morton’s* case (3). LORD MACMILLAN, indeed, expressly adopted LORD MONCRIEFF’S words above cited, which are the very pivot of his dissent. There were additional grounds on which the judgment of this House was based, but the rule to be deduced from the case is that the property comprised in the settlement is that and that only in respect of which some beneficial right is created in favour of beneficiaries under the settlement.”

C Counsel for the taxpayer also referred to the decision of the House of Lords in *St. Aubyn (L.M.) v. A.-G.* (No. 2) (5). I say at once that that was an entirely different case and related to the construction of another of the numerous Finance Acts which from time to time receive the attention of the court. The question there was whether there had been a transfer of property to a company within the meaning of the relevant section of the Finance Act, 1940. Counsel prayed in aid the general observations of LORD SIMONDS in his speech. The question was whether a man who paid money for the purchase of shares in a company transferred property to the company. LORD SIMONDS said ([1951] 2 All E.R. 485):

D “No one, lawyer, business man, or man in the street, was ever heard to use such language to describe such an act and I decline to stretch the plain meaning of words in an Act of Parliament in order to comply with what is said to be its purpose.”

E Then he cited the famous words of LORD WENSLEYDALE in *Re Micklethwait* (6). Counsel for the taxpayer says that, by parity of reasoning, no one, lawyer, or business man, or man in the street, could possibly be heard to describe as “settlements” such absolute gifts as were made by Mr. Thomas to his infant son and daughter in the present case. Persuasive though that argument is, it seems to me that it is impossible for this court to say that LORD GREENE, M.R., and the other members of this court in the *Hood-Barrs* case (1) misapprehended the real effect of the *Chamberlain* case (4), or that the *Vestey* case (2) and the *St. Aubyn* case (5) must be treated as having, by inference, overruled the decision in the *Hood-Barrs* case (1).

G I point out, first, that the *Hood-Barrs* case (1) was not considered by the House of Lords in either of the two last-mentioned cases. Furthermore, it is to be borne in mind that the two last-mentioned cases were dealing with a different Act of Parliament from that with which we are concerned. I leave aside the *St. Aubyn* case (5), only observing that, vigorous as was LORD SIMOND’S expression, two of his colleagues took a different view from him on the very point with which he was dealing, namely, whether there had been a transfer of property. The Finance Act, 1938, which was the subject-matter under discussion in the *Morton* case (3), the *Chamberlain* case (4), and the *Vestey* case (2), dealt with the situation where there had been a transaction consisting of the formation of a company and a transfer of assets to the company so formed, and the question was: Did the transferor, the so-called settlor, retain a beneficial interest of the character described in that statute? The Act of 1936 which, as counsel for the taxpayer pointed out, is, so to speak, a development of the law restricting the benefits to be derived from transactions of this kind, as found in s. 20 of the Finance Act, 1922, deals with a case in which, putting it generally, provision is being made by a parent for infant children. Parliament

is directing its attention to taxing income in certain circumstances which would otherwise be available by a father for the maintenance or benefit of his infant children. I have already referred to the circumstance that the words "transfer of assets", which formed the basis of the decision in the *Hood-Barrs* case (1), and are equally the vital words in the present case, are absent from the corresponding s. 41 of the Act of 1938. Counsel for the taxpayer says that they add nothing whatever to the formula beginning "any disposition", but I am not satisfied that this court ought to say that, where there are additional words, they must be regarded as completely otiose. However that may be, as I say, the Act of 1938 is dealing with a different subject-matter from that covered by the Act of 1936. Moreover, the real question which fell to be determined in *Morton's* case (3), *Chamberlain's* case (4) and *Vestey's* case (2), was not so much: Was there a settlement within the particular provisions of the Act in question?, but: What was the property comprised in the settlement?, and that is a somewhat different question. That emphasis is properly to be laid on that matter appears clearly from the language I have quoted from the speech of LORD NORMAND in the *Vestey* case (2). I think, therefore, it would be wrong for this court to say that, as it were by a side wind, the validity of the *Hood-Barrs* decision (1) has been destroyed or impeached by the observations of the noble Lords in the *Vestey* case (2).

I may add that in 1951 there came before this court *Yates (Inspector of Taxes) v. Starkey* (7), in which the question of the meaning of s. 21 of the Finance Act, 1936, was considered. JENKINS, L.J., specifically referred to the language of LORD GREENE, M.R., in the *Hood-Barrs* case (1) and expressed his own concurrence with it. It is true that the *Vestey* case (2) was not cited, but JENKINS, L.J., expressed his own opinion as being in line with that of LORD GREENE, and the other members of the court, HODSON, L.J., and myself, agreed with JENKINS, L.J.'s conclusion. In view of *Yates (Inspector of Taxes) v. Starkey* (7) it obviously would not be right for me to express any doubt about the correctness of LORD GREENE's decision, or of its binding authority on us. Indeed, I add this. I have indicated that the explanation of the formula with which we are concerned, the explanation which counsel for the taxpayer has said should be adopted, seems to me, at least, to involve a difficulty. It is easy, perhaps, if I may say so with great respect to LORD MONCRIEFF, to say that the word "settlement" is "the dominant word", but what the real consequence of so saying is, to my mind, far less clear. Again (and I speak with the utmost respect for LORD MACMILLAN), I cannot think that, as applied in the courts of England, his acceptance of LORD MONCRIEFF's language can be exhaustive, or, indeed, entirely correct, if he thereby intended to define what alone constituted a "settlement" within the meaning of this Act or the Act of 1938.

Finally, I add this. The argument has proceeded, to some extent, on the view that sub-s. (9) (b) is not really a definition section as that phrase is commonly understood. I am again not entirely clear what the effect of that, if it be right, will be, especially since it is conceded that the consequence of sub-s. (9) (b) is to expand the meaning of the word "settlement". It is, so far as I can see, tolerably clear that, in the *Chamberlain* case (4) the noble Lords treated that sub-section as a definition section and referred to it as such. The passage which LORD GREENE cited from LORD THANKERTON's judgment, I think, illustrates that point, and further reference can usefully be made to the speech of LORD ROMER. I need not pursue the matter further. I agree with the judgment of DONOVAN, J., in which the same reasoning as that which I have tried to express will be found. Counsel for the taxpayer fails to make good his point that later events have in any way disabled the authority in this court of *Hood-Barrs v. Inland Revenue Comrs.* (1). Treating myself, therefore, as bound by that decision, the inevitable result is that this appeal must be dismissed.

BIRKETT, L.J.: I agree. I hope it will not be thought improper if I say that I could have wished that these matters might have been decided on their merits, untrammelled by any previous authority, because I have been much attracted by the force of the argument addressed to this court by counsel for the taxpayer. He stated, at the very outset of the appeal, what was the essential question which this court had to determine. That was, in its simplest form:

A Is an out-and-out gift, made by a father to his children, a "settlement" within the meaning of s. 21 of the Finance Act, 1936, and sub-s. (9) (b) of the same section, which gives an enlarged meaning to the word "settlement"? The moneys paid into the Post Office Savings Bank accounts of the two young children, Michael and Heather, were out-and-out, absolute and unconditional gifts. Also the bestowal of the £1,000 three per cent. Defence Bonds equally

B was an unconditional and absolute gift. Posing the question as counsel stated it, it is: Is such a gift a "settlement" within the terms of s. 21 of the Act of 1936? Counsel says that, if it is held to be so, it is making use of the word "settlement" in a way that has never been used before and ought not to be used now.

C I was greatly attracted by the language of LORD SIMONDS in his speech in the *St. Aubyn* case (5), part of which was quoted by my Lord, and a further part of which I myself would like to quote. After citing LORD WENSLEYDALE, LORD SIMONDS said ([1951] 2 All E.R. 485):

D "This is true doctrine which I must bear in mind as I listen to the constant refrain of learned counsel for the Crown that this or that is just the transaction at which this or that section is aimed. The question is not at what transaction the section is according to some alleged general purpose aimed, but what transaction its language according to its natural meaning fairly and squarely hits."

In the argument which was addressed to us, in which counsel for the taxpayer substituted the word "gift" in the section for the word "settlement", he

E stated that in that form it was quite unworkable. I merely mention those matters to emphasise what I have ventured to say, that I could have wished that we had not been bound by the two authorities by which, I think, we are bound. *Hood-Barrs v. Inland Revenue Comrs.* (1) was decided in November, 1946; *Yates (Inspector of Taxes) v. Starkey* (7) was decided in 1951. As my Lord has said, those two cases are binding on us today. It is interesting to observe

F that in the *Hood-Barrs* case (1), both *Morton's* case (3) and *Chamberlain's* case (4) were dealt with at some length. The general commissioners in the *Hood-Barrs* case (1) say (27 Tax Cas. 388):

G "... we do not consider that the conclusion we have arrived at conflicts with the decision of the House of Lords in the case of *Chamberlain v. Inland Revenue Comrs.* (4) decided on June 9, 1943. In that case settlements, within the generally accepted meaning of the term, were in existence and the question turned upon 'income arising under the settlement' and 'property comprised in the settlement' under the provisions of the Finance Act, 1938, s. 38, and the definition of settlement in s. 41 (4) (b) of that Act. In this definition the words 'or transfer of assets' do not occur.

H We are of opinion that this is of importance in view of LORD MACMILLAN's statement in the *Chamberlain* case (4), 'that the settlement or arrangement must be one whereby the settlor charges certain property of his with rights in favour of others.' In our view LORD MACMILLAN was considering whether the various transactions constituted an arrangement and a settlement within the meaning of s. 38 and s. 41 (4) (b) of the Finance Act, 1938, having regard to the particular terms of the latter and the facts of the case. The inclusion of the words 'or transfer of assets' in sub-s. (9) (b),

s. 21, of the Finance Act, 1936, in our view, puts an entirely different complexion on the matter."

Therefore, they are saying that they are dealing with a different statute, and counsel for the Crown emphasised the same point here. WROTTESELEY, J., also proceeded on the same footing, because he said ([1945] 1 All E.R. 506):

"Similarly, I do not think that a discussion of the Finance Act, 1938, s. 38, can throw any light on the proper meaning of the word 'settlement' in the Act of 1936. For the purposes of that section, the expression 'settlement' was once more defined to include any disposition, trust, covenant, agreement or arrangement. Transfer of assets was, therefore, designedly omitted."

But LORD GREENE, M.R., dealt with the same matter, and his language has already been quoted by my Lord today. It is true that *Morton's* case (3) and *Chamberlain's* case (4) were both considered in the *Hood-Barrs* case (1), but in 1949 LORD NORMAN in the *Vestey* case (2), dealing with *Morton's* case (3), said ([1949] 1 All E.R. 1119):

"LORD MONCRIEFF dissented. He held that 'settlement' remained the dominant word and that a settlement meant 'the charging of the property of the settlor with rights constituted in favour of others'."

He went on to deal with the *Chamberlain* case (4), and said (*ibid.*):

"There were additional grounds on which the judgment of this House was based, but the rule to be deduced from the case is that the property comprised in the settlement is that and that only in respect of which some beneficial right is created in favour of beneficiaries under the settlement."

I venture to make these observations to emphasise my wish that a decision of the kind we are called on to make, involving circumstances where fathers make out-and-out unconditional gifts of this kind to their children, might have been decided on the merits, but, having regard to the two decisions which have been cited to us today, I do not think this court has any course open to it but to say that it is bound by those decisions, and, therefore, this appeal must be dismissed.

ROMER, L.J.: I agree that this appeal must fail in this court, and I do so because of the decision in the *Hood-Barrs* case (1) which is, in my view, still binding on us. In these circumstances, no useful purpose would be served by my expressing any opinion on the contention which has been advanced before us by counsel for the taxpayer, that an out-and-out gift is not within s. 21 of the Act of 1936 as being a "settlement." Perhaps, however, I may be permitted to say that, had the matter been *res integra*, I should have regarded that contention as one of considerable weight.

Appeal dismissed.

Solicitors: *Tyrrell Lewis & Co.* (for the taxpayer); *Solicitor of Inland Revenue* (for the Crown).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

ADLER v. BLACKMAN.

med. C.A. post p. 945.

[QUEEN'S BENCH DIVISION (Ormerod, J.), May 9, 1952.]

Landlord and Tenant—Duration of tenancy—Weekly tenancy—Tenancy for one year at weekly rent—Holding over at weekly rent—Notice to quit on basis of weekly tenancy—Claim for compensation or new lease under Landlord and Tenant Act, 1927 (c. 36), s. 4 (1), s. 5 (1) (2)—Unsuccessful application to court—Rebuttal of presumption of yearly tenancy.

A weekly tenant entered into an agreement with his landlord for a tenancy for one year of shop premises at a rent of £3 a week. At the end of the year he held over at the same rent, and later was given notice to quit on the basis that he held a weekly tenancy. He claimed compensation, or, alternatively, a new lease under the Landlord and Tenant Act, 1927, s. 4 (1) and s. 5 (1) and (2), and he applied to the court therefor, but without success. In an action by the landlord for possession,

HELD: the presumption that at the end of the tenancy for a year the tenant had held over on a yearly tenancy was rebutted by the fact that the rent which he paid under the tenancy for a year was £3 per week and was not calculated by reference to a yearly sum and that the tenancy was for only one year and not for a term, and also by the conduct of the parties in serving and accepting a notice to quit given on the basis that the tenancy was a weekly one. The tenancy was, therefore, a weekly one and the notice to quit was valid.

Dictum of MAUGHAM, J., in *Ladies' Hosiery & Underwear, Ltd. v. Parker* ([1930] 1 Ch. 327, 328), applied.

Covered Markets, Ltd. v. Green ([1947] 2 All E.R. 140), not followed.

Semble: having elected to treat the notice to quit as valid by proceedings under the Landlord and Tenant Act, 1927, s. 4 (1) and s. 5 (1) and (2), the tenant could not subsequently raise the question of its validity in an action for possession.

AS TO PRESUMPTION OF YEARLY TENANCY, see HALSBURY, Hailsham Edn., Vol. 20, p. 124, para. 137; and FOR CASES, see DIGEST, Vol. 31, Replacement, pp. 49-55, Nos. 2074-2121.

Cases referred to:

- (1) *Ladies' Hosiery & Underwear, Ltd. v. Parker*, [1930] 1 Ch. 304; 99 L.J.Ch. 201; 142 L.T. 299; Digest Supp.
- (2) *Covered Markets, Ltd. v. Green*, [1947] 2 All E.R. 140; 2nd Digest Supp.
- (3) *Davis (W.) (Spitalfields), Ltd. v. Huntley*, [1947] 1 All E.R. 246; on appeal, [1947] 2 All E.R. 371, n.; 2nd Digest Supp.

ACTION for damages, possession, and mesne profits.

The landlord, Szoel Noa Adler, the plaintiff in the action, claimed from the tenant, Philip Blackman, possession of shop premises, 29 Cheshire Street, Bethnal Green, by virtue of a notice to quit given on July 27, 1950, on the basis that the tenancy was a weekly one. The tenant contended that the notice to quit was invalid on the ground that he was entitled to six months' notice, his tenancy being an implied yearly tenancy on a holding over with the landlord's consent after the expiration of an agreement for a tenancy for one year. The landlord contended that the presumption of a yearly tenancy was rebutted by the payment of a rent calculated and payable by the week, by the fact that the tenant had been a weekly tenant before the agreement for a year's tenancy, and by the conduct of the tenant in claiming and applying to the court for compensation or a new lease under the Landlord and Tenant Act, 1927, s. 4 (1) and s. 5 (1) and (2), after receiving the notice to quit. He submitted that the tenant, having elected to treat the notice as valid by

taking such proceedings under the Act of 1927, could not now raise the question of its validity as a defence.

Avgherinos for the landlord.

Hawser for the tenant.

ORMEROD, J.: The landlord claims damages from the tenant, possession of premises known as 29 Cheshire Street, Bethnal Green, and certain mesne profits. Before June, 1948, one George Joseph Tibber, the then landlord, had let the premises to the tenant on a weekly tenancy at a weekly rent of 28s. 6d. That tenancy continued for some years until Jan. 13, 1948, when the landlord and the tenant entered into an agreement for a tenancy for twelve months. In that agreement, which was otherwise an ordinary tenancy agreement, there was a reservation of the rent in these terms:

"To hold for the term of one year to commence from Dec. 22, 1947, at the inclusive weekly rent of £3 payable weekly in advance on every Monday in each week during the whole of the tenancy the first four weeks to be paid on the signing hereof . . ."

Under the agreement the landlord could call on the tenant to carry out any proper repairs with a proviso that, in case of non-compliance within a period of thirty days after the notice, the landlord could execute the repairs. There was also a proviso for re-entry if the rent was in arrear for a period of fourteen days. The tenant remained in possession for the year for which the agreement was effective, and is now in possession. Up to the time when the notice to quit was served he had regularly paid the weekly rent of £3. At a date before July 27, 1950, the present landlord purchased the property, subject to the defendant's tenancy, and on July 27, by his solicitor, he served on the tenant notice to quit the premises. That notice was served on the basis that the tenant held the premises on a weekly tenancy, and its validity is not questioned if, in fact, the tenancy was a weekly one. But the tenant says that, on the termination of his year's tenancy, he held over, not on a weekly tenancy, but on an implied yearly tenancy which could only be determined by six months' notice to quit, expiring at the end of any complete year of the tenancy. At the time, however, the tenant did not question the validity of the notice. He accepted it, and caused his solicitors to serve, on Aug. 2, 1950, a notice on the landlord, pursuant to the Landlord and Tenant Act, 1927, claiming compensation for loss of goodwill, or, in lieu thereof, a new lease of the premises. On Aug. 25, 1950, the tenant applied to the court for compensation, or, alternatively, for a new lease. That application was eventually granted by a referee, but the landlord applied for the matter to be considered by the county court judge, who overruled that decision, with the result that the tenant did not get his new lease. He did not appeal from that decision. He attempted to enter into negotiations with the landlord for a new lease, but without success. He remained in the premises, and on Mar. 19, 1952, the landlord issued the writ in this action claiming possession of the premises. On proceedings under R.S.C., Ord. 14, the tenant for the first time set up the contention that the notice to quit was invalid because he held the premises on a yearly tenancy and had been given a week's notice.

The questions to be decided are: Was the tenant holding these premises as a tenant from year to year, in which case, of course, this notice was invalid, or was he holding them on a weekly tenancy, in which case admittedly the notice is good? Secondly, even if the notice was invalid, as the tenant elected to treat it as valid by taking proceedings under the Landlord and Tenant Act, 1927, can he now say that the notice was invalid and that he is entitled to remain in possession of the premises? So far as the first point is concerned, it is clearly established that, if a tenant holds over with the consent of the landlord at the expiration of a period reserved by a lease or tenancy agreement, an implied

tenancy is set up, and the presumption is that that tenancy is a yearly tenancy on the terms of the instrument creating the original tenancy so far as they are consistent with a yearly tenancy, but that presumption may be rebutted by various circumstances including, of course, the terms of the agreement itself. I am asked by the landlord to say that the fact that the original tenancy was admittedly a weekly tenancy is a circumstance which should be taken into account in rebutting this presumption. The agreement for a tenancy for twelve months, in which the rent was expressed to be payable by the week and was calculated by the week and not by the year, says the landlord, is also a very strong circumstance to take into account. Further, he says that the conduct of the parties after the expiration of the period of tenancy, and, particularly, when the notice to quit was served by the landlord on the tenant, establishes beyond doubt the inference that the tenancy was not a tenancy from year to year.

In *Ladies' Hosiery & Underwear, Ltd. v. Parker* (1) the tenancy provided for the payment of a weekly rent of £2, the rent being reserved by the week and not by the year. As counsel for the defendant has pointed out, the right of forfeiture there arose when the rent was only three days in arrear, and not fourteen days as in this case. MAUGHAM, J., said ([1930] 1 Ch. 328):

"The inference that [a tenancy from year to year] is the intention of the parties is an inference drawn from the fact that, in the ordinary case, the payment of rent is by reference to a yearly rent. It is true that the rent may be paid each year, or half-yearly or quarterly, or even weekly; but in those cases, at any rate so far as the authorities are concerned, the rent is always a payment by reference to a year's rent . . . In the present case the lease or agreement is one for three years at a rent of £2 a week. It is not a lease for three years at the rate of £104 per annum payable weekly . . . I cannot find, and counsel have been unable to find, any case exactly in point; but I have come to the conclusion that there is no reason for extending the views, which are binding on me, as to the terms which justify the inference that a tenancy is from year to year, and that in this case, narrow as the distinction is, the holding over of the premises after the expiration of the agreement of Oct. 10, 1914, would have resulted only, and did result only, in the tenant's being a tenant from week to week."

In *Covered Markets, Ltd. v. Green* (2) a tenant held over at the expiration of a tenancy for seven years at a rent of £3, payable weekly. MACNAGHTEN, J., decided that the presumption was that the tenancy was a yearly one, and he saw no reason to rebut that presumption. He distinguished that case from MAUGHAM, J.'s decision on the ground that the premises were a fishmonger's shop, whereas the premises in the *Ladies' Hosiery* case (1) were merely a piece of ground. I find it difficult to appreciate the distinction, but MACNAGHTEN, J., very clearly held that the proper inference from the circumstances was that there was a yearly tenancy on the termination of the seven years.

I have to consider whether in the present case there is a yearly tenancy or whether the circumstances are such that the presumption of a yearly tenancy has been rebutted and the tenant holds the premises on a weekly tenancy only. I have come to the conclusion that I ought to hold that the presumption has been rebutted and that the tenancy is a weekly one. I am not influenced by the situation before the agreement for a yearly tenancy was entered into. I do not think I ought to regard that as relevant to the consideration of the circumstances because it may well be that the parties decided that they would have the tenancy on an entirely new basis. There is no evidence about that one way or the other. The terms of the tenancy under the agreement were very different from the terms of the tenancy before it, including the rent, the terms relating to repairs, and so on, but I do take into consideration strongly the fact that the rent was expressed to be a rent of £3 per week and was never calculated by reference

to a yearly sum. It was always paid weekly, and, after the term of the agreement had expired, it continued to be paid weekly right up to the time when the notice to quit was given. I also take into consideration the conduct of the parties subsequently to the expiration of the term reserved by the agreement and up to and after the time when the notice to quit was given. The notice to quit was served on the basis that the tenancy was a weekly one, and was accepted without question by the tenant. Clearly the tenant's view was that he was holding on a weekly tenancy and not on a yearly tenancy, and I see no reason why that should not be taken into account in deciding whether the presumption of a yearly tenancy has been rebutted. Even if that were not the case, however, I think that, where as here, the original tenancy is not for a period of years, but is for only one year, and where the rent payable is expressed as a weekly sum and not by reference to a yearly rent, the presumption is rebutted that there is a yearly tenancy and the tenant must be taken to be holding over on the basis of a weekly tenancy on the terms of the agreement so far as they are consistent therewith. It follows that the notice was valid and the landlord is entitled to succeed in this action.

The further point has been raised by the landlord that, even if this notice was an invalid notice, the tenant cannot now raise that as a defence, because he has elected to treat it as a valid notice by reason of the proceedings which he took under the Landlord and Tenant Act, 1927. In view of my decision on the tenancy, it is not necessary for me to decide that point, but, if I had to decide it, I should have followed the decision of HENN COLLINS, J., in *W. Davis (Spitalfields), Ltd. v. Huntley* (3) and have said that the tenant, having claimed a new lease under s. 5 (1) of the Landlord and Tenant Act, 1927, had elected to accept the weekly notice and so could not say in these proceedings that it is invalid.

Judgment for landlord for possession and £275 mesne profits.

Solicitors: *Adler & Adler* (for the landlord); *Manches & Co.* (for the tenant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

R. v. COCKRAM (VALUATION OFFICER). *Ex parte* EAST MIDLANDS ELECTRICITY BOARD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Devlin and Gorman, JJ.), May 21, 1952.]

Rates—Electricity hereditament—Power to amend deleted assessment—Rating and Valuation Act, 1925 (c. 90), s. 20 (1)—Local Government Act, 1948 (c. 26), s. 92 (3), s. 92 (4)—Rating and Valuation (Transitional) Regulations, 1949 (S.I., 1949, No. 2313), reg. 3 (1).

On Mar. 27, 1946, an electricity company made a proposal, under the Rating and Valuation Act, 1925, s. 37 (1), for the amendment of the valuation list in respect of two hereditaments of which it was the occupier, on the ground that the assessments were excessive and should be reduced. On Apr. 1, 1948, before the proposal was determined, the hereditaments vested in the East Midlands Electricity Board under the Electricity Act, 1947, and, under the Local Government Act, 1948, s. 92 (3), the assessments were deleted from the valuation list, lines being ruled through the words and figures so as to leave legible the original entries, in accordance with the Rating and Valuation Acts (Form of Valuation List) Rules, 1932, r. 6 (ii). Under the Rating and Valuation (Transitional) Regulations, 1949, reg. 3 (1), the proposal of Mar. 27, 1946, was to be treated for the purposes of the Act of 1948 as a proposal served on the valuation officer on Feb. 1, 1950, under s. 40 of that Act, and on Oct. 18, 1950, it was agreed by the board, the rating authority, and the valuation officer that the valuation list should be altered in pursuance of the proposal with effect from Oct. 1, 1945. By a

letter, dated Oct. 20, 1951, however, the valuation officer said that, as the hereditaments had been deleted from the valuation list under s. 92 (3) of the Act of 1948, the alteration could not be made.

HELD: as the duty of the rating authority to remove the hereditaments from the valuation list arose under s. 92 (3) of the Act of 1948, and as, under s. 92 (4), the provisions of s. 92 (3) were to be without prejudice to the making or effect of any proposal made under the provisions of Part III of the Act (which contained s. 40) relating to the alteration of valuation lists, the valuation list could be altered so as to give effect to the proposal of Mar. 27, 1946, notwithstanding that, under the Rating and Valuation Act, 1925, s. 20 (1), the valuation list as in force at the time when the value of the premises was to be determined was to be conclusive evidence of the values of the hereditaments included in the list.

FOR THE LOCAL GOVERNMENT ACT, 1948, s. 92, see HALSBURY'S STATUTES, Second Edn., Vol. 20, p. 298.

MOTION by the East Midlands Electricity Board for an order of mandamus directed to the valuation officer for the Northampton valuation area requiring him to cause such alteration to be made in the valuation list for the county borough of Northampton as would give effect to a proposal for the amendment of the valuation list which was to be treated as having been made by the board on Feb. 1, 1950.

On Mar. 27, 1946, a proposal for the amendment of the valuation list in respect of two hereditaments occupied by the Northampton Electric Light and Power Co., Ltd., for the purposes of its works was made by the company under the Rating and Valuation Act, 1925, s. 37 (1), on the ground that the assessments were incorrect, excessive, and unfair, and ought to be reduced. The proposal had not been determined by the assessment committee on Apr. 1, 1948, when the hereditaments vested in the East Midlands Electricity Board under the Electricity Act, 1947. On June 11, 1948, pursuant to the Local Government Act, 1948, s. 92 (3), the assessment committee caused the hereditaments to be deleted from the valuation list. The deletion was made in accordance with the Rating and Valuation Acts (Form of Valuation List) Rules, 1932, r. 6 (ii), by ruling lines through the words and figures in such manner as to leave legible the original entries. By the Rating and Valuation (Transitional) Regulations, 1949, reg. 3 (1), the proposal of Mar. 27, 1946, was to be treated as a proposal served on the valuation officer on Feb. 1, 1950, under s. 40 of the Act of 1948. On Feb. 18, 1950, the valuation officer gave to the board notice of objection to the proposal, and on Feb. 28, 1950, the board gave notice of appeal to the local valuation court. On Oct. 18, 1950, the board, the rating authority, and the valuation officer (being all the parties to the board's appeal to the local valuation court) agreed that the valuation list should be altered in pursuance of the proposal, with effect from Oct. 1, 1945, but by a letter, dated Oct. 20, 1951, the valuation officer said that, since the hereditaments had been deleted from the valuation list in accordance with s. 92 (3) of the Act of 1948, it was no longer possible for an alteration to be made to give effect to the agreement of Oct. 18, 1950. In consequence of his refusal the board was unable to obtain from the rating authority a refund of £17,139 7s. 11d., in respect of rates overpaid by the electricity company between Oct. 1, 1945, and Mar. 31, 1948.

Sir Arthur Comyns Carr, Q.C., and Squibb for the applicants, East Midlands Electricity Board.

The Attorney-General (Sir Lionel Heald, Q.C.), and Maurice Lyell for the valuation officer.

LORD GODDARD, C.J., stated the facts and continued: By the Local Government Act, 1948, s. 85 (1):

" . . . no premises which are or form part of . . . (b) a hereditament occupied by the British Electricity Authority . . . shall be liable to be rated

or be included in any valuation list or in any rate, and . . . the British Electricity Authority . . . shall . . . make such payments for the benefit of local authorities as are provided for by [s. 96 of the Act] in lieu of the rates which would . . . be payable to rating authorities in respect of those hereditaments."

By s. 92 (3) of the Act it was the duty of assessment committees to cause all such alterations of the valuation lists to be made as were necessary to secure that no hereditament occupied on Apr. 1, 1948, by the British Electricity Authority (other than a hereditament used as a dwelling-house) remained on the valuation list. On June 11, 1948, pursuant to s. 92 (3), the assessment committee caused the hereditaments in regard to which the proposal of Mar. 27, 1946, was made to be deleted from the list. Under the Rating and Valuation Acts (Form of Valuation List) Rules, 1932 (S.R. & O., 1932, No. 395), r. 6 (ii), where a valuation list has to be altered for any reason:

"a line shall be ruled through any words or figures which require to be omitted . . . in such manner as to leave legible the original entries."

Thus, if it is necessary to refer to the original entry, there will be no difficulty in seeing what it is. That is the way in which the hereditaments were deleted from the valuation list in this case.

The Attorney-General has contended that, as the Rating and Valuation Act, 1925, s. 20 (1), provides that

". . . the valuation list as in force at the time when the rate is made or the value of the premises is to be determined, shall be conclusive evidence of the values of the several hereditaments included in the list . . .,"

there is nothing which will entitle the rated occupier of the premises to recover the rates after a hereditament is removed from the valuation list. It would be strange, however, if an Act which did not contain clear words to that effect were to deprive a person of a right which had accrued before the Act came into force. The ratepayers had a right to make the proposal of Mar. 27, 1946, and, if the proposal was found to be well founded, as it was, they have a right to recover the money. By the Rating and Valuation (Transitional) Regulations, 1949, reg. 3 (1):

"Any proposal for the amendment of a valuation list made by or served on a rating authority before the appointed day [Feb. 1, 1950] under s. 37 (1) of the Act of 1925, being a proposal which has not been determined by an assessment committee, shall be treated for the purposes of the Act of 1948 as a proposal made by or served on a valuation officer on the said day under s. 40 or s. 41 of that Act as the case may require."

In my opinion, the matter is put beyond doubt by s. 92 (4) of the Local Government Act, 1948. The duty of the rating authority to remove the hereditaments from the valuation list arises under s. 92 (3), and by s. 92 (4):

"The provisions of the last preceding sub-section shall be without prejudice to the making or effect of any proposal made under the provisions of Part III of this Act [which includes s. 40 and s. 41] relating to the alteration of valuation lists by means of proposals made by or served on valuation officers . . ."

It seems to me that the words at the beginning of s. 92 (4) are conclusive of the matter, and, accordingly, mandamus must go.

DEVLIN, J.: I agree.

ORMAN, J.: I also agree.

Mandamus granted.

Solicitors: *R. A. Finn*, agent for *A. J. D. Langford*, Nottingham (for the applicants); *Solicitor of Inland Revenue* (for the valuation officer).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

GLYNN AND ANOTHER v. SIMMONDS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Devlin and Gorman, JJ.), May 20, 1952.]

Criminal Law—Vagrancy—Frequenting a “place of public resort” with intent to commit felony—Tattersall’s enclosure on racecourse—Charge for admission—Right to refuse admission—Vagrancy Act, 1824 (c. 83), s. 4.

The appellants were convicted of, being suspected persons, having frequented a place of public resort, namely, Tattersall’s enclosure at Goodwood Racecourse during a race meeting, with intent to commit a felony. Admission to the enclosure was open to the public on payment of 30s., and could be refused to any person by the occupier.

HELD: notwithstanding the charge for admission and the right of the occupier to exclude any person, the enclosure was a “place of public resort” within the meaning of the Vagrancy Act, 1824, s. 4, and the appellants were rightly convicted.

AS TO SUSPECTED PERSONS, see HALSBURY, Hailsham Edn., Vol. 25, p. 442, para. 790 (14); and FOR CASES, see DIGEST, Vol. 37, pp. 363, 365, Nos. 1651-1662.

CASE STATED by the appeal committee of West Sussex Quarter Sessions.

The defendants appealed to quarter sessions against their conviction on Aug. 3, 1951, by a court of summary jurisdiction sitting at Chichester, of, being suspected persons, having on Aug. 2, 1951, frequented a place of public resort, namely, Tattersall’s enclosure, Goodwood Racecourse, West Sussex, with intent to commit a felony, namely, to steal therein, contrary to the Vagrancy Act, 1824, s. 4. At a race meeting attended by a large number of the public on Aug. 2, 1951, the defendants were arrested in Tattersall’s enclosure on the racecourse by two police officers in plain clothes who observed one of them on three occasions put his right hand under the jacket of a man in the region of his hip pocket while the other pushed the man from behind. Tattersall’s enclosure comprised the grand stand, the space between the grand stand and the actual course which was known as “the lawn” where bookmakers stood in two or three rows, and another part connected with the lawn by a passage-way under the grand stand by which access was obtained to two refreshment bars and a lavatory. Members of the public were admitted to Tattersall’s enclosure for the day only on payment of £1 10s. and also to another enclosure, the paddock, on payment of a further £2 10s. It was assumed on the facts without evidence that the occupiers of Tattersall’s enclosure had the right to refuse admission to anyone who applied therefor and also on reasonable grounds to require anyone to leave. At the hearing of the appeal on Sept. 28, 1951, the defendants contended that there was no evidence to bring them within the category of suspected persons or that they frequented any place, and they further said that Tattersall’s enclosure was not a place of public resort. The appeal committee held, as contended by the prosecutor, a superintendent of police, that there was such evidence and that Tattersall’s enclosure was a place of public resort. They, therefore, dismissed the appeals, and the defendants appealed.

M. J. Morris for the defendants.

P. A. Harmsworth for the prosecutor.

LORD GODDARD, C.J.: The defendants were two pickpockets who were observed by two police officers in Tattersall’s enclosure at the Goodwood race meeting last summer on two occasions pushing through the crowd round the bookmakers’ stands and endeavouring to pick pockets. It is contended that that conduct brought the defendants within the category of suspected persons. They then walked along a crowded passage-way and one of them entered a lavatory which was also crowded and the other one stood outside.

Pickpockets frequently work in pairs, one trying to pick pockets while the other jostles the victim. When the one defendant came out of the lavatory the two defendants walked through the crowd together to the refreshment bars. On the way they endeavoured to pick a pocket, and then, when they were standing at one of the bars, the police arrested them.

I cannot see that the justices could have had any option but to come to the conclusion that the defendants were frequenting this place for the purpose of committing a felony. The question, however, arises whether this enclosure was a "place of public resort". They were in Tattersall's enclosure, to which the public are admitted on payment of 30s. A place does not cease to be a place of public resort because the public have to pay to go there. An exhibition is obviously a place of public resort. The Zoological Gardens are, no doubt, a place of public resort because the public are invited to go there, and they enter the gardens on payment of a sum of money. So is a racecourse—not an open course like Newmarket, Brighton or Ascot, but a course in a park. They are all places of public resort because the owners or occupiers invite the public to go there, but it is said that because a person who has been warned off, or any other undesirable character, will not be allowed into Tattersalls or into a racecourse, that prevents it from being a place of public resort. It must be to some extent a question of degree, but I cannot see that property to which the owner invites the public to resort becomes any the less a place of public resort because he refuses to allow a particular individual or individuals to enter. If he limits admission to a certain category of people, for instance, if he allows only members of the universities of Oxford or Cambridge to go to a stand or a window he has got at the Boat Race, it may be said that that stand or window is not a place of public resort. It has been suggested to us that a good analogy is the Royal Enclosure at Ascot, but that is not a place of public resort because the public are not invited to go to the Royal Enclosure. Those who wish to go to the Royal Enclosure have to apply for permission. Everybody is invited to Tattersall's enclosure, subject to his paying 30s. and subject to the right of the keeper of the gate to say he will not be allowed to enter. The justices have found that the enclosure was a place of public resort, and, in my opinion, they had no option since it did not cease to be a place of public resort because a payment for entry was demanded, nor, in my judgment, did it cease to be a place of public resort because the occupier reserved the right to refuse admission to some particular individual or individuals. For these reasons I think the justices came to a right decision and this appeal is dismissed with costs.

DEVLIN, J.: I agree.

GORMAN, J.: I agree.

Appeal dismissed.

Solicitors: *Henry I. Sydney & Co.* (for the defendants); *Walmsley & Stansbury*, agents for *J. E. Dell & Loader*, Shoreham-by-Sea (for the prosecutor).

[*Reported by F. A. AMES, Esq., Barrister-at-Law.*]

Re SPENSLEY'S WILL TRUSTS. BARCLAYS BANK, LTD.
v. STAUGHTON AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), May 13, 14, 1952.]

Charity—Cy-près doctrine—Application of trust fund as National Trust may decide—Purposes for which fund applicable.

A By his will dated Mar. 24, 1932, a testator, who died on Mar. 3, 1938,
devised land, dwelling-houses and other buildings at Westoning, and also
the lordship of the manor and an advowson, to the National Trust for
Places of Historic Interest or Natural Beauty to hold them in trust for F.
for life, and after her death for S. for life, and after her death for the use of
the High Commissioner for Australia as a country residence. The will
B further provided: "Should the government of the Commonwealth of
Australia refuse this bequest at the time of my death or renounce it at any
future date then for such other uses preferably for some purpose in connection
with Australia as the said National Trust and [F.] if then alive may jointly
decide or if the said [F.] be not then alive as the said National Trust may
decide but so that the said estate of Westoning may as far as possible be
C kept intact." The testator suggested that (if the Australian government
refused the gift) a certain part of the said land should be sold, but that the
remainder of the estate should be maintained as a small residential agricultural
estate, the proceeds of sale of the part sold and the income from the rest
being used by the National Trust in the upkeep and maintenance of the
said house. The National Trust was to be at liberty to use capital as income.
D The testator bequeathed the furniture and other contents of the said house
to follow the trusts created in respect of the estate. On July 11, 1938, the
National Trust disclaimed "all estates, interests and powers therein given
to or vested in it as trustee or devolving under" the will. On Sept. 3, 1938,
the High Commissioner for Australia disclaimed all his interest, and that
of the government of Australia, under the will. F. sold the estate and the
E furniture and other contents of the house. On the question who, subject
to the life interests of F. and S., was entitled to the proceeds of sale,

HELD: the effective dispositive power must be regarded as having been
reposed by the testator in the National Trust, and the power was to apply
the property to purposes either the same as, or in pari materia with, its
own purposes as an incorporated charity and, therefore, in the circumstances
F the ultimate trusts were charitable, and a scheme would be directed to be
brought in.

Re Flinn ([1948] 1 All E.R. 541), applied.

Will—Revocation—Construction of revocatory clause in codicil—Will "to be read as if the name of [M.B.] did not occur therein"—Gift to children of M.B.—Effect on special power of appointment given to M.B.

G By his will the testator further gave a dwelling-house to trustees to allow
F. to have the use thereof for her life and after her death for M.B. for life,
and after her death to stand possessed of the said trust premises for such
child or children of the said M.B. who might attain twenty-one years as
she might appoint, or, failing such appointment, then for the first or other
son of M.B. who first attained the age of twenty-one years, or, if there were
H no such son, then for the eldest daughter of M.B. who first attained the age
of twenty-one years, with remainders over. By a codicil, the testator
provided: "I hereby revoke all provisions made in my said will for my
niece M.B. and I direct that my said will is to be read as if the name of my
said niece M.B. did not occur therein. In lieu thereof I bequeath the sum
of £2,000 to be added . . ." to a trust fund which he described as being for
the benefit of M.B. and her issue. As to the effect of the codicil, it being
accepted that M.B.'s direct personal beneficial interests were revoked,



HELD: the revocation was confined to the beneficial interests of M.B. under the will leaving the beneficial interests of her issue unaffected by the codicil, but the special power of appointment among children given to M.B. was, in a sense, beneficial to M.B., and, therefore, that also was revoked.

Re Wray ([1951] 1 All E.R. 375) and *Re Brough* (1888) (38 Ch.D. 456), applied.

AS TO PARTIAL REVOCATION OF A WILL, see HALSBURY, Hailsham Edn., Vol. 34, pp. 78-80, paras. 110, 111; and FOR CASES, see DIGEST, Vol. 44, pp. 324-330, Nos. 1560-1609. A

Cases referred to:

- (1) *Re Flinn*, [1948] 1 All E.R. 541; [1948] Ch. 241; [1948] L.J.R. 923; 2nd Digest Supp.
- (2) *Re Verrall*, [1916] 1 Ch. 100; 85 L.J.Ch. 115; 113 L.T. 1208; 80 J.P. 89; 8 Digest 260, 217. B
- (3) *Re Garrard*, [1907] 1 Ch. 382; 76 L.J.Ch. 240; 96 L.T. 357; 8 Digest 294, 716.
- (4) *Re Norman*, [1947] 1 All E.R. 400; [1947] Ch. 349; [1947] L.J.R. 780; 177 L.T. 125; 2nd Digest Supp.
- (5) *Prentice v. Tabor*, (1884), 52 L.T. 85; 44 Digest 330, 1603. C
- (6) *Re Wray*, [1951] 1 All E.R. 375; [1951] 1 Ch. 425.
- (7) *Re Brough*, (1888), 38 Ch.D. 456; 57 L.J.Ch. 436; 58 L.T. 788; 44 Digest 324, 1559.

ADJOURNED SUMMONS to determine whether, on the true construction of the will and codicil of Howard Spensley, deceased, and in the events which had happened, (i) subject to the successive life interests of the defendants Ethel Fairchild and Tassie Mary Skene the trusts contained in cl. 14 and cl. 15 of the will, concerning the testator's estate of Westoning and the furniture and contents of the manor house at Westoning, failed or were good charitable trusts; (ii) (a) the provisions of the codicil revoked all the trusts contained in cl. 12 of the will for the benefit of the children of the defendant Mary Gluckman (in the will and codicil called Mary Brignoli) a niece of the testator, and also a power of appointment conferred on the said Mary Gluckman, so as to accelerate the trusts in remainder therein declared after the life estate of the first tenant for life, Ethel Fairchild, or (b) notwithstanding the provisions of the said codicil, the said trusts in favour of the said Mary Gluckman's children and the said power of appointment or any and which of the same remained valid and effective. D

Hillaby for the plaintiffs, the trustees.

Pennyquick, Q.C., and *E. B. Stamp* for the first defendant, a nephew of the testator. E

Bradburn for the second and ninth defendants, respectively a child of the first defendant and a sister of the testator. F

D. S. Chetwood for the third and eighth defendants, respectively the younger child of the first defendant and a sister of the testator. G

S. Pascoe Hayward, Q.C., and *N. S. S. Warren* for the fourth, sixth and seventh defendants, respectively a niece of the testator and her two younger children.

J. A. R. Finlay for the fifth defendant, the eldest son of the fourth defendant.

Denys B. Buckley for the Attorney-General.

VAISEY, J.: The testator, Mr. Howard Spensley, of Westoning Manor, in the county of Bedford, and 5, Montpelier Place, Knightsbridge, who, as stated in his will, at one time was high sheriff of the county of Bedford, made his will on Mar. 24, 1932. There is a codicil, which is not material for the purposes of the question now to be considered. The testator died on Mar. 3, 1938. His will and the codicil were in due course proved in the Oxford District Registry by the surviving executors. By cl. 14 of his will, he disposed, inter alia, of his land, houses and buildings at Westoning and adjoining parishes, and also the lordship H

of the manor of Westoning and the advowson of the living of Westoning to the National Trust for Places of Historic Interest or Natural Beauty, thereafter called the National Trust. The National Trust was directed to hold them in trust for his sister, Mrs. Fairchild for life; after her death, for his other sister, Mrs. Skene for life; and after the death of both of those sisters, for the use of the High Commissioner of Australia, to be used by him as a country residence.

A On July 11, 1938, the National Trust executed a document of disclaimer in this form:

"The National Trust hereby disclaims the office of trustee of the will in respect of the said devises and bequests and of all estates, interests and powers therein given to or vested in it as trustee or devolving under the said will."

B On Sept. 3, 1938, in accordance with decisions come to by his government, Lord Bruce, as the High Commissioner for the time being of the government of the Commonwealth of Australia, both on behalf of his government and on behalf of himself, absolutely renounced and disclaimed the devises and bequests in all estates, interests and powers given to or vested in the government of the Commonwealth or devolving on him or the government under the will. So the C National Trust disclaims the trusts and the government of Australia disclaims the beneficial interest under those trusts for itself and for its High Commissioner for the time being.

I now turn to the will to see what the testator says must be done in the latter event. He says:

D "Should the government of the Commonwealth of Australia refuse this bequest at the time of my death or renounce it at any future date then for such other uses preferably for some purpose in connection with Australia as the said National Trust and my sister Ethel Fairchild if then alive may jointly decide . . ."

E Pausing there, the word "then" must refer back, I think, either to the date of the refusal or the subsequent renunciation of the gift. The will goes on:

" . . . or if the said Ethel Fairchild be not then alive as the said National Trust may decide but so that the said estate of Westoning may as far as possible be kept intact."

F The testator then expressed certain wishes in regard to the presentation to the living of Westoning and he expressed the hope that the living might be held by men who had experience in Australia so that a greater knowledge of the two countries might arise. He goes on to suggest that the 38½ acres on the Harlington Road lying within a ring fence might be sold, but that the remainder of the estate should not be sold, but, so far as possible, maintained as a small residential agricultural estate, the income from that estate and the income from the sale G of the 38½ acres to be used by the National Trust in the upkeep and maintenance, internal and external (including the renewal when necessary of the furnishings), of the said house, and the National Trust to be at liberty to use capital as income. Finally, by cl. 15 of the will the testator bequeaths the furniture and contents of the house to the National Trust to be used in connection with the house and to follow the trusts created in respect of the estate. Mrs. Fairchild, H as tenant for life, no doubt, sold the property in question, and it is now represented by a sum of some £9,400 invested. The sale included, not only the land, but also the furniture and contents of the house.

The question is: To whom, in the events which have happened, does that sum of purchase money, or the investments representing it, belong? Particularly, I have to determine whether, on the true construction of the will and in the events which have happened, subject to the successive life estates of the two ladies, the trusts contained in cl. 14 and cl. 15, i.e., the gift of the land and the

gift of the furniture, have failed, or whether the estate and furniture and contents are held on charitable trusts, and, if and so far as necessary, to direct a scheme.

The permutations and combinations of the cases relating to charitable trusts, or borderline charitable trusts, with which the court has to deal seem to be unending, and I suppose there never will be a time, unless the law is in some way drastically altered, in which this problem will not constantly recur in novel and unprecedented forms. One looks at the earlier decisions hoping for guidance, and sometimes finding with guidance a certain amount of perplexity, but a very large number of the cases that arise are not precisely covered by any previous decision and many of them are cases to which the settled principles, however plain they may be as principles, are not very easy to apply with accuracy and conscience.

In *Re Flinn* (1), JENKINS, J., summarised the decisions, if I may say so, with great clarity and in a very attractive and useful way. In *Re Flinn* (1) the gift was of the residuary estate of the testatrix to

“His Eminence the Archbishop of Westminster Cathedral London for the time being . . . to be used by him for such purposes as he shall in his absolute discretion think fit.”

JENKINS, J., held, first, that that was a gift to the Roman Catholic archbishop by virtue of his office and not as a personal gift and that the words “to be used by him for such purposes as he shall in his . . . discretion think fit” did not give him an absolute discretion to use the residuary estate for every kind of purpose, however general the words might appear, or even to use that estate for general charitable purposes, but rather to use it for those charitable purposes which were within his ambit and under his direction as archbishop. In other words, that was a case in which the direction as to the purposes was merely an explanatory or an enlarging expression to show, and to emphasise, that the gift was not a personal gift but was a gift for what I may call archiepiscopal purposes.

The present is a curious case for more reasons than one. Subject to the life estates of the two ladies and in the events which have happened of the disclaimer of the gift by the High Commissioner, the property is placed under the control, in the first instance, of two persons, Mrs. Fairchild, the testator's sister, and a corporate person, the National Trust, with a further direction that if there was no unanimity of decision between those two people, then, in the natural course of events, the decision would rest with the National Trust, it being remembered that the time when this decision would be operative is at and not before the death of the sister who was given the first of the two life interests. I am bound to say that, applying the principle explained rather than laid down by JENKINS, J., in *Re Flinn* (1), it seems to me that I have to look at this case as if the person who has the effective disposing power is the National Trust.

The National Trust is, admittedly, a charity with defined charitable purposes. That is best to be seen from *Re Verrall* (2), where it was held that the purposes for which the National Trust had been incorporated were charitable purposes, and they are expressed by ASTBURY, J. ([1916] 1 Ch. 115), as being

“ . . . plainly public purposes, expressly stated to be for the benefit of the nation . . . ”

He further went on to say that they had no choice of applying them to any other purposes.

It is said that the words which I have read, “preferably for some purpose in connection with Australia”, must necessarily exclude any idea of the purposes to which the National Trust was confined, and in declaring these alternative purposes, which have to be brought into operation in the events which have happened, those words preclude the National Trust from applying the purchase money to the general purposes for which it, the National Trust, was incorporated. I do not think I can accept that. To begin with, the words introduced by the

word "preferably" cannot, I think, be more than a mere predilection, and I think I must so look at this matter that it is the National Trust, not only by way of property, but also by way of power, which has the disposing power over this property now represented by the proceeds of sale.

A It seems to me on the whole, though I agree that this seems to go a little further than *Re Garrard* (3) and a little further also than my own decision in *Re Norman* (4) (both of which are mentioned in the judgment in *Re Flinn* (1)), this decision follows as a necessary sequel to those decisions. It is not so simple, it is not so straightforward, and it is not so clear-cut, but on the whole I think that the National Trust, by virtue not only of this property, but also by virtue of the power which it has, is given only such control over this property and over these proceeds of sale as enables it to dedicate to purposes which are either the same or in *pari materia* with its own proper purposes as an incorporated charity. I do not think that it is consistent with either *Re Flinn* (1) or *Re Verrall* (2) to hold that the testator intended to give the National Trust a free hand so that it could have, as is said in some of the cases, put the money in its pocket, an expression which is not quite so happy in regard to a corporate body but which will explain what I mean. Nor do I think I can construe the words as enabling the National Trust to devote the property to any charitable use irrespective of its own particular charitable purposes. I do not think, for instance, that they could devote this to founding a scholarship at a university, or anything of that kind, or, indeed, that they could depart from their own statutory purposes.

B I have come to the conclusion, not without some hesitation, that, relying very largely on the extremely useful and able and convincing summary of the law which has been put to me in argument by counsel for the Attorney-General, in this case I am obliged to declare that the trusts concerning the estate and the furniture and effects disposed of by cl. 14 and cl. 15 of the testator's will are good charitable trusts and, if I am right in that, then I think it follows that I must direct a scheme to be brought in for the application of the money.

[His LORDSHIP heard argument on the question secondly stated above.]

E VAISEY, J.: The very difficult point now raised is whether on the true construction of the will and codicil of the testator, Howard Spensley, the provisions of the codicil revoke all the trusts contained in cl. 12 of the will for the benefit of the children of the defendant Mary Gluckman (referred to in the will as Mary Brignoli) and the power of appointment thereby conferred on that lady so as to accelerate the trusts in remainder therein declared after the life estate of the first tenant for life, or whether notwithstanding the provisions of the codicil the trusts in favour of the children and the said power of appointment or any and which of the same remain valid and effective.

F The will, so far as material, bequeaths (which would more properly be "devises") the testator's house and premises, No. 5, Montpelier Place, Knightsbridge, to his trustees to allow his sister Mrs. Fairchild to have the use thereof for life, and after her death for the testator's niece, Mary Brignoli, for life, and after her death to stand possessed of the said trust premises for such child or children of the said Mary Brignoli who might attain twenty-one years as she might appoint, or failing such appointment, putting it shortly, then for her eldest son, or, if there is no such son, then for her eldest daughter. In the event of the lady having no child who attains a vested interest in the premises then subject to her life—which I suppose means her life interest—for other persons named in the will. That, of course, is straightforward enough and I think would give rise to no complication or difficulty, but the codicil, which was executed only a few days before the testator's death, contains these words:

H "I hereby revoke all provisions made in my said will for my niece Mary Brignoli and I direct that my said will is to be read as if the name of my said niece Mary Brignoli did not occur therein. In lieu thereof I bequeath the sum of £2,000 to be added . . ."

to a certain trust fund which he describes as being held for the benefit of the lady and her issue, such £2,000 to be an addition to the £8,000, the original trust fund, and to be held on the same trusts and to be paid free of duty.

It is clear that, so far as Mary Brignoli's personal beneficial interests under the will are concerned, they are revoked by the codicil. They include not only the life estate in the premises in Knightsbridge, but also the life estate in the testator's residue which he has given by reference to the gift of the Knightsbridge premises, and also a certain absolute gift of furniture. The difficulty is the question whether that revocation destroys and revokes, along with the beneficial gift to Mary Brignoli, the benefits conferred on and trusts relating to her children. It has been pointed out that there are a good many indications in this will which seem to show that the revocation was to be a wholesale revocation of the benefits given to Mary Brignoli and her issue. In the first place, it is pointed out that the word "provisions" is of the widest possible character and might well include not only a direct beneficial gift to the lady but provision for her and her family, and I think that there is a good deal of weight to be given to that. Then there is the direction that the will is to be read as if the lady's name did not occur in the document. It is also pointed out that, when the testator proceeds to make an alternative gift in lieu of the revoked gift, he confers a benefit not only on the lady but on her issue. I think there is the further point that the gift of furniture to the lady must have been intended to have been a provision for her family rather than a personal gift to herself, and the destruction of that gift by the revocation seems to indicate that the family were not to be provided for as was originally intended by the terms of the will. Some reliance was also put on the fact that the gifts to the lady's children are not gifts to them by name, but are gifts merely by reference to her, a point which I thought might have some validity, but I now rather doubt that because I understand that the lady, Mary Brignoli, was at the date of the codicil unmarried, so that the testator could not have indicated her issue otherwise than in the referential manner which he did.

Those indications which I have mentioned are all in favour of what I might call the wholesale revocation, and I have been referred to certain authorities which appear to point in the same direction—such, for instance, as *Prentice v. Tabor* (5). If I were left to construe this will without guidance and apart from authority, I think that there is a great deal to be said for the argument that the codicil constituted and must be construed as effecting a wholesale revocation, but, on the other hand, there is, undoubtedly, a very strong and rigid rule that a codicil ought not to be construed as revoking a will except in so far as it does so necessarily—necessarily, that is, either by its express terms or by what has been called "inevitable inference". It is said that, the testator having in his reference to the substituted gift referred to the fund to which the accretion was to be made as one which was held for the benefit of the lady and her issue, it is remarkable that he omitted to revoke the provisions made for that lady and her issue at the beginning of the sentence in the codicil. Those two indications do seem to point the other way, in the light of the principle to which I have referred. The testator may have meant to effect a wholesale revocation, and I am inclined to think—it is a matter of guesswork—that he probably did, but is the matter so clear, so certain, and so inevitable that I can disregard the overriding rule and principle that the will stands unaltered except in so far as the codicil can be said to do so in plain terms?

I have been reminded of *Re Wray* (6), a decision on a difficult will in which the Court of Appeal came to a conclusion other than that at which I myself had arrived in the court of first instance. The headnote of that case states, I think, accurately, as a résumé of what appears in the judgments of the judges, that the principle to be applied in such a case is that when an interest is clearly given by a will, it is not to be held to be revoked in the absence of clear words of revocation.

"If there were a gift under a will and an ambiguous clause in a codicil which might or might not be intended as revocation, then the gift in the will should stand."

The case goes on to deal with what weight should be attached to the words which we have here superadded to the words of revocation, directing that the will is to be read as if the name of the primary beneficiary did not occur therein.

A I am bound to say that the trend which the cases have taken—and I do not propose to go into them at any length—is, I think, rather surprising, but there is a great number of cases, some unreported, which decide that words directing a will to be read as if the name of some person had been omitted are words which ought not to be read literally, i.e., they are to be read as merely confirmatory of the preceding words of revocation. Thus, if a legacy to a named person is
B revoked and there are added words to say that the will must be read as if his name did not occur in it, that does not, for instance, necessarily discharge him from the office of executor and trustee to which he has been appointed in another part of the will, although I confess that it seems to me that very scant attention has been paid to these very strong words, "the will is to be read"—sometimes it says "in all respects", sometimes it says "throughout", although here
C no such words are inserted—"as if the name of the person in question did not occur in it."

Applying as best I can the rules laid down for my guidance in *Re Wray* (6) and expressing, as I think the judges in the Court of Appeal did in that case, a good deal of doubt whether this way of construing a will is going to effect the true wishes of the testator, I think I must hold that in this case there was only a
D partial revocation of the will, i.e., a revocation confined to the beneficial interests of the legatee Mary Brignoli, leaving the provisions in favour of her issue unaffected. I think it is a very awkward decision to have to come to, because, in certain events—if, for instance, the first tenant for life had died leaving Mary Brignoli still unmarried—it would mean that at some future indefinite date her prospective future issue would come into the succession, so to speak, and
E great difficulties would arise, but I do not think that that is a consideration which should weigh with me very much.

That raises a further short, but I think interesting and far from easy, point: How far does that revocation deprive the lady of her power of appointment among her issue? Does she retain that power, the revocation not affecting it, or does the gift to the eldest son or eldest daughter come in without any risk of
F being displaced by the exercise of the power? Counsel for the eldest son of Mary Brignoli submits to me a view of the will which I am bound to say impresses me very much. He says that the name of Mary Brignoli cannot be struck out of the will altogether, or one would find gaps which would make the document unintelligible. He says that, admittedly, Mary Brignoli's beneficial interests have gone. He says, further, that her power of appointment is a provision which is
G actually in the words of the codicil a provision for her. Counsel submits that in so far as the intrusion of the lady's name into the will is, so to speak, adjectival or descriptive, one is bound to leave it there, but, in so far as it gives her rights or imposes duties on her, then the direction that her name is to be struck out ought to come into operation.

H Though I think the point is a very doubtful one, it is to some extent covered by the decision of KAY, J., in *Re Brough* (7). There the headnote is as follows:

"A testator by his will gave to his sister H. a life interest in a share of his residuary estate, and a special power of appointment by will over the capital of the share. By a codicil he revoked all devises and bequests whatsoever 'in favour of' H.:—Held, that the power was revoked as well as the life interest."

There the point arose in a very neat form, and I think on words which are really indistinguishable from the words here. The words are "provisions made for"

the lady in this will, and "devises and bequests in favour of" the lady in *Re Brough* (7). KAY, J., said (38 Ch.D. 457):

"Beyond all doubt the life estate given to Harriet Brough by the will was revoked by the fifth codicil. But the question is, what became of the power of appointment? Was it revoked or not? That depends upon whether it is to be considered as a devise or bequest 'in favour of' Harriet. Some people might consider that it was a burden rather than a benefit, but the question is what the testator intended. Did he intend this to be 'in favour of' Harriet or not? A person who gives to another the power of disposing of a considerable part of his residuary estate must, in my opinion, be supposed to intend to confer on that person a favour; and the meaning of the word 'favour' in this codicil is what the testator intended it to be. I cannot doubt that he considered that the power of appointment which he gave to Harriet was a devise or bequest in her favour, and when he revoked all devises and bequests whatsoever contained in his will or codicils in favour of Harriet, I cannot doubt that he meant to revoke the power of appointment. Accordingly as to this share the gift in default of appointment must take effect."

I take the view that when a parent has a power of appointment among his or her issue, it is a provision very much in his or her favour and can properly be said to have been made for his or her benefit. I am impressed by the truth and good sense of *Re Brough* (7), because a father or a mother having such a special power of appointment is, in a sense, given a certain measure of control over his or her children, and, I think, such a parent is in a very much more favourable position than if he or she has no such controlling power.

I must declare that on the true construction of the will the provisions contained in the codicil revoke all the trusts contained in cl. 12 for the benefit of Mary Brignoli herself, but do not affect the trusts contained in the will for the benefit of her issue, with the exception that the power of appointment which is purported to be given to her over the fund in favour of her children attaining twenty-one has ceased to be exercisable, and, following *Re Brough* (7), I must declare that the gift to the issue in default of appointment is the gift which must take effect in due course.

Order accordingly.

Solicitors: *Radcliffes & Co.* (for the plaintiffs and the first, second, third, eighth and ninth defendants); *Leman, Harrison & Flegg* (for the fourth, fifth, sixth and seventh defendants); *Treasury Solicitor*.

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

Re LEIGH'S MARRIAGE SETTLEMENT. ROLLO v. LEIGH AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), May 15, 16, 1952.]

Perpetuities—Rule in Whitby v. Mitchell—Marriage settlement dated before 1926

—*Power of appointment under marriage settlement exercised by deed after 1926*

—*Application of rule—Law of Property Act, 1925 (c. 20), s. 161 (2).*

A *Power of Appointment—Special power to appoint—Marriage settlement dated before 1926—Power exercised by deed dated after 1926—“Trusts created by an instrument coming into operation after the commencement of” the Law of Property Act, 1925—Law of Property Act, 1925 (c. 20), s. 161 (2).*

B An ante-nuptial marriage settlement, dated Dec. 8, 1913, provided that the settled fund should be held to the use of the intended husband during his life and after his death to provide a rentcharge for the wife, and subject thereto “to the use of all or such one or more exclusively of the others or other of the children or remoter issue of the [intended husband] such remoter issue to be born and take vested interests within twenty-one years from the death of the [intended husband] for such estates or estate interests or interest and if more than one in such shares and subject to such charges powers of charging and other powers provisions and limitations over for the benefit of all or any one or more of such children or issue and in such manner as the [intended husband] shall by any deed or deeds revocable or irrevocable or by will or codicil appoint . . . but so that no such appointment shall infringe the rule against limiting an estate to an unborn person for life with remainder to the child of such person”. By a deed of appointment dated Mar. 21, 1946, the husband, in purported exercise of the power under the marriage settlement, appointed that the settled property be held on trust for a son for life, with remainder on trust for sale, and as to the net proceeds of sale on trust for the son's children.

C D HELD: although the terms of the deed of appointment clearly infringed the rule in *Whitby v. Mitchell* (1890) (44 Ch.D. 85) (the infringement of which was, in effect, prohibited by the terms of the marriage settlement), the trusts arising by virtue of the deed of appointment were “created by an instrument coming into operation after the commencement” of the Law of Property Act, 1925 (i.e., by the deed of appointment), within s. 161 (2) thereof, and, therefore, having regard to s. 161 (1) of that Act, the rule had no application to those trusts; the provisions of the deed of appointment were not ultra vires the power given by the settlement; and, therefore, the appointment was valid and effectual.

E *Re Batty* ([1952] 1 All E.R. 425), explained and distinguished.

F AS TO THE RULE IN *WHITBY v. MITCHELL*, see *HALSBURY*, Hailsham Edn., Vol. 25, pp. 162-165, paras. 278-280; and FOR CASES, see *DIGEST*, Vol. 37, pp. 122-124, Nos. 546-566.

G Cases referred to:

(1) *Whitby v. Mitchell*, (1890), 44 Ch.D. 85; 59 L.J.Ch. 485; 62 L.T. 771; 37 Digest 71, 125.

(2) *Re Nash*, [1910] 1 Ch. 1; 79 L.J.Ch. 1; 101 L.T. 837; 37 Digest 123, 552.

(3) *Re Batty*, [1952] 1 All E.R. 425; [1952] Ch. 280.

H (4) *De La Bere's Marriage Settlement Trusts*, [1941] 2 All E.R. 533; [1941] Ch. 443; 110 L.J.Ch. 194; 165 L.T. 393; 2nd Digest Supp.

(5) *Re Dickinson's Settlements*, [1939] Ch. 27; 108 L.J.Ch. 40; 159 L.T. 614; Digest Supp.

(6) *Muir v. Muir*, [1943] A.C. 468; 112 L.J.P.C. 39.

ADJOURNED SUMMONS to determine whether, on the true construction of an ante-nuptial settlement, dated Dec. 8, 1913, and in the events which had happened, the trusts declared by a deed of appointment, dated Mar. 21, 1946,

after the life interest thereby appointed to the defendant, William Henry Gerard Leigh (a son of the appointor), were to any, and, if so, what, extent valid or effectual, or whether the same wholly failed.

T. A. C. Burgess for the plaintiff, the trustee of the marriage settlement.

Cross, Q.C., and *J. L. Arnold* for the first defendant, William Henry Gerard Leigh.

Russell, Q.C., and *Wilfrid Hunt* for the second and third defendants, infant children of the first defendant. A

VAISEY, J.: In a marriage settlement dated Dec. 8, 1913, the parties were the intended husband, John Cecil Gerard Leigh, of the first part, the intended wife, Helen Goudy, of the second part, and certain trustees, of the third part. It was a settlement of real estate consisting of certain land and certain perpetual yearly rentcharges of large value. That property was conveyed to the use of the intended husband until the solemnization of the marriage and afterwards to the use of the intended husband and his assigns during his life. Certain provisions were made by way of rentcharge to take effect after his death in favour of his wife if surviving. Next there was a declaration that following those interests the property was to go B

“ to the use of all or such one or more exclusively of the others or other of the children or remoter issue of the [intended husband whether by his first wife or otherwise] such remoter issue to be born and take vested interests within twenty-one years from the death of the said John Cecil Gerard Leigh for such estates or estate interests or interest and if more than one in such shares and subject to such charges powers of charging and other powers provisions and limitations over for the benefit of all or any one or more of such children or issue and in such manner as the said John Cecil Gerard Leigh shall by any deed or deeds revocable or irrevocable or by will or codicil appoint . . . ” C D

Then come the words which have given rise to the difficulty which I am asked to resolve, E

“ . . . but so that no such appointment shall infringe the rule against limiting an estate to an unborn person for life with remainder to the child of such person ”.

Subject to any appointment under the power, certain further uses are declared in favour of the children, their heirs and assigns. The words which I have quoted merely state the effect of what is known as the rule in *Whitby v. Mitchell* (1), which is referred to in *Re Nash* (2). At the date of the settlement such words were in one sense otiose. They merely reminded the draftsman (who might have been expected or supposed to know all about it) that there was a particular pitfall which he should be careful to avoid. There are two such reminders in the passage which I have read. One is that the remoter issue who take under an appointment must be born and take a vested interest within a perpetuity limit, which is restricted in this case to the limit of twenty-one years from the death of one named person, so that the appointor was not allowed to select some other life by which to measure the extent of the possible interests which he might create, the named person being the intended husband. The second reminder contained in the words which I have read might have been written in more colloquial language by saying: “ But please take care to remember what you are told not to do in *Whitby v. Mitchell* (1) ”. F G H

By what looks at first sight a somewhat perverse falling into the pit, a deed of appointment was executed on Mar. 21, 1946, which did exactly what *Whitby v. Mitchell* (1) said must not be done, i.e., either the whole or a considerable part of the settled property was directed to be held on trust for a son of the marriage for life without impeachment of waste with remainder on trust for sale, and as to the net proceeds of sale on trust for the son's children, thus clearly infringing

the rule to which I have referred. But for the benevolent intrusion into the law as it formerly stood of the Law of Property Act, 1925, the matter would have been straightforward because the appointment would clearly have been bad, and obviously, I should think, would never have been made. But s. 161 (1) of the Act, to which I have referred, provides:

A "The rule of law prohibiting the limitation, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person is hereby abolished, but without prejudice to any other rule relating to perpetuities."

There, again, put colloquially, sub-s. (1) of that section could be read: "The rule in *Whitby v. Mitchell* (1) has gone. It is abolished, and there is an end of it." But sub-s. (2) of the section provides:

B "This section only applies to limitations or trusts created by an instrument coming into operation after the commencement of this Act."

C The point to which argument has been directed can be stated thus: Were the limitations set out in the deed of appointment of Mar. 21, 1946, within the meaning of s. 161 (2) limitations "created" by that deed, or must they be deemed to be limitations created either by the settlement of Dec. 8, 1913, or by that settlement and the appointment in conjunction? No doubt the subsection can be read under the Interpretation Act, 1889, as if it referred, not only to "an instrument", but to "instruments". I think the question is not without difficulty. It came before me in somewhat different guise and under a different statutory enactment in *Re Batty* (3). There I was dealing with the Trustee Act, 1925, s. 32, which gives a power of advancement to persons contingently entitled to a capital sum, and involves the possibility of an infant under age being advanced to the extent of fifty per cent. of his presumptive share of a fund notwithstanding that he may never become entitled in possession under the trusts of the instrument in question. In *Re Batty* (3) I expressed the view that it was not wrong to describe such a provision as confiscatory, and that such a provision would not in all probability have been inserted in a document which came into operation before the time when the Act was passed. The words of the qualifying sub-section, s. 32 (3) of the Trustee Act, 1925, are:

E "This section does not apply to trusts constituted or created before the commencement of this Act",

F i.e., Jan. 1, 1926. In *Re Batty* (3), I came to the conclusion that, in the case of a will conferring a power of appointment, when the testator had died before that date and the power was exercised by an instrument executed after that date, the trusts set up by the latter instrument were, for the purposes of the qualifying sub-section, constituted before the commencement of the Act, and accordingly that the trustees had no statutory power to make advancements under the provisions of the section. I thought that the very special language, especially the words "constituted or created", which I had to consider there, could be explained by the fact that the section had a confiscatory effect, and it was therefore unlikely that the legislature would have wished so to interfere with trusts which were constituted or created or had their origin at a time before the Trustee Act, 1925, had been passed.

G In that case I distinguished a number of other authorities, especially *Re De La Bere's Marriage Settlement Trusts* (4), in which it was held that the instrument under which a property was "acquired" was a deed of appointment and not the settlement creating the power from which the later document derived its force. I also distinguished *Re Dickinson's Settlements* (5), where CROSSMAN, J., dealing with s. 31 of the Trustee Act, 1925, had to consider the qualifying sub-section of that section which relates to maintenance. The words of that sub-section, s. 31 (5), are:

"This section does not apply where the instrument, if any, under which

the interest arises came into operation before the commencement of this Act."

There it was held that where a power of appointment is exercised, the document exercising the power and not the document creating the power is for the purpose of the above mentioned section the instrument under which the appointed interest arises, because a new interest is created by the appointment. No doubt for many purposes the limitation which came into existence through the deed in the present case of Mar. 21, 1946, may be said to have originated in, and, therefore, to owe its creation to, the earlier document of 1913, but the same argument might have been used in either of the two cases to which I have been referring. I think there is a great deal of hair splitting in this case as to the difference between the creation of a power, the constitution of a power, the act which causes the power to arise, and so on. After all, the proxima causa of the limitation is undoubtedly the second of the two instruments, and, when one looks at the reason and sense of the matter, I cannot help thinking that what the legislature was really contemplating in s. 161 (2) of the Law of Property Act, 1925, was the protection of interests which had accrued and come into existence, or had arisen, or had been created, prior to Jan. 1, 1926, and that it was not intended to say that all limitations created in the sense of originating from or created under or in pursuance of an earlier instrument were to be protected. I do not think the legislature was intending to limit the operation of s. 161 (1) in that manner. I agree that it is a difficult subject of speculation, and it seems to me to be capable of argument both ways as to what is meant by the creation of a limitation in such circumstances as I have here to deal with. I think it is a matter of some difficulty. I have, of course, considered the important decision in the House of Lords of *Muir v. Muir* (6). For many purposes, no doubt, the creation of a limitation or of a trust has to be referred back to the originating instrument. One cannot for all purposes confine it to the later instrument.

On the whole, however, looking at s. 161 (2), I think that the better view is that the instrument by which these limitations were created was the deed of Mar. 21, 1946, which came into operation after the commencement of the Act. In my judgment, in this case the proper view of s. 161 (2) is that the "creating" instrument at which I have to look is not the instrument of 1913 but the instrument of 1946.

There is another question which arises in this case: What did the instrument mean when it said

"so that no such appointment shall infringe the rule against limiting an estate to an unborn person for life with remainder to the child of such person?"

In my view, if the settlement had merely prohibited an appointment to an unborn person for life with remainder to that person's child without any reference to infringing any rule the appointment of 1946 would have been ultra vires the instrument of 1913. I think it would have been outside the power, but, knowing the troublesome ways of conveyancers in this respect, I think the object was merely to give a warning to the draftsman not to fall into the well-known pit labelled "*Whitby v. Mitchell*" (1). The operative words indicate, to my mind, a prohibition against infringing a rule, and if, when the relevant time came (and, in my judgment, it came in 1946 and not 1913), the rule had gone, it seems to me that the prohibition had no operation because there was no rule left to be infringed. In my judgment, the appointment purported to be effected by the deed of Mar. 21, 1946, is valid and effectual, and I will so declare.

Order accordingly.

Solicitors: *Withers & Co.* (for all parties).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

LOWRY v. LOWRY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Pearce, J.) May 5, 1952.]

Justices—Husband and wife—Maintenance order—Husband resident in Northern Ireland—“Last ordinarily resided together as man and wife in England”—Maintenance Orders Act, 1950 (c. 37) s. 1 (1).

The parties were married in England in 1938 and lived in London thereafter. In 1941 they went to live in Ireland, but in 1942, while on seven days leave from the Royal Air Force, the husband brought the wife back to the house in London where they had previously lived. The parties drifted apart, but in 1947 the husband rejoined the wife at the house in London and they occupied the same bedroom for two nights. The husband then left the wife on the understanding that he would return to his work and that she would join him at the place where he was sent by his employers. The wife never heard again from the husband who now resided in Northern Ireland. On a summons by the wife alleging desertion by the husband,

HELD: (i) in 1947 the parties “last ordinarily resided together as man and wife in England” within the Maintenance Orders Act, 1950, s. 1 (1), and, therefore, the court of summary jurisdiction had jurisdiction to deal with the summons; (ii) there was evidence from which the court could find the husband guilty of desertion.

Per LORD MERRIMAN, P.: “‘Residing together as man and wife’, in the language of the Divorce Court, is sometimes called cohabiting, and I am bound to say that I should find a great deal of difficulty in distinguishing between residing together as man and wife and cohabiting. I do not think one carries it any further by paraphrasing it, but I suppose the words ‘last ordinarily resided together as man and wife in England’ could be paraphrased by saying that the matrimonial home at which they last cohabited was in England.”

FOR THE MAINTENANCE ORDERS ACT, 1950, s. 1 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 422.

Cases referred to:

- (1) *Levene v. Inland Revenue Comrs.*, [1928] A.C. 217; 97 L.J.K.B. 377; 139 L.T. 1; 13 Tax Cas. 486; Digest Supp.
- (2) *Re Adoption Application No. 52/1951*, [1951] 2 All E.R. 931; [1952] Ch. 16; 115 J.P. 625.
- (3) *Mummery v. Mummery*, [1942] 1 All E.R. 553; [1942] P. 107; 111 L.J.P. 58; 166 L.T. 343; 2nd Digest Supp.
- (4) *Pulford v. Pulford*, [1923] P. 18; 92 L.J.P. 14; 128 L.T. 256; 27 Digest 307, 2846.
- (5) *Macrae v. Macrae*, [1949] 2 All E.R. 34; [1949] P. 397; [1949] L.J.R. 1671; 113 J.P. 342; 2nd Digest Supp.

APPEAL by the husband against a decision, dated Feb. 12, 1952, of the metropolitan magistrate sitting at Tower Bridge, whereby he was found guilty of the desertion of his wife.

Leonard Halpern for the husband.

W. G. Wingate for the wife.

LORD MERRIMAN, P.: This is a husband's appeal from a decision of the learned metropolitan magistrate sitting at the Tower Bridge magistrate's court, who, on Feb. 12, 1952, made an order against him on the ground that he had deserted his wife. This decision is challenged on several grounds. It is said, first, that the learned magistrate had no jurisdiction to deal with the case, and,

secondly, that, supposing she had jurisdiction, the facts did not warrant a finding of desertion.

The serious matter is the question of jurisdiction. Under the Maintenance Orders Act, 1950, s. 1 (1), an English court of summary jurisdiction has jurisdiction (which it did not possess before, having regard to certain very clear decisions to that effect), to make against a man living in Scotland or Northern Ireland orders for maintenance on behalf of a wife. That the husband in this case resides in Northern Ireland cannot be doubted, and the wife resides in England, but the wife must also show that the parties last ordinarily resided together as man and wife in England. Those are the words which are crucial in this case. The learned magistrate has found that these persons did last ordinarily reside together as man and wife in England. That was on an occasion in 1947, when, by no means for the first time, they resided together at the house of the wife's mother in London. The learned magistrate has also held that it was from the matrimonial home that the husband deserted the wife. If it be a fact that these parties last ordinarily resided together as man and wife at the mother's address in England, in my view, there can be no argument that the parting had the quality of desertion on the part of the husband, as the learned magistrate has found.

I will confine myself now to the important question whether it can truly be held that these parties "last ordinarily resided together as man and wife in England". The words "ordinarily reside" or "ordinarily resident" have a familiar ring. They have been interpreted in connection with liability to assessment to income tax, and the best known case on the subject is *Levene v. Inland Revenue Comrs.* (1). Without discussing the details of that case, I think I can say that these principles emerge—(i) that as a matter of law it is extremely difficult, if, indeed, it is possible, to distinguish between "residence" and "ordinary residence"; and (ii) a finding one way or the other is a finding of fact which is not to be disturbed if there is evidence to support it. That principle applies mutatis mutandis to the present matter, and, unless the decision of the learned magistrate that these parties last ordinarily resided together as man and wife in England has no evidence to support it, our duty is to uphold it. The words with which we are concerned here differ from the corresponding phrase in the Income Tax Acts and other provisions in which the words are used, inasmuch as they introduce the element which is contained in the words "together as man and wife". Not merely must they have resided and ordinarily resided, but they must have resided together as man and wife, and it must be true to say of the last occasion when that can be said of them that that event took place in England. "Residing together as man and wife", in the language of the Divorce Court, is sometimes called cohabiting, and I should find a great deal of difficulty in distinguishing between residing together as man and wife and cohabiting. I do not think one carries the matter any further by paraphrasing it, but I suppose the words "last ordinarily resided together as man and wife in England" could be paraphrased by saying that the matrimonial home at which the parties last cohabited was in England.

It so happens that the house of the wife's mother was the first matrimonial home and also the matrimonial home on many later occasions. The husband, who comes from Southern Ireland, came to England in 1935 and joined the Royal Air Force, and when the parties were married in England in 1938 they lived for the next three years at the home of the wife's parents, the husband visiting the wife there at week-ends and when he was on leave. In 1941 they went to live for a time with a sister-in-law of his at Newbury and then to Dundalk in Ireland. In the course of his duties in the Royal Air Force the husband had been transferred to Antrim, whence he visited his wife at Dundalk when he was on leave, and at Dundalk, in December, 1941, the second child of the marriage was born. In 1942 the husband, having seven days' leave, took his wife back to her mother's house in London, the place which had been the matrimonial home.

Then they appear to have drifted apart. The husband said that he gave up his wife's company because her mother had too much influence on her. In the course of his work after demobilisation he went to America. There is said to have been some correspondence, but no letter was produced. At any rate, on his return from America, in or about 1947, the husband re-joined the wife at her mother's house. The learned magistrate has found that they were reconciled. There was evidence that they slept together there as man and wife, and the matter was left, according to the wife, that she would go with him wherever he could find a home for her, which would depend to some extent on where his next job was. He left her to go to his work, and she has not heard from him since, except that he sent her 30s. a week for the two children. That is the desertion complained of. The cohabitation in 1947 is what the learned magistrate has found was their last residence together as man and wife.

It has been said that there is no evidence to support that, because there was no element of permanence in this residence, nothing which, in the words of HARMAN, J., in *Re Adoption Application No. 52/1951*, (2), an adoption case, could be regarded as a headquarters which had any air of permanence about it. Therefore, it is argued it was not open to the learned magistrate to hold that there was a residence together as man and wife. I do not agree. I think there is evidence, and I think that it is very important to bear in mind what it is that the learned magistrate has found about this reconciliation. She has, in effect, accepted the evidence of the wife that these two people deliberately resumed cohabitation as man and wife on the terms and in the expectation that where his employers ordered him to go he would settle down and she would join him there. I see no reason to suppose that that meant anything but a continuance of this resumed cohabitation in England. I do not say that it was necessarily stipulated that it should be in England, but everything shows that was what was expected. There was some suggestion by the husband that the understanding was that they must go and live at Dundalk, but the wife does not accept that as true.

In *Mummery v. Mummery* (3), if I may quote a passage from my own judgment, I said something to the effect that the whole question turns on what a resumption of cohabitation means, and continued ([1942] 1 All E.R. 555):

"Now, LORD MERRIVALE said more than once that no judge has ever attempted a comprehensive definition of desertion and that no judge would ever succeed in doing so. Amongst the descriptions of desertion which he gave was one which has always appealed to me. He said that desertion was a withdrawal, not from a place but from a state of things (*Pulford v. Pulford* (4) [1923] P. 21). Similarly, I doubt whether any judge could give a completely exhaustive definition of cohabitation and certainly I am not going to attempt to do so. At least a resumption of cohabitation must mean resuming a state of things—that is to say, setting up a matrimonial home together. That involves, so it seems to me, a bilateral intention on the part of both spouses so to do."

I think that there is ample evidence that when the husband re-joined the wife in circumstances which the learned magistrate has found effected a reconciliation between them there was a bilateral intention of setting up a matrimonial home together which did not merely consist in staying for a night, as a lodger in a particular set of rooms or in one room, but had an element of permanence about it, and there was a further intention of continuing that cohabitation elsewhere, wherever his employers should send him and he was able to settle down, on the understanding that the part of the world in which that would occur would still be England, though not necessarily in London. That being so, I think the learned magistrate had ample evidence on which to found jurisdiction to decide this case. In my opinion, she rightly found desertion, and I think this appeal fails and should be dismissed.

PEARCE, J.: I agree with all that my Lord has said. In *Levene's* case (1), in dealing with the words "ordinarily resident" for the purposes of the Income Tax Acts, VISCOUNT CAVE, L.C., pointed out that in such cases the question is always one of fact and degree. "Ordinary residence is a thing which can be changed in a day" said SOMERVELL, L.J. in *Macrae v. Macrae* (5) ([1949] 2 All E.R. 36). The question has to be decided in the light of all the circumstances. In considering whether there has been enough of the quality of continuity and permanence in the two nights that the husband spent with the wife in 1947, one must remember that the income tax cases deal with different words from those which we have in this case which are, "ordinarily resided together as man and wife". A night spent at an address by a solitary traveller does not carry so much weight or consequence as that spent by a husband who returns to and is reconciled with a wife in the home where they have lived together before their estrangement. The husband in such a case has returned, not only to an address, but also to a state of things. In my view, it is impossible to say that there was no evidence in this case on which the learned magistrate could properly come to the decision at which she arrived. For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Teff & Teff* (for the husband); *Philcox, Sons & Edwards* (for the wife).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

SAYCE v. BAHAWALPUR STATE (AMEER).

[COURT OF APPEAL (Somervell, Jenkins and Morris, L.JJ.), May 20, 1952.]

Foreign State—Ruler of—Liability to be sued—Partial dependency on another Power—Conclusiveness of certificate of government department—British Nationality Act, 1948 (c. 56), s. 1.

On May 24, 1950, a writ was issued in an action for damages for breach of contract against the Ameer Ruler Sadiq Mohammad Abbasi Bahawalpur State. The Ameer entered a conditional appearance and took out a summons asking that the service of the writ be set aside on the ground that he was entitled to immunity as the ruler of a sovereign State. In a certificate to the court the Commonwealth Relations Office stated that the Ameer "executed on Oct. 3, 1947, an instrument of accession [to the Federation of Pakistan] and he executed further instruments or agreements on Oct. 1, 1948, Aug. 2, 1949, and Apr. 29, 1951". The certificate concluded: "The government of Pakistan have informed the Secretary of State that the State of Bahawalpur did not, on accession to the Federation of Pakistan, become a part of His Majesty's dominions, and that the view of the government of Pakistan is that the Ameer has continued to be a sovereign ruler and is entitled to immunity before the courts both within and outside Pakistan in civil cases . . . The State of Bahawalpur is not a part of His Majesty's dominions, and . . . the Ameer, within the limitations imposed upon him by the constitutional arrangements set out [herein], is sovereign ruler of the State."

HELD: (i) the Commonwealth Relations Office was the proper Ministry for the court to approach regarding the defendant's sovereignty, and that Ministry, in supplying the information, were entitled to obtain and to communicate the views of the Pakistan government.

(ii) the certificate of the Ministry was conclusive as to the fact that the State of Bahawalpur was not within His Majesty's dominions, and that, within the limits stated, the defendant was the sovereign ruler of that State.

Dicta of VISCOUNT CAVE and VISCOUNT FINLAY in *Duff Development Co. v. Kelantan Government* ([1924] A.C. 808, 815), and of LORD ATKIN in *The Arantzazu Mendi* ([1939] 1 All E.R. 721), applied.

(iii) even if, by virtue of the Pakistan Citizenship Act, 1951, the defendant became a subject of Pakistan with the consequential status under the British Nationality Act, 1948, s. 1, of a British subject or Commonwealth citizen, this did not affect his status as disclosed in the instrument of 1951, and, therefore, he was entitled to succeed.

Decision of McNAIR, J. ([1952] 1 All E.R. 326), affirmed.

AS TO OFFICIAL CERTIFICATES, see HALSBURY, Hailsham Edn., Vol. 13, pp. 661-664, paras. 731-733; and FOR CASES, see DIGEST, Vol. 22, p. 318, Nos. 3118-3126.

B Cases referred to:

- (1) *Duff Development Co. v. Kelantan Government*, [1924] A.C. 797; 93 L.J.Ch. 343; 131 L.T. 676; Digest Supp.
- (2) *The Arantzazu Mendi*, [1939] 1 All E.R. 719; [1939] A.C. 256; 160 L.T. 513; *sub nom. Spain Republic Government v. Arantzazu Mendi*, 108 L.J.P. 55; Digest Supp.
- (3) *Statham v. Statham & Baroda (Gaekwar)*, [1912] P. 92; 81 L.J.P. 33; 105 L.T. 991; 1 Digest 48, 388.

APPEAL by the plaintiff from an order of McNAIR, J., dated Jan. 21, 1952, and reported [1952] 1 All E.R. 326, affirming an order of Master GRUNDY dated Oct. 13, 1950, setting aside the service of a writ issued on May 24, 1950, in an action for damages for breach of contract, on the ground that the defendant was entitled to immunity as the ruler of a sovereign State.

McNAIR, J., held that a certificate of the Commonwealth Relations Office that the defendant was a sovereign ruler was conclusive, and, that, semble, that statement was not inconsistent with the defendant having the status of a British subject under the British Nationality Act, 1948, s. 1 (1).

J. Chinna Durai for the plaintiff.

Scott Henderson, Q.C., and *H. G. Garland* for the defendant.

SOMERVELL, L.J.: This is an appeal from a decision of McNAIR, J., and it raises the question of the position in these courts of the ruler of an Indian State which has acceded to the State of Pakistan. In May, 1950, the plaintiff issued a writ claiming damages for breach of contract against the defendant, who is correctly described as the Ameer Ruler Sadiq Mohammad Abbasi Bahawalpur State. A conditional appearance was entered by the defendant, who took out a summons asking that the service of the writ be set aside on the ground that, as the ruler of a sovereign State, he was entitled to immunity. Master GRUNDY made an order setting aside the service of the writ, and there was an appeal to McNAIR, J. There was a letter before Master GRUNDY from the Commonwealth Relations Office, and when the matter came before McNAIR, J., he required that letter to be amplified. That was done by a second letter from the Commonwealth Relations Office, and it was on this letter that McNAIR, J. proceeded. He dismissed the appeal, affirming the order of the master, and the plaintiff now appeals to this court.

In *Duff Development Co. v. Kelantan Government* (1), which raised a question regarding the immunity of the State of Kelantan, VISCOUNT CAVE said ([1924] A.C. 808):

"No doubt the engagements entered into by a State may be of such a character as to limit and qualify, or even to destroy, the attributes of sovereignty and independence: WHEATON, 5th ed., p. 50; HALLECK, 4th ed., p. 73; and the precise point at which sovereignty disappears and dependence begins may sometimes be difficult to determine. But where such a question arises it is desirable that it should be determined, not by the

courts, which must decide on legal principles only, but by the government of the country, which is entitled to have regard to all the circumstances of the case. Indeed, the recognition or non-recognition by the British government of a State as a sovereign State has itself a close bearing on the question whether it is to be regarded as sovereign in our courts."

Then he referred to a declaration by the Secretary of State for the Colonies as to the status of Kelantan to which were appended various treaties and acknowledgments between His Majesty's government and the ruler of Kelantan. VISCOUNT FINLAY said (*ibid.*, 815):

"It might be said that there was a want of candour in merely stating the conclusion that the Power is a sovereign Power without disclosing any such limitations on the sovereignty as exist here. The contention that by appending these documents the Colonial Office remits the question to the court to form its own opinion upon it is based on a misconception. When the letter and the documents are read together, it is clear that the Secretary of State says explicitly that the sultan is a sovereign ruler, and the documents are appended by way of making it clear that their effect has been considered and that the Colonial Office has given all due weight to them in arriving at the conclusion that the sultan is a sovereign prince."

After considering the limitations of sovereignty, he says (*ibid.*, 816):

"While there are extensive limitations upon its independence, the enclosed documents do not negative the view that there is quite enough independence left to support the claim to sovereignty. But, as I have said, the question is not for us at all; it has been determined for us by His Majesty's government, which in such matters is the appropriate authority by whose opinion the courts of His Majesty are bound to abide."

LORD SUMNER expressed the view that, in the absence of any clear answer from His Majesty's government, the court would proceed on legal principles.

That difference of approach was considered in *The Arantzazu Mendi* (2), a case in which immunity was claimed and which turned on the question which of the rival governments of Spain at that time was recognised as the *de facto* sovereign of a certain area. LORD ATKIN said ([1939] 1 All E.R. 721):

"On the question whether the nationalist government of Spain was a foreign sovereign State, BUCKNILL, J., took the correct course of directing a letter, dated May 25, 1938, to be written by the Admiralty registrar to the Secretary of State for Foreign Affairs, asking whether the nationalist government of Spain is recognised by His Majesty's government as a foreign sovereign State. I pause here to say that not only is this the correct procedure, but it is the only procedure by which the court can inform itself of the material fact whether the party sought to be impleaded, or whose property is sought to be affected, is a foreign sovereign State. This, I think, is made clear by the opinions in this House in the *Kelantan* case (1). With great respect I do not accept the opinion implied in the decision of LORD SUMNER in that case, that recourse to His Majesty's government is only one way in which the judge can ascertain the relevant fact. The reason is, I think, obvious. Our State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another. Our sovereign has to decide whom he will recognise as a fellow sovereign in the family of States, and the relations of the foreign State with ours in the matter of State immunities must flow from that decision alone."

In that case, as in the *Kelantan* case (1), the court was dealing with State immunity as distinct from the personal immunity of a ruler, but, in my opinion, the principles laid down there with regard to the proper approach to a case of this kind and the necessity for the court to obtain and act on information from His Majesty's government in the United Kingdom are applicable.

A Counsel for the plaintiff sought to distinguish the letter from the Commonwealth Relations Office in the present case from the letters which were referred to in earlier cases on two grounds. First, he submitted that the Commonwealth Relations Office had not the authority or the finality in this regard of the Foreign Office regarding foreign countries, or as the Secretary of State for India had regarding questions within his jurisdiction, or the Colonial Secretary regarding colonial matters. Secondly, he submitted that the letter on its face was unsatisfactory and the conclusions in it inconsistent with the earlier matters referred to, and in any case on one particular matter he invited us to seek further information.

B As to the first point, I think that the Commonwealth Relations Office are the proper ministry in this country for this court to approach for information on the question of a ruler the limitation on whose sovereignty—and it is admitted there are some limitations—arise out of his relations with the Dominion of Pakistan. I do not think there is any ground for criticism in the fact that the Commonwealth Relations Office, having been approached by this court, communicated to this court, among other things, the views of the Pakistan government. That government had come to an arrangement, as will be seen, with the ruler of Bahawalpur State, and I think it would be contrary to all principles of C the Commonwealth that they should not be communicated with and I think they were in an authoritative position to assist the court through the Commonwealth Relations Office in the decision of this question. Coming to the letter, which is dated Sept. 4, 1951, it states at the outset (and this is not disputed):

D “ . . . until Aug. 15, 1947, His Highness the Ameer of Bahawalpur was recognised by His Majesty as the ruler of the State of Bahawalpur, which was under the suzerainty of His Majesty. The territory of the State was not part of British India or of His Majesty’s dominions, and neither the Ameer nor his subjects were subjects of His Majesty.”

E Then there is a reference to *Statham v. Statham & Baroda (Gaekwar)* (3), in which it was held that the then Gaekwar of Baroda was a sovereign prince and immune from procedure, and prior to 1947 the present defendant would have been in the same position. The letter then proceeds to go through the constitutional changes which have happened since 1947 with references to the Government of India Act, 1935, which, as modified, is still operative in Pakistan. The letter concludes with this paragraph:

F “ In these circumstances I am to say that the State of Bahawalpur is not a part of His Majesty’s dominions, and that the Ameer, within the limitations imposed upon him by the constitutional arrangements set out above, is sovereign ruler of the State.”

G Having come to the conclusion that on the facts of the present case the statement by the Commonwealth Relations Office is in precisely the same position as the statements referred to in the earlier cases, that would seem to dispose of the matter and to justify the learned judge’s conclusion, but out of deference to the argument I will deal, as, indeed, in most of the other cases the court has dealt, with the various matters which determine the position of the ruler and where in this class of case the limitations of sovereignty are to be found. They H are referred to in the letter. I agree with the learned judge when he says ([1952] 1 All E.R. 330):

“ In my judgment, the final paragraph of the letter of Sept. 4, 1951, contains a clear and unequivocal statement made on behalf of His Majesty on two points: (i) that the State of Bahawalpur is not a part of His Majesty’s dominions and (ii) that the Ameer within the limitations imposed on him by the constitutional arrangements set out in the letter is sovereign ruler of the State.”

I now come to the history of the changes. By s. 1 (1) of the Indian Independence Act, 1947, as from Aug. 15, 1947, two independent dominions were to be set up in India to be known respectively as India and Pakistan. Section 2 (4) provides:

"Without prejudice to the generality of the provisions of sub-s. (3) of this section, nothing in this section shall be construed as preventing the accession of Indian States to either of the new dominions."

A

We are concerned only with Pakistan. Section 7 (1) provides:

"As from the appointed day—(a) His Majesty's government in the United Kingdom have no responsibility as respects the government of any of the territories which, immediately before that day, were included in British India; (b) the suzerainty of His Majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian States, all functions exercisable by His Majesty at that date with respect to Indian States, all obligations of His Majesty existing at that date towards Indian States or the rulers thereof, and all powers, rights, authority or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise . . ."

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C

By s. 8 (2) it was provided that the Government of India Act, 1935, applied in the dominion with such modifications as should be made according to the terms of the Act. By the Act of 1935, as adapted by the Pakistan (Provisional Constitution) Order, 1947, a governor-general was appointed by His Majesty by warrant of the Royal Sign Manual. Part II of the Act of 1935, as adapted, refers to the Federation of Pakistan, and by s. 5 it is provided:

D

"As from Aug. 15, 1947, there shall be united in a federation by the name of Pakistan (a) the provinces hereinafter called Governor's Provinces, (b) the provinces hereinafter called Chief Commissioners' Provinces, and such Indian States as may accede to the Federation in the manner hereinafter provided."

E

In pursuance of this section the Ameer of Bahawalpur executed an instrument of accession on Oct. 3, 1947. On Oct. 1, 1948, a supplementary instrument was executed which was followed on Apr. 29, 1951, by a further supplementary instrument. One of the questions to which the learned judge addressed his mind was whether he had to consider the matter as at the date of the writ (i.e., May, 1950) or as at the date of the hearing before him. That question was relevant, because, undoubtedly, the powers parted with under the further supplementary instrument of accession, which was executed after the writ, are greater than those parted with under the earlier instruments. The learned judge decided that he ought to address his mind to the position as at the date of the hearing, and that was not challenged before us and I will, therefore, adopt the same principle.

F

G

The instrument of Apr. 29, 1951, contains a schedule in three Parts setting out the subjects included in sched. VII to the Act of 1935 under the heading of Legislation Lists, as possible subjects of legislation. In Part I are the subjects which are exclusively federal, in Part II are those which are, *prima facie*, concurrent subjects for legislation, and Part III, subject to certain powers, *prima facie* State subjects. Counsel for the plaintiff rightly drew attention to the fact that under this instrument the ruler is declaring that

H

"any change which may be made hereafter by competent authority in the aforesaid lists, in their application to the federation of Pakistan, shall have effect in relation to this State in such wise that the respective Part of the said schedule shall be deemed to have been modified, in like manner as the corresponding list, and with effect from the same date."

Of course, such a change might radically alter the position, but we have to consider the matter before any such change has been made. By cl. 9 of the instrument provision was made regarding possible future alterations of the provisions of the Act of 1935. The clause provided:

A "Nothing in the second supplementary instrument affects the continuance of my sovereignty in and over this State, or the exercise of any powers, authority, rights and jurisdiction now enjoyed by me as ruler of this State, or the validity of any law at present in force in this State, save as provided by the second supplementary instrument."

B It is unnecessary, in my view, to go through the various subjects in Part I and Part II, but in Part III, which deals, *prima facie*, with State subjects, one finds public order (excluding the use of His Majesty's naval, military or air forces in aid of the civil power), the administration of justice, constitution and organisation of all courts, except the federal court, police, prisons, compulsory acquisition of land, local government, and public health. In my opinion, there is ample justification in that document for the learned judge's conclusion ([1952] 1 All E.R. 330) that

C "An examination of the constitutional arrangements set out in the letter satisfies me that today the limitations imposed on the Ameer's sovereignty have no application over a very substantial sphere."

D In making this examination I am being in no way inconsistent with the principles which I cited from the *Kelantan* case (1). In that case they also examined the relations which existed between His Majesty's government and the government of Kelantan and it is proper, I think, that they should be explained and in any necessary document set out by the relevant government department to assist the court. It enables one to see that the proper matters have been considered and have been before the proper ministers.

E There was a further matter which was raised before the learned judge and before us. On Apr. 13, 1951, sixteen days before the second supplementary instrument of accession, there was passed the Pakistan Citizenship Act, 1951. It provided for Pakistan citizenship, and by ss. 13 and 15 it provided:

F "13 If any territory becomes a part of Pakistan the Governor-General may, by order, specify the persons who shall be citizens of Pakistan by reason of their connection with that territory; and those persons shall be citizens of Pakistan from such date and upon such conditions, if any, as may be specified in the order. 15 Every person becoming a citizen of Pakistan under this Act shall have the status of a Commonwealth citizen."

G By the British Nationality Act, 1948, s. 1, any person who, under any enactment for the time being in force in, *inter alia*, Pakistan, is a citizen of that country shall, by virtue of that citizenship, have the status of a British subject, and may be known either as a British subject or as a Commonwealth citizen. The Pakistan Citizenship Act, 1951, was referred to in the letter from the Commonwealth Relations Office, which proceeds on the basis which would be favourable to the argument of counsel for the plaintiff:

H "Under the Pakistan Citizenship Act, 1951, the subjects of the Ameer have now in general also become citizens of Pakistan, while remaining subjects of the ruler . . ."

They have, therefore, two citizenships, their local citizenship under which they owe allegiance to their ruler and their Pakistan citizenship with a consequential status under the Act of 1948 as British subject or Commonwealth citizen. At one time counsel argued that we ought to assume that under the Act of 1951 the ruler has himself become a citizen of Pakistan. That is not stated in the letter, and I cannot think that that would be the result, but, assuming that it was so and he became a Pakistan citizen, it seems to me that it would be impossible

to regard that as affecting his status as declared in the further supplementary instrument signed only some sixteen days later. The position in the present case, as in so many of the earlier cases which have come before the courts, is *sui generis*, but I can find nothing in any of these documents or in the Pakistan Citizenship Act, 1951, which would lead this court to decide against the general principle on which the House of Lords has stated that our courts must act, namely, to accept as final in a matter of this kind the declaration of the appropriate government department. For these reasons I would dismiss the appeal.

JENKINS, L.J.: I agree.

MORRIS, L.J.: I agree.

Appeal dismissed.

Solicitors: *Stanley Johnson & Allen* (for the plaintiff); *Seagrove, Woods & Simmons* (for the defendant).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

WATSON v. HERMAN.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Devlin and Gorman, JJ.), May 23, 1952.]

Firearms—Certificate—Telescopic sight—Firearms Act, 1937 (c. 12) s. 1, s. 32 (1).

The appellant was in possession of a .22 rifle with a removable telescopic sight. He held a firearm certificate authorising him to possess a rifle and a silencer, but no certificate relating to the sight.

HELD: the sight was not a "firearm" within the definition of that term in the Firearms Act, 1937, s. 32 (1), and, therefore, it was not necessary that the appellant's certificate should expressly authorise him to possess it.

FOR THE FIREARMS ACT, 1937, s. 32 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 5, p. 1115.

CASE STATED by city of York justices.

At a court of summary jurisdiction sitting at York on Dec. 6, 1951, an information was preferred by the respondent, the chief constable of the city of York, charging that the appellant did unlawfully have in his possession a certain component part of a firearm, viz., a telescopic sight, otherwise than as authorised by a firearm certificate held by him, contrary to s. 1 of the Firearms Act, 1937. The appellant was in possession of a .22 rifle fitted with a telescopic sight, but not fitted with a sound moderator. He had a firearm certificate authorising him to purchase or acquire one .22 B.S.A. Sportsman 15 rifle and one sound moderator, but he had not applied for a certificate regarding the telescopic sight. The telescopic sight was not an original part of the rifle as manufactured by the makers, but it had been made by the appellant and could be attached to the rifle if and when it was desired to use it and detached after use. The rifle was designed to be and could be used without the telescopic sight. It was contended for the respondent that the telescopic sight was "a component part", and, therefore, "a firearm" within the definition of s. 32 (1) of the Act, and, as it was not included in the certificate, the appellant was guilty of the offence charged. On the part of the appellant it was contended that the telescopic sight was merely an accessory and need not be separately included in the firearm certificate. The justices were of opinion that the contention of the respondent was correct because the efficiency and lethal quality of the weapon were improved by the addition of the telescopic sight, and found the charge proved, but discharged the appellant absolutely.

E. Ould for the appellant.

E. H. P. Wrightson for the respondent.

LORD GODDARD, C.J. This is a Case stated by justices of the peace for the city of York, before whom the appellant was summoned for

"Having in his possession a certain component part, viz., a telescopic sight, to which Part I of the Firearms Act, 1937, applies otherwise than as authorised by a firearm certificate held by him, contrary to s. 1 of the Firearms Act, 1937."

- A** The appellant had a firearm certificate which entitled him to have a rifle in his possession, and he also had a telescopic sight. A telescopic sight, one knows well, is used for sighting the rifle for firing at targets, and it can be put on and taken off. If it is merely a part of a complete rifle then, of course, a separate certificate is not required. If one required a certificate for every component part of a rifle I do not know how many certificates one would want. The justices thought that, because the telescopic sight improved the lethal quality of the weapon, therefore a separate certificate for it was required or the sight had to be separately mentioned in a certificate. I can find no justification for that. The certificate for the rifle must extend to its component parts. If one has a component part which is not made up into, so as to be part of, the rifle, it may be that one requires a certificate for it, but the only accessory which requires to be mentioned is an accessory "designed or adapted to diminish the noise or flash caused by firing the weapon". I think the justices came to a wrong decision, and the appeal must be allowed with costs.

DEVLIN, J.: I agree.

GORMAN, J.: I agree.

D

Appeal allowed.

Solicitors: *C. Grobel, Son & Co.*, agents for *G. F. Mitchell*, York (for the appellant); *Sharpe, Pritchard & Co.*, agents for *T. C. Benfield*, town clerk, York (for the respondent).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

E

LEICESTER v. PEARSON.

[**QUEEN'S BENCH DIVISION** (Lord Goddard, C.J., Hilbery and Devlin, JJ.), May 27, 1952.]

F

Street Traffic — Pedestrian crossing — Uncontrolled crossing — Precedence to foot-passenger — Precedence not accorded — Driver not negligent — Liability of driver — Pedestrian Crossings (London) Regulations, 1951 (S.I., 1951, No. 1193), reg. 4.

G

On an information against the driver of a motor vehicle charging him with failing to accord precedence to a foot-passenger on a non-controlled pedestrian crossing, contrary to the Pedestrian Crossings (London) Regulations, 1951, reg. 4, the magistrate found that the driver was not negligent and that it was not his fault that he did not accord precedence to the foot-passenger and he dismissed the information.

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HELD: the duty imposed by reg. 4 was not absolute, but was a duty to take reasonable steps to let the foot-passenger have precedence, and, therefore, the finding that the driver was not negligent was conclusive that there was no breach of the regulation.

Cases referred to:

- (1) *Harding v. Price*, [1948] 1 All E.R. 283; [1948] 1 K.B. 695; [1948] L.J.R. 1624; 112 J.P. 189; 2nd Digest Supp.
- (2) *London Passenger Transport Board v. Upson*, [1949] 1 All E.R. 60; [1949] A.C. 155; [1949] L.J.R. 238; 2nd Digest Supp.

CASE STATED by a metropolitan magistrate.

At a court of summary jurisdiction sitting at the North London Magistrate's Court on Dec. 14, 1951, the appellant, a sergeant of the Metropolitan Police Force, preferred an information against the respondent, that he, being the driver of a vehicle approaching a pedestrian crossing where traffic was not for the time being controlled by a police constable or a light signal, unlawfully did fail to accord precedence to a foot-passenger who was on the carriageway at the said crossing, contrary to reg. 4 and reg. 9 of the Pedestrian Crossings (London) Regulations, 1951. The magistrate, being of opinion that the respondent was exercising all due care, was keeping a proper look-out, and was driving without negligence, and that it was not his fault that he did not accord precedence to the foot-passenger in question, dismissed the information.

M. J. H. Turner for the appellant.

J. D. Stocker for the respondent.

LORD GODDARD, C.J.: I will ask **DEVLIN, J.**, to deliver the first judgment.

DEVLIN, J.: This case raises a very short point of construction of the Pedestrian Crossings (London) Regulations, 1951, reg. 4, which provides:

"Every foot-passenger on the carriageway within the limits of an uncontrolled crossing shall have precedence within those limits over any vehicle and the driver of the vehicle shall accord such precedence to the foot-passenger, if the foot-passenger is on the carriageway within those limits before the vehicle or any part thereof has come on to the carriageway within those limits."

The respondent, while driving his car, knocked down a Mrs. Cowley while she was on an uncontrolled pedestrian crossing, and he was prosecuted for having committed a breach of reg. 4.

The facts the magistrate finds, so far as they are material, are that the lighting in the neighbourhood of the said crossing was poor, it was raining, and the road surface was wet and in poor condition. He finds, by way of amplification with regard to the lighting, that the east side of the road in question is flanked by trees causing shadows on that side of the road, that on the west side light showed through the windows of shops, and that Mrs. Cowley was crossing from the darker side of the road towards the lighter side. He finds that the respondent was driving his car at a reasonable and proper speed in the prevailing circumstances, and that the respondent did not see Mrs. Cowley till she was on the crown of the road although there was no physical obstruction to interfere with his view of either Mrs. Cowley or the crossing. His conclusion was that the respondent was exercising all due care, was keeping a proper look-out, and was driving without negligence, and that the accident happened because, when he saw Mrs. Cowley, he then being seven or eight yards from the crossing, he applied his brakes and his car skidded. He found that it was not the fault of the respondent that he did not accord precedence to Mrs. Cowley at the said crossing, and he dismissed the information. Against that decision the police now appeal. It is not clear from the Case whether the magistrate thought that the accident was due to the respondent having failed to see Mrs. Cowley in time, and, therefore, having applied his brakes too late, or whether he thought it was due to the fact that, seeing Mrs. Cowley in time and applying his brakes in time, as the result of the skid he collided with Mrs. Cowley, but the fundamental finding is that there was no negligence on the part of the respondent, and, accordingly, before it is necessary to consider which of those two views was operating in the magistrate's mind, it is relevant, first, to determine whether the finding of no negligence is by itself an answer. That depends on the construction of reg. 4.

Regulation 4 appears in terms to be absolute. It provides that every foot-passenger shall have precedence within the limits stated and that the driver of

A the vehicle shall accord such precedence to the foot-passenger, but there are plenty of precedents for saying that words which are expressly absolute in a statute or a statutory regulation can be construed as imposing only a qualified obligation if the context so requires. Statutes and regulations of this sort have not uncommonly been held to mean "shall use reasonable endeavours to accord such precedence". If one reflects on the consequences of imposing an absolute obligation, those consequences tend, in my judgment, to show that it could not have been the intention to impose such an obligation in this regulation. It would mean, for example, that, although the respondent had done everything that he could be required to do, including keeping a proper look-out and actually seeing the lady in good time, nevertheless, because he skidded, he committed a breach of the regulation. Similarly, as my Lord put it in the course of the argument, if, having pulled up himself, he were pushed forward by a car which struck the back of his car and propelled him into collision with the lady on the crossing, a matter that would be quite beyond his control, he would still be liable. These matters are certainly matters one ought to consider, and I do consider them, but the predominating feature in my mind is that this is not a regulation which is prohibiting particular sorts of driving. The regulation does not provide that one shall not drive in a certain manner, or that one shall not drive at more than a certain speed, or anything of that sort—a type of provision which has often been construed as imposing an absolute obligation—but it is a regulation for controlling the order of traffic and indicating who is to have precedence at certain points. Regarded as a regulation of that sort, I think it would be quite unreasonable to suppose that an absolute prohibition or an absolute obligation was intended. I think this regulation means that reasonable steps must be taken to accord precedence. Accordingly, I think the finding of the magistrate that there was no negligence is conclusive that there was no breach of the regulation. That does not mean that it would be a defence every time for a motorist to say: "I did not see the pedestrian". Far from it. The duty is to accord precedence. The duty is to give way to the pedestrian if he is on the crossing before the vehicle or any part thereof has come on to the crossing, and it would only, I imagine, be in an exceptional case that the magistrate would be able to find that a failure to see a foot-passenger was not due to some failure on the part of the driver to keep a proper look-out. I would dismiss the appeal.

F HILBERY, J.: I concur. Regulation 4 does not prohibit the doing of some specific act. It imposes a duty to do something on the happening of a certain event, and, therefore, it is just such a regulation, as my Lord pointed out in *Harding v. Price* (1), as requires one to construe it as though qualifying words were written into it. The magistrate has found that there was no negligence, that the driving was at a reasonable and proper speed, and that the respondent was exercising all due care, was keeping a proper look-out and was driving without negligence, which means that he did not fail to see this person on the crossing at the time he ought to have seen her. It means that he was not driving at a speed improper in the circumstances, and part of the circumstances were that the road was wet. The magistrate came to the conclusion in the circumstances that there was a failure effectively to accord precedence because there was in fact a physical impact, but, having regard to his findings of fact and the clearance he gives to the respondent in respect of any allegation of negligence, it seems that he is saying in effect that, notwithstanding the exercise of every care that a man could reasonably be expected to take, there was a failure to give an effective right of precedence to the foot-passenger. What happened was inevitable or was due to some circumstance over which the driver had no reasonable or possible control, and those are circumstances which indicate that the construction we put on this regulation is essentially the right one.

LORD GODDARD, C.J.: I agree. I am conscious that the decision we have given may cause difficulties in administering the regulation, but I think it would be impossible to construe this regulation as imposing absolute liability in the sense that, come what may, be the reason what it may, an offence has been committed. I agree, therefore, with the judgments which have been delivered.

Appeal dismissed.

Solicitors: *Solicitor, Metropolitan Police* (for the appellant); *Ponsford & Devenish* (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

LAWRENCE v. HOWLETT.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Devlin and Gorman, JJ.), May 23, 1952.]

Street Traffic — “Motor vehicle” — *Dual-purpose vehicle* — *Bicycle fitted with auxiliary engine* — *Use as pedal cycle after removal of essential parts of engine* — *Need for third-party insurance* — *Road Traffic Act, 1930 (c. 43), s. 1, s. 35 (1).*

The appellant was charged with using a motor vehicle in relation to the user of which no policy of insurance against third-party risks was in force, contrary to s. 35 (1) of the Road Traffic Act, 1930. The vehicle was a bicycle which had been fitted with an auxiliary engine, but it could also be used as an ordinary pedal bicycle. At the time of the alleged offence the appellant was using it as a pedal bicycle, and it could not be used otherwise as essential parts of the engine had been removed.

HELD: as the auxiliary engine was not in working condition and the vehicle could only be used as a pedal bicycle, it was not at the material time a “motor vehicle” within s. 1 and s. 35 (1) of the Act of 1930, and, therefore, the appellant had not committed an offence against the latter sub-section.

FOR THE ROAD TRAFFIC ACT, 1930, s. 1 and s. 35 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 572 and p. 602, respectively.

CASE STATED by Middlesex justices.

At a court of summary jurisdiction, sitting at Brentford, an information was preferred by the respondent, a police officer, charging that the appellant used a motor vehicle on a road without there being in force in relation to its user a policy of third-party insurance, contrary to s. 35 (1) of the Road Traffic Act, 1930. It was proved or admitted that while the appellant was riding a pedal bicycle which was fitted with an auxiliary motor he was thrown off his machine due to the sheering of the bolt of the engine engagement lever. No policy of insurance was then in force. There was some petrol in the tank of the bicycle, but the auxiliary motor was not in working condition, the cylinder, piston, and connecting rod having been removed, and the appellant was using the vehicle as a pedal cycle. It was contended on behalf of the appellant that at the time of the alleged offence the machine was not a “motor vehicle” within the meaning of s. 1 of the Act of 1930, since it was not mechanically propelled, and that, therefore, it was not subject to the requirement of s. 35 (1) of the Act. The justices were of the opinion that the machine was a motor vehicle within the meaning of s. 1 of the Road Traffic Act, 1930, and that the offence charged had been committed.

Skelhorn for the appellant.

Vernon Gattie for the respondent.

LORD GODDARD, C.J.: This is a Case stated by Brentford justices before whom the appellant was charged with using on a road a motor vehicle in respect of which there was not in force an insurance policy as required by the Road Traffic Act, 1930. The vehicle in question was a bicycle, a dual-purpose machine which could be used either mechanically or as pedal-driven. The

justices found that on the day in question the auxiliary motor fitted to the appellant's cycle was not in working order because certain vital parts, namely, the cylinder, piston, and connecting rod, had been removed by the appellant, though there was some petrol in the tank. That seems to suggest that the removal of those parts had been a mere temporary removal, and, no doubt, the appellant intended at some time to replace them, but the justices also found that at the material time the appellant was riding the machine simply as a pedal cycle.

The question, therefore, is, whether or not on those findings the justices were entitled to hold that on the occasion in question the appellant was using a mechanically propelled vehicle on the road without a policy of insurance being in force in relation to its user. The Road Traffic Act, 1930, provides by s. 1:

"This Part of this Act shall apply to all mechanically propelled vehicles intended or adapted for use on roads (in this Act referred to as 'motor vehicles')"

In the opinion of the court, the words "mechanically propelled vehicles", though words of classification, are not words of definition, and where a vehicle, which is, to use a convenient expression, a dual-purpose vehicle, is found, as the justices have found in the present case, to have been so treated that on the day of the alleged offence it could not be mechanically propelled, though it could be, and was being, used as a pedal cycle, the user is not bound to have in force an insurance policy relating to the user of the vehicle. It is true that to some extent the finding of the justices that this was a motor vehicle may be one of fact, but I do not think that that is consistent with their finding that the appellant was riding the machine simply as a pedal cycle. Not without a certain amount of hesitation, I have come to the conclusion that this appeal must be allowed.

DEVLIN, J.: I come to the same conclusion, but also with a certain amount of hesitation. The question is whether this vehicle was a mechanically propelled vehicle within the meaning of s. 1 of the Road Traffic Act, 1930, and that section is one of a group of sections which is headed: "Classification of motor vehicles". I am, therefore, satisfied, that the words "mechanically propelled" are intended as words of classification and prima facie do not refer to the way in which a vehicle is being propelled at any given moment. A motor car is a mechanically propelled vehicle. It is designed so that it has only a mechanical means of propulsion, and, therefore, I should hold that, whatever its use might be at any given moment, whether it was in working order or whether it was being driven on a free-wheel or driven downhill with the engine disengaged, it still was being used as a mechanically propelled vehicle. Where, however, a vehicle is designed to have two means of propulsion, one mechanical and the other non-mechanical, different questions are raised, and to see into which classification it comes regard must be had to its working condition and the use to which it is being put at the material time. I agree also that to some extent it is a question of fact and of degree, but in view of the justices' finding of fact that the auxiliary motor was not in a working condition at the material time and that the appellant was riding the machine simply as a pedal cycle, I think the conclusion is irresistible that the cycle did not fall within the classification of a mechanically propelled vehicle.

GORMAN, J.: I agree. I think this is an exceptional case and must not be taken to be in any way extended beyond its particular facts.

Appeal allowed.

Solicitors: *A. J. A. Hanhart* (for the appellant); *Solicitor, Metropolitan Police* (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

STROUD v. BRADBURY.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Devlin and Gorman, JJ.), May 20, 1952.]

Public Health—Entry on premises—“Twenty-four hours’ notice of intended entry”—Letter stating intention to “proceed under s. 290 (6) of the Public Health Act, 1936,” sent to occupier four months before entry—Public Health Act, 1936 (c. 49), s. 287 (1), proviso.

In view of the failure of the owner of a bungalow to carry out work thereon relating to the drainage of the bungalow in accordance with a notice served on her by the local authority under s. 39 (1) of the Public Health Act, 1936, the local authority on Feb. 17, 1951, wrote her a letter in which they said: “As you have not complied with the council’s notice, it is intended to proceed under s. 290 (6) of the Public Health Act, 1936” (which authorised the local authority to enter the premises and do the work themselves). On June 1, 1951, a sanitary inspector employed by the local authority, with a builder and his men, attended at the premises to carry out the work, but the appellant, the owner’s husband, refused to allow them to proceed with it and threatened to assault them if any attempt were made to carry it out.

HELD: the letter written to the appellant’s wife by the local authority on Feb. 17 did not constitute a “twenty-four hours’ notice of the intended entry” as required by the proviso to s. 287 (1) of the Act to be given to the occupier of the premises, and, therefore, resistance to the entry was lawful and the appellant did not commit an offence under s. 288.

FOR THE PUBLIC HEALTH ACT, 1936, s. 287 (1), proviso, see HALSBURY’S STATUTES, Second Edn., Vol. 19, p. 466.

CASE STATED by the appeal committee of East Kent Quarter Sessions.

The appellant was convicted by a court of summary jurisdiction sitting at St. Augustine, Kent, on July 4, 1951, of having, on June 1, 1951, at Herne Bay, Kent, wilfully obstructed a sanitary inspector employed by Herne Bay Urban District Council when acting in the execution of the Public Health Act, 1936, contrary to s. 288 of that Act. He was fined £4, with £1 costs. He appealed to quarter sessions where it was proved or admitted that on Feb. 17, 1951, following the failure of the appellant’s wife to carry out works for renewing a drain at her property at 83, School Lane, Herne Bay, in accordance with a notice served on her on Aug. 24, 1950, by the council under s. 39 (1) of the Act (against which notice she had appealed under s. 290 (3) of the Act to a court of summary jurisdiction which had dismissed the appeal), the respondent, the clerk of the council, wrote to her saying that the council intended to proceed under s. 290 (6) of the Act to carry out the works themselves. On a day or days before May 2, 1951, a builder, on the instructions of the council, called at the property and was given permission to measure the work for which he had been invited by the council to tender. On May 2 and 31 he called again to inform the appellant and his wife that he was coming to commence the work. On June 1, 1951, a sanitary inspector employed by the council attended at the property with the builder and his men with the intention of carrying out the work, but the appellant refused to allow the work to be carried out and threatened to assault them if they attempted to do it. The appellant contended, inter alia, that the council had not given the twenty-four hours’ notice of intention to do the work required by s. 287 (1) of the Act of 1936. The appeal committee held that the letter of Feb. 17, 1951, was a sufficient notice to comply with s. 287 (1) and s. 290 (6) of the Act of 1936, and dismissed the appeal.

The appellant in person.

W. L. Roots for the respondent.

LORD GODDARD, C.J.: To be entitled to enter the premises to execute the works the employees of the council had to observe the provisions of the Public Health Act, 1936, s. 287 (1), which gives them that right subject to their giving proper notice of their intention. When the sanitary inspector of the council arrived, the appellant obstructed him with all the rights of a free-born Englishman whose premises were being invaded and defied him with a clothes prop and a spade. He was entitled to do that unless the sanitary inspector had a right to enter. He was brought before the justices and fined, and quarter sessions upheld the conviction. In the opinion of this court, the appellant now succeeds because the sanitary inspector had not done that which the statute required him to do before he had a right of entry. It was very necessary that the inspector should enter the premises to do this work and it was very necessary that the work should be done, but before the inspector could enter the premises he must comply with the statute. The statute provides by the proviso to s. 287 (1):

“ . . . admission to any premises not being a factory, workshop or work-place, shall not be demanded as of right unless twenty-four hours' notice of the intended entry has been given to the occupier.”

By s. 283 (1) of the Act the notice must be in writing. The only document relied on as a notice justifying this entry on June 1 was a letter which was written on Feb. 17, 1951, more than three months before, saying:

“ This matter has now been held over for a considerable time since the appeal was dismissed by the quarter sessions committee, and, as you have not complied with the council's notice, it is intended to proceed under s. 290 (6) of the Public Health Act, 1936.”

Section 290 (6) provides:

“ . . . if the person required by the notice to execute works fails to execute the works indicated within the time thereby limited, the local authority may themselves execute the works and recover from that person the expenses reasonably incurred by them in so doing and, without prejudice to their right to exercise that power, he shall be liable to a fine not exceeding £5, and to a further fine not exceeding 40s. for each day on which the default continues after conviction therefor.”

It may be that the appellant's wife was liable to some penalties for not having done the work. It may be that the council are entitled to enter and do the work themselves, but before they do so they must give the proper notice. The contention that an expression of intention on Feb. 17 to proceed under s. 290 (6) of the Act of 1936 on June 1 can possibly be a twenty-four hours' notice of the intended entry is quite untenable. Therefore, the appellant was not guilty of obstructing the sanitary inspector in the execution of his duty because the sanitary inspector had no right to enter the appellant's wife's premises when he did. The appellant was entitled to order him off and prevent him from entering. The result is that the appeal is allowed, the appellant's conviction is quashed, and he must have the costs here and the costs of the appeal before the appeal committee.

DEVLIN, J.: I agree.

GORMAN, J.: I agree.

Conviction quashed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *A. C. Bradbury*, clerk of Herne Bay Urban District Council (for the respondent).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

R. v. NOTTINGHAM QUARTER SESSIONS. *Ex parte* HARLOW.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Jones and Parker, JJ.), May 14, 15, 23, 1952.]

Public Health—Dustbin—Provision—Owner of building required by local authority to provide—Notice set aside by justices—Right of local authority to appeal to quarter sessions—"Person aggrieved"—Public Health Act, 1936 (c. 49), s. 301.

Acting under s. 75 (1) of the Public Health Act, 1936, a local authority served a notice on the applicant, as the agent of the owners of a building, requiring him to provide a dustbin for the building. On an appeal by the applicant to a court of summary jurisdiction, the notice was set aside, but no order as to costs was made. The authority appealed to quarter sessions under s. 301 of the Act, and its appeal was allowed. On an application by the applicant for an order of certiorari to bring up and quash the order of quarter sessions, on the ground that the authority had no right of appeal as it was not "a person aggrieved" by the justices' order within s. 301,

HELD: (i) the authority was a "person", within the meaning of s. 301.

R. v. Surrey Quarter Sessions Appeal Committee. Ex p. Lilley ([1951] 2 All E.R. 659), applied.

(ii) as a result of the order of the court of summary jurisdiction the authority was left with a legal burden which it would have discharged had the order not been made, and, therefore, it was "a person aggrieved" within s. 301, and quarter sessions had jurisdiction to entertain the appeal.

Dictum of JAMES, L.J., in *Ex p. Sidebotham. Re Sidebotham* (1880), (14 Ch.D. 465), applied.

FOR THE PUBLIC HEALTH ACT, 1936, s. 72, s. 75 and s. 301, see HALSBURY'S STATUTES, Second Edn., Vol. 19, pp. 366, 368 and 474.

Cases referred to:

- (1) *R. v. Surrey Quarter Sessions Appeal Committee. Ex p. Lilley*, [1951] 2 All E.R. 659; [1951] 2 K.B. 749; 115 J.P. 507.
- (2) *Sevenoaks Urban District Council v. Twynam*, [1929] 2 K.B. 440; 98 L.J.K.B. 537; 141 L.T. 566; 93 J.P. 189; Digest Supp.
- (3) *R. v. London Sessions Appeal Committee. Ex p. Westminster City Council*, [1951] 1 All E.R. 1032; [1951] 2 K.B. 508; 115 J.P. 350.
- (4) *Ex p. Sidebotham. Re Sidebotham*, (1880), 14 Ch.D. 458; 49 L.J. Bey. 41; 42 L.T. 783; 4 Digest 225, 2114.
- (5) *R. v. London County Keepers of the Peace & JJ.*, (1890), 25 Q.B.D. 357; *sub nom. R. v. London JJ. Ex p. Fulham Vestry*, 59 L.J.M.C. 146; 63 L.T. 243; 55 J.P. 56; 26 Digest 460, 1760.
- (6) *Ex p. Official Receiver. Re Reed, Bowen & Co.*, (1887), 19 Q.B.D. 174; 56 L.J.Q.B. 447; 56 L.T. 876; 4 Digest 180, 1669.
- (7) *R. v. Hannam*, (1886), 2 T.L.R. 234; 34 W.R. 355; 18 Digest 415, 1548.

MOTION for an order of certiorari to bring up and quash an order made by Nottingham City Quarter Sessions on Sept. 28, 1951.

On an appeal by the applicant from a notice served on him by the Nottingham City Council under the Public Health Act, 1936, s. 75 (1), requiring him to provide a dustbin for a building, a court of summary jurisdiction, sitting at Nottingham on May 30, 1951, made an order declaring the notice and requirement void and of no effect. The council appealed, under s. 301 of the Act, to quarter sessions who allowed the appeal and quashed the order of the justices. It was contended by the applicant that the council had no right of appeal to quarter sessions as (a) it was not "a person" within s. 301, and (b) it was not "a person aggrieved" within the section.

Elwes, Q.C., and Lymbery for the applicant.

Marshall, Q.C., and Cotes-Predy for the council.

Cur. adv. vult.

May 23. **PARKER, J.**, read the following judgment of the court: The applicant is the agent of the owners of premises known as 33, Peas Hill Rise, in the city of Nottingham. By a notice, dated Apr. 26, 1951, the Nottingham City Council, pursuant to its powers under the Public Health Act, 1936, s. 75 (1), required the applicant to provide a dustbin for the premises. The applicant, as he was entitled to do, appealed to the court of summary jurisdiction sitting at the Guildhall, Nottingham, and on May 30, 1951, that court allowed the appeal and ordered that the said notice and requirement of the respondent council be void and of no effect. The court made no order as to costs. From that order of the justices the council appealed to Nottingham City Quarter Sessions who, on Sept. 28, 1951, ordered that the appeal be allowed and quashed the order of the justices, leaving the notice and requirement of the council in force.

Counsel for the applicant now moves for an order of certiorari to bring up and quash that order of quarter sessions on the ground that quarter sessions had no jurisdiction to entertain the council's appeal. He contends (i) that the council was not "a person" within s. 301 of the Public Health Act, 1936; (ii) that, in any event, the council was not "a person aggrieved" within that section; and that, accordingly, the council had no right of appeal to quarter sessions. As regards the first contention, the court is clearly of opinion that the council is a "person" within that section. Indeed, the matter is concluded by the decision of this court in *R. v. Surrey Quarter Sessions Appeal Committee. Ex p. Lilley* (1). It is true that in that case the court was considering another Act, the Nurseries and Child-Minders Regulation Act, 1948, but by s. 6 (5) of that Act s. 300 to s. 302 of the Public Health Act, 1936, were made to apply, and the court had to construe s. 301 of the latter Act, and held that the local authority was "a person" within that section.

The other question, viz., whether the respondent council was "a person aggrieved", is more difficult, since the court of summary jurisdiction merely allowed the applicant's appeal and did not make any order for costs against the council. Had such an order been made, then, clearly, as was held in the *Surrey* case (1), the council would have been "aggrieved". In approaching this question, it is important to bear in mind what LORD HEWART, C.J., said ([1929] 2 K.B. 443) in *Sevenoaks Urban District Council v. Twynam* (2):

"Now undoubtedly those words, 'a person aggrieved', have very often been considered, and, if one looked at the mere terms apart from their context and apart from the particular circumstances, it would have been quite easy to marshal decisions of contradictory import. But as has been said again and again there is often little utility in seeking to interpret particular expressions in one statute by reference to decisions given upon similar expressions in different statutes which have been enacted alio intuitu. The problem with which we are concerned is not, what is the meaning of the expression 'aggrieved' in any one of a dozen other statutes, but what is its meaning in this part of this statute?"

Turning, then, to the Public Health Act, 1936, it is to be observed, without going through the Act in detail, that numerous powers are given to and duties and burdens imposed on local authorities. They can make a variety of requirements, refusals, decisions and determinations, and from these the member of the public concerned is given a right of appeal to courts of summary jurisdiction, which by s. 300 (1) is to be by way of complaint. Local authorities are also given the right to sue in such courts for expenses: [see s. 293]. It is from decisions of courts of summary jurisdiction in all such matters, in some of which the local authority will have been the defendants to a complaint, and, in others, the complainants that a right of appeal to quarter sessions is given by s. 301. That section provides:

"Subject as hereinafter provided, where a person aggrieved by any

order, determination or other decision of a court of summary jurisdiction under this Act is not by any other enactment authorised to appeal to a court of quarter sessions, he may appeal to such a court: Provided that nothing in this section shall be construed as conferring a right of appeal from the decision of a court of summary jurisdiction in any case if each of the parties concerned might under this Act have required that the dispute should be determined by arbitration instead of by such a court."

The proviso does not matter for the purpose of this case. Prima facie, a local authority who have either gone to a court of summary jurisdiction as complainants, or have been brought before such a court as defendants to a complaint, and have failed are, one would have thought, in common parlance, "a person aggrieved".

Turning, next, to the sections of the Act concerning a local authority's powers and duties as sanitary authority, one finds that by s. 72 (1) (a) the local authority, if so required by the Minister of Health, as was the case here, are charged with the duty of removing house refuse, for which purpose dustbins are clearly necessary, and, by s. 72 (2), they can be compelled to perform that duty. By s. 75 (1) the local authority can require an owner or an occupier of premises to provide dustbins, and a right of appeal to a court of summary jurisdiction is given to a person aggrieved by such a requirement. Provision is also made, in s. 75 (3), empowering the local authority themselves to provide dustbins, and to make an annual charge therefor. Accordingly, once the court of summary jurisdiction in the present case had declared null and void the notice and requirement to the applicant, as agent for the owners, to provide a dustbin, the respondent council would have to fulfil its duties in some other way. It would either have to provide a dustbin itself, or serve a notice on the occupier requiring him to do so with the risk of being taken by the occupier to the court, and having to incur and, possibly, to pay costs. In other words, the council is left with a legal burden which, if the order of the court of summary jurisdiction had not been made, the council would have discharged. In these circumstances, the council is, in our view, "a person aggrieved".

Reference, however, was made in the course of the argument to a number of cases, and, in particular, to *R. v. London Sessions Appeal Committee. Ex p. Westminster City Council* (3) and to the *Surrey* case (1), which, it is said, require us to hold that the council was not "a person aggrieved". In the *Westminster* case (3), the court had to consider the London County Council (General Powers) Act, 1947, empowering borough councils to register street traders and to grant, renew, vary and revoke licences to street traders. Under s. 25 (1) a trader has a right of appeal to a court of summary jurisdiction, and from an order of that court "any person deeming himself aggrieved" can appeal to quarter sessions under s. 64. The Westminster City Council cancelled the registration of certain street traders who appealed to a metropolitan magistrate. The cancellations having been reversed by the magistrate, the city council sought to appeal to quarter sessions. This court held not only that, as a matter of the construction of that Act, the city council was not "a person", but that, in any event, it was not "a person aggrieved". That case, as it seems to us, is clearly distinguishable. The cancellation of the registration cast no legal burden on the city council, and, while it might have been annoyed or disappointed at the magistrate's decision, it was not aggrieved thereby.

In the *Surrey* case (1), the principal of a nursery school applied to the Surrey County Council to be registered under the Nurseries and Child-Minders Regulation Act, 1948, as a child-minder. The council made an order registering her subject to certain conditions and, objecting to the conditions, she appealed to a court of summary jurisdiction. The court held that the Act did not apply to the applicant's premises and, accordingly, that the council had no power to make the order, and they made an order for costs against the council. By s. 6 (5), the

Act of 1948 incorporated s. 301 of the Public Health Act, 1936, and the council appealed to quarter sessions. This court held that the council was "a person aggrieved", since an order for costs had been made against it, but it is clear from the judgments that, but for the order for costs, the court would have held to the contrary. That case also is, in our view, distinguishable and for the same reasons. The cancellation of the council's order did not result in any legal burden being cast on the council.

A Both in the *Westminster* case (3) and in the *Surrey* case (1) reliance was placed on *Ex p. Sidebotham. Re Sidebotham* (4) and *R. v. London County Keepers of the Peace & JJ.* (5), but neither of these cases seem to us to conflict in any way with the view which we have formed in the present case. Indeed, in *Ex p. Sidebotham* (4) JAMES, L.J. said (14 Ch.D. 465):

B "But the words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something."

C We think that the respondent council in the present case can be said to come within that definition. But, in any event, it is to be observed that, as LORD ESHER, M.R., pointed out (19 Q.B.D. 178) in *Ex p. Official Receiver. Re Reed, Bowen & Co.* (6), that definition does not purport to be and is not an exhaustive definition.

D The only case which has caused doubt in our minds is *R. v. Hannam* (7). In that case the corporation of Ramsgate rated the Ramsgate Smackowners' Ice Co. in respect of certain premises. The company failed to pay and the corporation took out a summons for an order for payment, under the Public Health Act, 1875, s. 256. The justices refused to make the order on the ground that, by reason of certain local Acts, the premises were exempt from rates. A rule nisi for a mandamus was made absolute by the Queen's Bench Division to compel the justices to make an order for payment on the ground that they had no power to inquire into the validity of the rate, since, the company not having appealed to quarter sessions against it, the rate was good on the face of it. In dismissing the appeal, the Court of Appeal had to consider whether the corporation could have appealed under the Public Health Act, 1875, s. 269, against the justices' decision, since, if so, a mandamus would not have been the proper remedy. On that matter LORD ESHER, M.R., said:

F "But that section only applied to a person aggrieved—that was a person against whom an order was made throwing a burden upon him—and it did not give an appeal to a rating authority."

No argument on this point is set out in the report, nor is the passage cited above easy to follow. The corporation were plaintiffs who had failed before the justices and, we should have thought, were "aggrieved" within the definition given by JAMES, L.J. (14 Ch.D. 465) in *Ex p. Sidebotham* (4). It may be that the real point taken was that the corporation was not "a person", within s. 269 of the Public Health Act, 1875. The requirement in s. 269 (2) that the appellant should give notice to the authority lends support to the view that the corporation could not appeal. It is enough, however, for us to reiterate the words of LORD HEWART, C.J. ([1929] 2 K.B. 443) in *Sevenoaks Urban District Council v. Twynam* (2) and to consider, as we have to, the position under the relevant provisions of the statute in question in this case. This application must be refused.

Application dismissed.

Solicitors: Peacock & Goddard, agents for Browne, Jacobson & Hallam, Nottingham (for the applicants); Sharpe, Pritchard & Co., agents for T. J. Owen, town clerk, Nottingham (for the respondent council).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

BENTLEYS, STOKES AND LOWLESS v. BEESON (INSPECTOR OF TAXES).

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.J.J.), May 5, 6, 7, 21, 1952.]

Income Tax—Computation of profits—Deduction—Entertainment of clients—Income Tax Act, 1918 (c. 40), sched. D, Cases I and II, r. 3 (a).

The partners in a firm of solicitors were accustomed to entertain existing clients of the firm to luncheon at a social club and various restaurants. During luncheon, business was discussed. The legal advice given to clients at luncheon was charged to them in the normal way, but the fees charged did not include the expenses of the meals, which were paid by the firm. This practice was adopted by the partners both for their own convenience, so that they could devote the remainder of the day to other work in their offices, and for the convenience of clients. The partners claimed to deduct the cost of these entertainments (which included the cost of their own meals) in computing the profits of the firm for assessment to income tax. The Income Tax Act, 1918, sched. D, Cases I and II, r. 3 (a), forbids the deduction of "any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation."

HELD: in spite of an element of hospitality which was necessarily inherent in what was done, in the circumstances the sole object in incurring the expenses was the promotion of the business of the firm, and, therefore, they were "money wholly and exclusively laid out or expended for the purposes of the profession" within r. 3 (a) and were properly to be deducted in computing the amount of the firm's profits to be charged to tax.

Per curiam: "If the activity be undertaken with the object both of promoting business and also with some other purpose, for example, with the object of indulging an independent wish of entertaining a friend or stranger or of supporting a charitable or benevolent object, then the rule is not satisfied though in the mind of the actor the business motive may predominate."

Decision of ROXBURGH, J. ([1951] 2 All E.R. 667), affirmed.

AS TO DEDUCTION FOR EXPENSES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 149-156, paras. 309-320; and FOR CASES, see DIGEST, Vol. 28, pp. 42-45, Nos. 215-226.

Cases referred to:

- (1) *Strong & Co., Ltd. v. Woodifield*, [1906] A.C. 448; 75 L.J.K.B. 864; 95 L.T. 241; 5 Tax Cas. 215; 28 Digest 57, 290.
- (2) *Smith's Potato Estates, Ltd. v. Bolland. Smith's Potato Crisps (1929), Ltd. v. Inland Revenue Comrs.*, [1948] 2 All E.R. 367; [1948] A.C. 508; [1948] L.J.R. 1557; 30 Tax Cas. 267; 2nd Digest Supp.
- (3) *Spofforth & Prince v. Golder*, [1945] 1 All E.R. 363; 173 L.T. 77; 26 Tax Cas. 310; 2nd Digest Supp.
- (4) *Bourne & Hollingsworth, Ltd. v. Ogden*, (1929), 14 Tax Cas. 349; Digest Supp.
- (5) *Margerison v. Tyresoles, Ltd.*, (1942), 25 Tax Cas. 59; 2nd Digest Supp.

APPEAL by the Crown from an order of ROXBURGH, J., dated July 27, 1951 (reported [1951] 2 All E.R. 667), reversing the decision of the Special Commissioners, and holding that certain entertainment expenses were incurred by the taxpayers "wholly and exclusively" for the purposes of their profession.

Sir Frank Soskice, Q.C., and *Sir Reginald Hills* for the Crown.

Millard Tucker, Q.C., and *J. W. P. Clements* for the taxpayers.

Cur. adv. vult.

May 21. **ROMER, L.J.**, read the following judgment of the court. This is an appeal from an order of **ROXBURGH, J.**, dated July 27, 1951, in which he allowed the appeal of Messrs. Bentleys, Stokes and Lowless (a firm of solicitors practising in London) from a decision of the Special Commissioners, in which they disallowed a claim by the firm that they were entitled to a deduction (under r. 3 (a) of the Rules Applicable to Cases I and II, sched. D, of the Income Tax Act, 1918) in computing their profits and gains for the purposes of income tax for the year ended Apr. 5, 1950, in respect of certain entertainment expenses. There are two partners in the firm, namely, Mr. B. H. Dulanty and Mr. R. L. Williams, and for the year of assessment 1949-50, based on the firm's accounts for the year ended Dec. 31, 1948, the amount claimed as a deduction was £539, this sum being apportioned as to £430 expended by Mr. Dulanty and as to £109 by Mr. Williams.

So far as material, the facts which the commissioners found, in their Case Stated, as established are as follows. It had been the custom for some years past for the partners, acting on behalf of the firm, to incur expenses in entertaining existing clients. The nature of the entertainment was all in connection with lunches to existing clients, apart from one or two dinners. These took place at the Thatched House Club, an ordinary social club, in St. James's Street, of which Mr. Dulanty was a member, or at restaurants. The firm had a number of clients in the West End of London and in the country, and it was more convenient for business interviews to be held in the West End. By giving these clients lunches, during which the business in hand was discussed, the remainder of the day could be devoted to the firm's routine work by the partners at the office. Mr. Dulanty attended to the commercial work and Mr. Williams to the Admiralty side of the firm's business. If the partners had decided to hold interviews solely in the office at Bishopsgate, certain clients might have been lost. The entertainment was confined to existing clients, who alone were present. The firm's three largest clients were three companies whose total fees brought in more than £3,000 of profit costs in a year. Directors of those three companies, whose offices were in the West End, were entertained at lunch from time to time in the West End for the sake of convenience. The amounts claimed included the cost of the partner's entertainment while entertaining clients. Some of the persons entertained were professional clients from the country for whom the firm acted. In all cases the legal advice given to clients at lunch was charged to them in the normal way, but the cost never included the expenses in question, which were charged as an expense in the firm's profit and loss account under the heading: "Expenses incurred not directly chargeable to clients." Clients were sometimes entertained at the Palmerston Restaurant, which was close to the office in Bishopsgate. The expenses claimed were primarily and principally, but not purely, for business purposes. Mr. Williams, who dealt exclusively with the Admiralty side, and also with some general clients, had to meet in London foreign marine underwriters, mainly from Scandinavia, Germany, Holland and France. They were only in London for a brief time and telephoned their arrival. They were usually only free at lunch time or night time. Meetings were usually fixed for lunch time. The same underwriters would visit London on several occasions. Foreign underwriters often had agents in London, and these agents would bring their foreign employers with them to lunch. Mr. Williams entertained at various restaurants, not at any club.

Evidence, which the commissioners accepted, was given on behalf of the Law Society to the effect that the entertainment by solicitors of existing clients, whether with a view to retaining them as clients or of obtaining new business, was not unprofessional and that it was not uncommon for a solicitor to entertain a client at lunch and discuss business with him, as many solicitors were pressed for time. Copies of entertainment expenses incurred by each of the partners for 1947 onwards were annexed to and formed part of the Case, and we were told by counsel that the detailed records of expenditure subsequent to the relevant

year (1948) were treated at the hearing before the commissioners as representative of the entertainment expenses incurred in that year.

The Special Commissioners held that the sum claimed was not money wholly and exclusively laid out or expended for the purposes of the firm's profession and that the appeal by the solicitors accordingly failed. The firm's appeal from the decision of the Special Commissioners was allowed by ROXBURGH, J. The learned judge said that the reasons on which the commissioners had founded their decision were, first, that the expenses in question had not been proved to be necessary for the carrying on of the firm's profession, and, secondly, that the entertainment had the complexion, at least partially, of private or social hospitality. The learned judge held that neither of these reasons was sufficient to sustain the commissioners' decision—as to the first reason because it was not a valid reason in law, and, as to the second, because there was no evidence to support it. The learned judge, in the course of his judgment, also considered the finding by the commissioners that "the amount claimed included the cost of the partners' entertainment while entertaining clients", but came to the conclusion that that element did not, in itself, prevent the cost of the entertainment from being allowed as a proper deduction. "I accept," he said, "the submission that this is really a single transaction in which the partner's lunch is an essential ingredient." We think that the judge's view on this point was clearly right, and inasmuch as no argument to the contrary was presented to this court we need not consider it further.

The Crown has appealed to this court from the decision of ROXBURGH, J. Apart from the question of the necessity of the expenditure in question, and of the approach by the commissioners to that aspect of the case (to which we will return hereafter), the argument for the Crown may be summarised as follows:— There is a personal relation between solicitor and client and there are strict rules governing their relations which do not exist in trade. Without imputing in the slightest degree any sort of impropriety in providing the entertainment in question, it was argued that there are elements of personal contact existing between a solicitor and his client which tend to distinguish such entertainment from the hospitality which a business man extends to a customer. Then, against this background, the Crown contends that the commissioners found as a fact that in the lunches which the partners gave to their clients in the present case there was, in part, a social element; that this element formed a part of the motive in providing the hospitality; and that, on these findings, the commissioners were right in holding that the expenses of the meals were not exclusively incurred for the purposes of the firm's profession. Counsel for the Crown argued that, if hospitality is inspired by a double motive, viz., the furtherance of professional interests and the entertainment of friends, the court was not concerned to ascertain which was the dominant motive. The presence in itself of the personal motive disqualifies the expenditure as a whole from the category of permissible deductions for income tax purposes.

The relevant words of r. 3 (a) of the Rules Applicable to Cases I and II—"wholly and exclusively laid out or expended for the purposes of the . . . profession"—appear straightforward enough. It is conceded that the first adverb—"wholly"—is in reference to the quantum of the money expended and has no relevance to the present case. The sole question is whether the expenditure in question was "exclusively" laid out for business purposes, that is: What was the motive or object in the mind of the two individuals responsible for the activities in question? It is well established that the question is one of fact: and again, therefore, the problem seems simple enough. The difficulty, however, arises, as we think, from the nature of the activity in question. Entertaining involves inevitably the characteristic of hospitality: giving to charity or subscribing to a staff pension fund involves inevitably the object of beneficence: an undertaking to guarantee to a limited amount a national exhibition involves inevitably supporting that exhibition and the purposes for which it has been

organised. But the question in all such cases is: Was the entertaining, the charitable subscription, the guarantee, undertaken *solely* for the purposes of business, that is, solely with the object of promoting the business or its profit-earning capacity? It is, as we have said, a question of fact. And it is quite clear that the purpose must be the sole purpose. The paragraph says so in clear terms. If the activity be undertaken with the object both of promoting business and also with some other purpose, for example, with the object of indulging an independent wish of entertaining a friend or stranger or of supporting a charitable or benevolent object, then the paragraph is not satisfied though in the mind of the actor the business motive may predominate. For the statute so prescribes. Per contra, if, in truth, the sole object is business promotion, the expenditure is not disqualified because the nature of the activity necessarily involves some other result, or the attainment or furtherance of some other objective, since the latter result or objective is necessarily inherent in the act.

The matter may be illustrated by simple cases which were given in argument. A London solicitor may hear that an old friend and client whom he has not for a long time seen has arrived in London. He says to himself: "I would like to see my friend again, and I know he may wish to talk business with me. I will ask him to have lunch with me and then we can discuss any business he has at the same time. I can kill two birds with one stone." A London solicitor may hear from the representative of a foreign firm, old clients of his own, that the representative is in London and urgently desires to see him on some matter of business, but that his time is very short—he cannot come to the solicitor's office, and is only free at lunch time. The solicitor, to enable the client to get his advice, asks him to lunch at his club or a restaurant. In the first case it appears to us clear that the expenditure could not be justified under the paragraph even though it turned out that the friend spent the whole of the lunch time seeking the solicitor's advice on his private affairs. On the other hand, it would appear to us reasonably clear that in the second case the expenditure (so far, at any rate, as reasonable) must be allowable. The difficulty, of course, arises in the large area between the two examples when it is a question of fact in each case to determine what was the real motive or purpose of the entertaining. But in both examples we have given there is present inevitably the motive or purpose of hospitality—that is, the solicitor in inviting the friend or the foreign representative to lunch does so with the purpose of giving him lunch. That motive is unavoidably involved in the activity itself. A man, to oblige a friend who is a Roman Catholic priest, may agree to participate in a church bazaar organised for the purpose of promoting the interests of the Catholic Church, though he has himself no desire whatever to support that church to which he may be religiously opposed. In such a case the subsidiary purpose is no part of the conscious or deliberate motive of the actor.

So much, indeed, counsel for the Crown concedes, for otherwise it would follow that all entertaining expenses, all charitable donations, would be necessarily excluded. Counsel admits, as we understand him, that in such a case as the present there must be a deliberate and independent wish or motive, that is, independent of the business purposes to be served, to entertain the guest, and for simplicity counsel has described this independent motive as "private hospitality". Thus, we return to the question: In the case before us, was this element of private hospitality in some degree present? Many cases were properly cited to us, but on such a matter we cannot think that, by and large, they are of much assistance. It is not relevant to the present matter that the business purpose must be related to its profit-earning capacity: *Strong & Co., Ltd. v. Woodfield* (1). Nor are we assisted by cases in which there is involved, not so much duality of purpose, as duality of capacity—cases, for example, where the question has been, whether the activity is at least in part attributable to the doer's character, not as proprietor of, or partner in, a business, but to his character as an ordinary citizen—cases relating to the costs of litigation, like *Smith's Potato Estates, Ltd. v. Bolland*, *Smith's Potato Crisps* (1929), *Ltd. v. Inland*

Revenue Comrs. (2) or *Spofforth & Prince v. Golder* (3), and cases of particular charitable donations such as *Bourne & Hollingsworth, Ltd. v. Ogden* (4). If we have correctly analysed the problem, then the present question remains one of fact to be determined in the light of its own circumstances, and we agree with the Crown's contention that it is for the taxpayer to satisfy the tribunal of fact on his claim. More important, it is a firm rule in tax cases that, if the tribunal of fact has found the fact, the court will not disturb its conclusion unless it is clear either that the tribunal has misapplied the law to the facts found or that there was no evidence whatever to support the finding. The first essential question, then, in the present case is: What have the Special Commissioners found? It is here that we have experienced the greatest difficulty from the form of the Case itself.

The commissioners' decision that the expenditure in question was not money wholly and exclusively laid out or expended for the purposes of the solicitors' profession appears at the end of para. 11 of the Case Stated, and is expressed to be "for the above reasons". Inasmuch as paras. 3 to 8 inclusive of the Case are devoted to the facts which the commissioners accepted as established, and not to reasons, and paras. 9 and 10 are confined to the contentions of the respective parties, it is clear, we think, that the reasons on which the commissioners founded their decision are those which appear in the earlier part of para. 11. These reasons are, in effect, that although the provision of meals to existing clients was convenient, customary, and a matter of good policy, and was not contrary to professional etiquette, the commissioners were unable to say that it was necessary or that the expenditure on the meals was incurred solely for the purposes of the profession and was entirely divorced from the element of hospitality and the relationship of host and guest. Such being the reasons for the decision of the commissioners, the court is entitled to review them and to ascertain whether they are sufficient in law to support the decision itself: *Margerison v. Tyresoles, Ltd.* (5) (25 Tax Cas. 67). In our opinion, if one takes the reasons which we have above summarised by themselves, they cannot validly support the decision at which the commissioners arrived.

We will first consider the commissioners' view that the expenditure (although convenient and customary) was not "necessary". As to this, the Crown contends that the commissioners were using the word "necessary" in some special sense and were not intending to convey that the necessity or non-necessity of any particular expenditure was a criterion by which to test its admissibility as a deduction. We cannot accept this contention, for that is precisely, we think, on the plain meaning of the language used, what the commissioners were intending to do. They were saying that one reason for refusing to accept the expenditure as a permissible deduction was that it was not necessary for the purposes of the solicitors' business, and we can find no reason for supposing that they were using the word "necessary" in any sense other than that which it ordinarily bears. If so, this reason is clearly a bad reason. Expenditure is permitted as a deduction under r. 3 (a) if it is

"wholly and exclusively laid out or expended for the purposes of the trade, profession . . ." etc.,

and this language makes no reference to the necessity of the expenditure. If any particular expenditure is necessary for the purposes of a profession it presumably satisfies the test laid down by the rule, but there is no warrant for saying that the absence of necessity automatically prevents it from doing so. It is not for the commissioners to prescribe what expenditure is or is not necessary for the conduct of a profession or business, and they should not, in our judgment, have applied their minds to that question in the present case. The first reason, accordingly, on which the commissioners based their decision was wanting in the requisite element of relevance.

It is, as we think, possible that the second reason is so bound up with the first that it cannot possess any independent validity of its own. This would be so if the commissioners were intending to say that because there was an element of hospitality in the lunches, therefore the expenditure incurred could not be regarded as necessary, with the implication that they would have regarded the expenditure as necessary, and therefore permissible, but for the presence of this consideration. On this view the element of hospitality was being treated, not as a ground in itself for rejecting the claim, but as a test of necessity which, as we have said, is an irrelevant and immaterial criterion. However, this would involve the factor of non-necessity being the only reason for the commissioners' decision, and as they refer to "reasons" in the plural we will assume that the element of hospitality constituted a separate ground in their minds for rejecting the claim which was before them.

Does, then, an "element of hospitality and the relationship of host and guest" to which the commissioners refer in para. 11 of the Case prevent the cost of the lunches from being regarded as money exclusively laid out for the purposes of the firm's profession? At first sight this question would require a negative answer, for (as already indicated) if A pays for B's lunch A cannot be altogether divested of the role of host nor can the element of hospitality be wholly wanting, however businesslike the occasion may be in every other respect. If the presence of this element, in however small and subordinate a degree, is fatal to a claim for deduction under r. 3 (a), then no money spent by, for example, a manufacturer in entertaining a prospective or existing customer could ever be allowed. Nevertheless, such would apparently be the result of the commissioners' second reason for their decision if the language of para. 11 of the Case be taken by itself and given its natural interpretation. Counsel for the Crown was not disposed to contend that such a result could be defended; indeed he said that it would be so absurd that the commissioners cannot be taken to have said what, on the face of para. 11, they did say, and, in referring to hospitality, they must have had private or social hospitality in mind. Now, if the commissioners had been considering a similar claim by a business man we think there might possibly have been some force in this contention, but they were not; they were applying their minds solely to the question of entertainment given by professional men to their clients, which might very well have given rise in the minds of the commissioners to a different conception from that relative to business hospitality and leading to a different result. It does not appear to us that this conception (although, in our opinion, quite unjustified) is so inherently ludicrous as to require the addition of the word "private" or "social" as a qualification of the word "hospitality" when the commissioners themselves did not think proper to use it.

Counsel for the Crown then said that, be that as it may, the commissioners found as a fact, in para. 6 of the Case, that "the expenses claimed were primarily and principally, but not purely, for business purposes", and that this finding throws a light on the reference to hospitality in para. 11 and is decisive of the matter against the solicitors. This point is, in our opinion, the most difficult feature of the present appeal. If the commissioners were intending to indicate by this language, and to find as a fact, that the partners had in mind a dual purpose, namely, the furtherance of their professional interests and the social entertainment of their friends, then the expenditure in question would not meet the test of exclusiveness which the rule requires and this appeal must succeed unless there was no material on which the commissioners could arrive at such a finding. We cannot, however, agree that this bald statement deserves the weight which the Crown sought before us to attribute to it, and this for several reasons. First, it is dropped almost incidentally into a paragraph which is, in other respects, inconsistent with the idea that the subordinate motive which the commissioners were inferring was that of private hospitality. Secondly, if the commissioners had hospitality of this description in mind, they would surely

have said so expressly and stated at all events some items of expenditure which were illustrative of social, as distinct from professional, entertainment. Thirdly, we can find nothing in any of the commissioners' findings of fact as set forth in the Stated Case which tends to indicate that the secondary or "impure" motive which inspired the lunches was that of social hospitality. The whole drift of the facts as found and set forth by the commissioners, in pursuance of their statutory duty to state them, is towards the business character of these lunches, and no fact indicative of a social character is mentioned from first to last. The learned judge in the court below, indeed, went so far as to say that if the commissioners were finding that the entertainments had a social as well as a professional motive there was nothing elsewhere in the Case that was capable of supporting such a finding. Whether or not this be so, we regard this absence of material as affording cogent support for the belief that the commissioners had not arrived at, nor were intending to express, in para. 6 of the Case a finding of private hospitality. The fourth reason for rejecting the Crown's argument on para. 6 is, we think, decisive. For the purposes of the present case it appears clear that both the Crown and the taxpayer were content to treat all the instances of entertainment which occurred since August, 1949, as being in *pari materia*, and also as being fairly representative of the instances of entertainment before that date (of which no details were kept or are available), and no investigation was made and no specific evidence was given in regard to the circumstances of any particular instance.

We are not to be taken as complaining of the propriety, in the circumstances, of that procedure, but it inevitably leads to certain consequences. Stating it, first, in general terms, it must follow that all the lunches had features in common, one of which was that either they were or were not characterised by a subordinate motive of private or social hospitality. If the commissioners were intending to find as a fact that all the lunches were so characterised, it is almost inconceivable that they would not have said so, and such a finding would be so conclusive of the whole appeal that they need have proceeded no further, and certainly need not have inquired into the question of the necessity of the entertainment or introduced a negative answer to that inquiry as one of the grounds of their decision. But the matter goes further, for not only must it follow that the phrase in para. 6 of the Case, "primarily and principally, but not purely, for business purposes", must be capable of application, generally, to every instance of entertainment, but it must apply in particular to those instances in which (as found by the Case) entertainment of the client was the only or the best means of meeting the risk of losing such client. It is this last point which appears to us to be of such importance. Entertainment expenses incurred as being the only practicable means of keeping the individual entertained (or his principals) as a client of the firm appears clearly on the face of it to qualify as moneys wholly and exclusively expended for the purposes of the business. Yet to such an example the formula "principally, but not purely" must be intended as applicable notwithstanding that the expenses of such an exclusively professional entertainment could not possibly be disallowed on any consideration of private hospitality.

In these circumstances one must look elsewhere in the Case for an explanation of what the commissioners meant in their finding, in para. 6, that the expenses claimed were not "purely for business purposes". It seems to us that, in this quest, one is necessarily driven (for there is no other clue that we can find) to para. 11 and to the view of the commissioners, therein expressed, that the expenditure was not entirely divorced from the element of hospitality. In our judgment, it was that consideration and nothing else that lay behind the finding in para. 6, and, if so, that finding adds nothing to para. 11, to which it is, in effect, merely introductory. We are unable, therefore, to attribute any appreciable weight to the statement in para. 6; much less can we regard it as possessing the decisive significance which counsel for the Crown, in argument, sought to attach to it.

Our conclusion, therefore, is that the reasons for the commissioners' decision are solely those that are mentioned in para. 11 of the Case; that each of those reasons is insufficient in law to justify the commissioners in rejecting the taxpayers' claim; and that, as no other reasons for rejecting it were advanced before the commissioners or before us, the claim should succeed, and the appeal, accordingly, fails. In dismissing the appeal, however, we desire to add the following observations. Once it is established that the commissioners rejected the claim on the single ground that in every case there was present the element of hospitality, it necessarily follows from the course taken in the present case that the whole of the expenditure must be allowed. We are satisfied that in the circumstances it would not be just to send the case back to the commissioners for further findings, for, as we have said, the various items were clearly treated as all standing or falling together. Further, it would be extremely difficult after this interval of time to expect either partner to give evidence as regards the particular circumstance of every instance. We must not, however, be taken as deciding that on its particular facts every instance was, in fact, proved to be justifiable. On any future claim for deduction it would be proper to inquire into the special circumstances of any item in the claim, and on such an inquiry the true answer would depend on the application of the principles we have tried to state above to the facts of each instance or (if agreement to that effect can be reached) of any case which should be treated for the purposes of the claim as typical of the whole.

Appeal dismissed.

Solicitors: *Bentleys, Stokes & Lowless* (for the taxpayers): *Solicitor of Inland Revenue.*

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

DALE AND OTHERS v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.J.J.), May 7, 8, 9, 21, 1952.]

Income Tax—Special contribution—“Investment income”—Annuity to trustee conditional on acting as such—Income Tax Act, 1918 (c. 40), s. 14 (3) (a) (b)—Finance Act, 1948 (c. 49), s. 47 (1).

The taxpayer, a trustee under a will, was entitled by the will to an annuity of £1,000 a year free of income tax and surtax “so long as he shall continue to act as trustee”. The duties of the trusteeship were onerous, and the taxpayer had been chosen for his special qualifications. He was assessed to the special contribution under s. 47 (1) of the Finance Act, 1948, on the basis that his income as trustee was investment, not earned, income.

HELD: an office of profit was an office the tenure of which constituted the title to the profit in contrast to an office the tenure of which constituted merely the condition on which profit was derived from some other source or title; the office of trustee involved a denial of any right to make a profit from it, and for those reasons it was not an office of profit within the meaning of s. 14 (3) (a) of the Income Tax Act, 1918; the annuity to which the taxpayer was entitled under the will was not remuneration from his office of trustee, but was derived from the bounty of the testator; and, therefore, the income was to be regarded as investment income, and not as earned income, and the taxpayer was liable for special contribution in respect of it.

Baxendale v. Murphy ([1924] 2 K.B. 494), applied.

Per SIR RAYMOND EVERSLED, M.R.: The annuity was not “income from any property which is attached to or forms part of the emoluments” of the office of trustee, within s. 14 (3) (b) of the Income Tax Act, 1918.

Decision of HARMAN, J. ([1951] 2 All E.R. 517), reversed.

FOR THE FINANCE ACT, 1948, s. 47 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 842.

Cases referred to:

- (1) *A.-G. v. Eyres*, [1909] 1 K.B. 723; 78 L.J.K.B. 384; 100 L.T. 396; 21 Digest 46, 297.
- (2) *Baxendale v. Murphy*, [1924] 2 K.B. 494; 93 L.J.K.B. 974; 132 L.T. 490; 9 Tax Cas. 76; 28 Digest 87, 497.
- (3) *Hearn v. Morgan. Pritchard v. Harding Lathom-Browne*, [1945] 2 All E.R. 480; 173 L.T. 361; 26 Tax Cas. 478; 2nd Digest Supp.
- (4) *Re Pooley*, (1888), 40 Ch.D. 1; 58 L.J.Ch. 1; 60 L.T. 73; 42 Digest 122, 1178.
- (5) *Re Thorley*, [1891] 2 Ch. 613; 60 L.J.Ch. 537; 64 L.T. 515; 21 Digest 52, 345.
- (6) *Re White*, [1898] 2 Ch. 217; 67 L.J.Ch. 502; 78 L.T. 770; 24 Digest 603, 6341.
- (7) *Cowan v. Seymour*, [1920] 1 K.B. 500; 89 L.J.K.B. 459; 122 L.T. 465; 7 Tax Cas. 372; 28 Digest 85, 490.
- (8) *Fry v. Salisbury House Estate, Ltd. Jones v. City of London Real Property Co., Ltd.*, [1930] A.C. 432; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266; Digest Supp.
- (9) *Inland Revenue Comrs. v. Westminster (Duke)*, [1936] A.C.1; 104 L.J.K.B. 383; 153 L.T. 223; *sub nom. Westminster (Duke) v. Inland Revenue Comrs.*, 19 Tax Cas. 490; Digest Supp.
- (10) *Re Hanbury*, (1939), 20 Annotated Tax Cases, 333.
- (11) *Jones v. Wright*, (1927), 139 L.T. 43; 13 Tax Cas. 221; Digest Supp.

APPEAL by the Crown from an order of HARMAN, J., dated July 4, 1951 (reported [1951] 2 All E.R. 517), holding that the annuity payable to the taxpayer was remuneration from his office of trustee and so was earned income within the meaning of s. 14 (3) (a) of the Income Tax Act, 1918.

Pennycuik, Q.C., J. H. Stamp and Sir Reginald Hills for the Crown.

Millard Tucker, Q.C., and F. N. Bucher for the taxpayer.

Cur. adv. vult.

May 21. The following judgments were read.

SIR RAYMOND EVERSHED, M.R.: The short question in this appeal is whether there has arisen a liability to the "special contribution" imposed by s. 47 of the Finance Act, 1948, in respect of the remuneration of £1,000 per annum "free of duty and tax" payable to Sir Henry Dale as one of the trustees of the trust known as the Wellcome Foundation and established by the will of the late Sir Henry Wellcome, by virtue of the terms of the will. It is agreed that the gross amount of the remuneration is £1,446, and there has at all material times been paid annually to Sir Henry Dale out of the income of the funds subject to the trusts of the Wellcome Foundation the net sum of £1,000, the balance of £446 being retained by the trustees in respect of the tax appropriate to the annual sum. It is also the fact that no separate assessment for income tax has ever been made on Sir Henry Dale under sched. E or otherwise in respect of this annual sum. The "remuneration" so payable has been uniformly treated for this purpose as being in *pari materia* with other "remuneration" payable under a will or settlement to an individual trustee, namely, as falling within the scope of Case III of sched. D to the Income Tax Act, 1918, and payable subject to deduction of the appropriate tax by virtue of r. 19 of the All Schedules Rules. In other words, "remuneration" to such a trustee has not hitherto been regarded as falling within the ambit of sched. E.

The "special contribution" imposed by the Finance Act, 1948, is leviable (subject to the limitations specified in s. 47) in respect of "investment income", and that expression is, by the terms of s. 49 (1) of the Act, defined as meaning

“income from any source other than a source of earned income”. Section 68 (2) of the Act of 1948 having made applicable for the purposes of that Act the definitions to be found in the Income Tax Acts, the meaning of the term “earned income” must be sought in s. 14 (3) of the Income Tax Act, 1918, the definition in that sub-section having been made generally applicable to the Income Tax Acts by s. 33 of the Finance Act, 1920. So far as relevant that definition is:

- A “(a) any income arising in respect of any remuneration from any office or employment of profit held by the individual . . . (b) any income from any property which is attached to or forms part of the emoluments of any office or employment of profit held by the individual . . .”

It follows that the special contribution under the Act of 1948 is eviable in respect of the sum of income in question unless that income is excluded from the impost on the ground of being “earned income” within the meaning of the Income Tax Acts. For the present I leave out of account any significance that may belong to the repeated use of the word “source” in s. 49 (1) of the Act of 1948.

- B It is clear from the facts stated in the Case that the selection of Sir Henry Dale as a trustee of the Wellcome Foundation depended on his special personal and professional qualifications. It is no less clear that the duties imposed on him by his trusteeship are by no means slight. The meetings of the trustees occur fortnightly, and it is found as a fact that the work involved occupies Sir Henry on an average for two hours of every day. According to the ordinary acceptance of our language Sir Henry indubitably “earns” his remuneration. By ordinary standards of speech his £1,000 a year (net) would be aptly described as “earned income”. It certainly could not by such standards be called appropriately “investment income”. So the matter appealed to HARMAN, J., and for my part I greatly sympathise with his satisfaction in being able to reach a conclusion conformable to his sense of the propriety of the language. The matter, however, is not, unhappily, as simple as it might appear. The question is not whether, according to common sense and popular terminology, Sir Henry Dale has earned his remuneration, but whether, according to the proper interpretation of the Finance Act, 1948, the annual sum payable to Sir Henry is exempted from the special contribution as falling fairly within the definition of “earned income” comprised in s. 14 (3) of the Income Tax Act, 1918. I add that, if it be not so exempted, the levy falls in the end, not on Sir Henry Dale personally, but, by reason of the terms of the will and s. 56 of the Act of 1948, on the trust premises out of which the annual sum is payable. For that reason the other trustees of the foundation were joined as appellants before HARMAN, J., and are joined as respondents in this court.

- F The main part of the argument has been directed to para. (a) of the definition in s. 14 (3) of the Act of 1918, and I turn to it first. Is the duty or office of a trustee entitled to remuneration under the terms of the instrument by which he serves an “office or employment of profit” within the meaning of the paragraph, and, if so, can his annual sum be properly described as “arising in respect of any remuneration from” that office? Since *A.-G. v. Eyres* (1) it is conceded by the Crown that a trusteeship of the character here in question is an “office”, so that the question is narrowed down to the inquiry: Is Sir Henry Dale’s trusteeship an “office of profit”? And since, if the qualifying characteristic is attributable to the remuneration here in question, it must follow that the annual sum he receives must be income “arising in respect of any remuneration from” that office, the significance of the last-mentioned words must lie, in my judgment, solely in the bearing that they have on the vital inquiry: Is the office an office of profit? The debate before us has in part been directed to the special characteristics belonging to remuneration payable to a trustee as such by virtue of the trust instrument and in part to the structure of the charging provisions of the Income Tax Acts and particularly to the distinctions which (as it is said) must now be taken to have been established between Case III of sched. D, on the one hand,

and sched. E (as the successor for certain purposes, since s. 18 of the Finance Act, 1922, of Case II of sched. D), on the other. I have already said that for many years—and certainly since *Baxendale v. Murphy* (2), which the Special Commissioners regarded as binding them to decide the present case in favour of the Crown—remuneration payable to an ordinary individual trustee, as distinct from the charges which a professional trustee may as such be authorised to make, has been regarded as taxable only under the provisions of Case III of sched. D and payable after deduction of tax in accordance with r. 19 or r. 21 of the All Schedules Rules. The view of the effect of the Income Tax Acts reflected by this practice is, undoubtedly, advantageous to beneficiaries in the common case of a trust established by deed or will. The annual remuneration authorised by the trust instrument is paid to the trustee, net, out of the trust income which has suffered deduction of tax at the source, and the amount of the tax in respect of the annual sum is retained and becomes available for distribution among the beneficiaries. On the other hand, if such annual remuneration were properly chargeable under sched. E (formerly under Case II of sched. D), *prima facie* it would appear that the gross annual amount would have to be paid out of the already taxed income. In effect, income tax would be paid or deducted twice in respect of the annual sum in question—first, by reason of the fact that all the trust income would have suffered tax by deduction at the source, and, secondly, because the recipient is himself chargeable in respect of the gross sum paid to him, and this is indeed, as I understand it, what occurs in practice where a solicitor or other professional trustee is entitled to charge for his professional services in relation to the trust. The result is disadvantageous to the beneficiaries, who thereby lose the enjoyment of that portion of the gross annual sum attributable to tax which would otherwise be retained and distributed.

The court, accordingly, should, in my opinion, be slow to arrive at a conclusion in the present case which would be liable to disturb a long-established practice operating to the benefit of the persons interested in trust premises in the great majority of cases. The point was, therefore, naturally much pressed on us by counsel for the Crown, and counsel for the taxpayer referred to it as the *argumentum in terrorem*. But counsel for the taxpayer sought to avoid the difficulty by challenging the validity of the proposition which I have indicated—that, if the trustees' remuneration were taxable under sched. E, it would not be paid out of taxed income after deduction of tax in accordance with r. 19 of the All Schedules Rules, and it will be necessary to examine this matter more closely hereafter. It is unfortunate that on this matter the learned judge appears to have made a slip in the course of his judgment, for he said ([1951] 2 All E.R. 519):

“Counsel for the Crown contended that, since s. 14 (3) (a) of the Act of 1918 referred to ‘remuneration from any office,’ to be earned income the remuneration must be income arising from an office of profit. Under that Act offices of profit, if they were private offices, were chargeable to tax under sched. D, and Case III of sched. D applied to them. Rule 1 of the Rules Applicable to Case III of sched. D provides: ‘The tax shall extend to—(a) any interest of money, whether yearly or otherwise, or any annuity, or other annual payment . . . by virtue of any . . . will . . .’ That exactly describes the payments received by the trustees in the present case. This is an annuity or other annual payment payable by virtue of the will, and, therefore, chargeable, as ROWLATT, J., held in *Baxendale v. Murphy* (2), under Case III. By s. 18 (1) of the Finance Act, 1922, profits or gains from an office, which under the Income Tax Act, 1918, had been chargeable under sched. D, were transferred to sched. E, and it is said, therefore, that, unless a trustee can be directly assessed under sched. E, he cannot be taken as holding an office of profit. I cannot see why. *Baxendale v. Murphy* (2) decided that Case III of sched. D applied, and Case III deals with annuities and directs one to r. 19 of the All Schedules Rules. So, after 1922, the

A profit remained chargeable under r. 19 which in terms corresponds with the former cases under the Rules Applicable to Case III of sched. D. Although this is, according to *Baxendale v. Murphy* (2) and *Hearn v. Morgan. Pritchard v. Harding Lathom-Browne* (3), a remuneration which is not assessable directly to tax under sched. E, but remains under r. 19, nevertheless, I am not going to say that because of that fact it is not an office of profit. There is nothing which drives me to a conclusion so contrary to the dictates of reason."

B There can be no doubt that the reference to Case III of sched. D at the beginning of the passage which I have quoted is a mistake for Case II of sched. D, and I have felt unable to satisfy myself that the learned judge was not considerably influenced towards the comforting conclusion which he reached by the consequence which he treated as flowing from his erroneous premise.

C In the circumstances it is, I think, important to concentrate first on the true meaning and effect of s. 14 (3) of the Act of 1918. Consideration of the schedules to the Act points to the consequences which properly result from the determination of the question of construction under s. 14 (3), and it is, no doubt, true that, if the question of interpretation be doubtful, the nature of the consequences of one view or the other is proper to be considered in determining the matter of construction. But I am disposed to think that to pay regard too much or too soon to the schedules involves a risk of begging the question. I prefer, therefore, to attack the problem first, as I have intimated, by reference to the language of s. 14 (3) itself and without regard to the schedules.

D I have referred already to the fact that trusteeship is admittedly an "office", and the description is particularly appropriate to the derivation of that word. It is given to a large number of Englishmen in the course of their lives to serve at one time or another as trustees of other persons' wills, so much so that the conception of trusteeship as a service or duty in which self-interest must be excluded has acquired an accepted place in public and national affairs. If it offends common sense to say that Sir Henry Dale does not earn his £1,000 per annum from the Wellcome Foundation, it would, in my judgment, no less be regarded as startling and offensive to the proprieties to describe trusteeship as an "office of profit" or as a profession or vocation in any ordinary sense. This conclusion depends on the strict and peculiar characteristics which have always been held by the court to belong to trusteeship, for it has been long established that, in the absence of some special dispensation, the trustee can never derive any profit or advantage for himself out of his trust and should be scrupulous to prevent any conflict between his duty and his interest. The strictness of the rule depends on the circumstance that the trustee is both master and servant at the same time, and, as regards any remuneration, necessarily combines the functions of payer and payee. So, by the three cases in this court to which we were referred—*Re Pooley* (4), *Re Thorley* (5), and *Re White* (6)—it has been laid down that remuneration made payable to a trustee by the terms of the instrument of trust is properly regarded as bounty on the part of the settlor or testator, in all material respects on the same footing as the bounty conferred on the other beneficiaries under the trust instrument and distinguished only from those others by the characteristic that acceptance of the obligation of the "office" is the condition on which the benefit may be taken. So, in the case of deficiency the trustee can never compete with creditors for his remuneration, but must (in the absence of some special priority conferred by the trust instrument) abate rateably with the claims of other beneficiaries, and so, in the case of a trust created by will, the remuneration was subject, like other legacies, to legacy duty.

H It is this quality which, in my judgment, must be taken to lie at the root of the whole matter. For with whatever truth it may be said that a trustee in the position of Sir Henry Dale "earns" his reward or that a trustee in like position would, and could only be expected to, undertake the burden of the trust because

of the expectation of that reward, still the distinction remains (and remains intelligible) between the duties of the office, on the one hand, and the independent benefaction, albeit conditional on the assumption of those duties, on the other. The distinction may at first sight seem to be fine, but it rests on the peculiar and almost sacred character of trusteeship which the courts of equity have so jealously preserved. That character denies the existence of any true analogy between a trustee in regard to his remuneration, on the one hand, and a waiter or porter in regard to the gratuities which he expects, or a secretary of a corporate body in regard to the award ultimately made to him by the shareholders at the end, but by virtue, of his labours (as in *Cowan v. Seymour* (7)), on the other. For the latter occupations are of a character such as, of themselves, to entitle their holders to claim or expect reward. In the case of the trustee, though the assumption and discharge of the office may qualify the holder to receive some benefaction, the office itself involves a denial of any right to make a profit out of its performance. Counsel for the taxpayers sought to draw a parallel between the office of a director of a company and that of a trustee, on the ground that a director is, in the absence of provision to the contrary in the company's regulations, equally disabled from claiming any payment for his services, but, in my opinion, there is no true analogy. In the case of a company and one of its directors the fatal identity between payer and payee is absent. And even where the company's regulations provide that the director's remuneration is to be determined by a general meeting of shareholders, the director is entitled to expect such an award directly by virtue and as an incident of his office, and once the award has in fact been made, the director becomes a creditor of the company for its amount.

In my judgment, therefore, the office of trustee held by Sir Henry Dale is, in truth, not an office of profit within the meaning of s. 14 (3) (a) of the Income Tax Act, 1918. Put another way (though it is the same thing) the remuneration to which he is entitled by virtue of Sir Henry Wellcome's will and the order of the Chancery Court is not income arising in respect of remuneration *from* such an office. In my judgment, the general language of ATKIN, L.J., applied to the case of the secretary in *Cowan v. Seymour* (7), is inapplicable to produce a similar result in the present case, and see the language of YOUNGER, L.J., in the same case (7 Tax Cas. 384). A truer analogy—if analogies assist—would be found in the example given in argument of a treasurer or other officer of some charitable body strictly prohibited by the rules of the charity from making any charge for his services, but to whom, so long as he discharged his duties as such officer, a benevolent testator bequeathed an annuity, or in the case of an incumbent of some poorly endowed ecclesiastical office to whom a similar legacy had been given. Though it is unnecessary for me to decide any case but that now before the court, it would appear to me at any rate sensible to say that in neither of the cases supposed could the annuity or legacy (as the case may be) be regarded as remuneration from an office of profit. The case is the more striking if the benefaction took the form of a single legacy rather than a recurring annuity. In brief, therefore, I think that counsel for the Crown was well founded in the proposition which he submitted, that an office of profit is an office the tenure of which constitutes the title to the profit in contrast to an office the tenure of which constitutes merely the condition on which profit is derived from some other source or title.

If I turn now to the schedules to the Income Tax Act, it appears that the view which I have formed explains and justifies the practice which, as I have earlier said, has been uniformly followed at any rate since *Baxendale v. Murphy* (2) was decided by ROWLATT, J., in 1924. It must, in my judgment, be taken to be established that as regards any income or source of income the schedules to the Act and the Cases thereunder are *prima facie* mutually exclusive, so that, if any sum of income is from its character fairly within the ambit of Case III of sched. D it should be regarded as outside the scope of Case II of sched. D or of sched. E and vice versa: see per LORD ATKIN in *Fry v. Salisbury House*

Estate, Ltd. (8) ([1930] A.C., at p. 455). Although r. 19 (1) of the All Schedules Rules cannot (from the fact of its location) be easily regarded as intended to be applicable only in respect of income assessable under Case III of sched. D, its language, undoubtedly, reflects the wording of Case III, r. 1 (a) and in a case such as the present the natural conflict is between the application of Case III of sched. D and r. 19 of the All Schedules Rules, on the one hand, and Case II of sched. D or sched. E, on the other. *Inland Revenue Comrs. v. Duke of Westminster* (9) is a classic example of the antinomy. Although during the argument some examples were given of income assessable to tax otherwise than under Case III of sched. D to which r. 19 of the All Schedules Rules might be applicable, none was satisfactorily suggested of income falling within the scope of Case II of sched. D or sched. E to which the machinery of r. 19 of the All Schedules Rules would be appropriate—unless it were the present case itself. It is, however, unnecessary, in my judgment, to express conclusions on all these general matters. If I have rightly defined the nature and quality, as understood by the law, of the remuneration payable to a trustee by virtue of the instrument of trust, it is, to my mind, clear that it is an “annual payment” within the meaning of Case III, r. 1 (a), of sched. D, and (where it is paid out of a fund of income which has already suffered tax) also within the corresponding language of r. 19 (1) of the All Schedules Rules, and no less clear that it is outside the scope of sched. E.

In *Baxendale v. Murphy* (2) the sum of the trustee’s remuneration in question related to a period before the transfer to sched. E by s. 18 of the Finance Act, 1922, had taken effect, so that the contest was between Case III and Case II of sched. D. It is, no doubt, significant that the word “office” did not occur in Case II, so that *A.-G. v. Eyres* (1) was not cited to ROWLATT, J., and the argument of the Crown was that the trustee’s remuneration arose from an “employment”, but it is, in my judgment, clear that ROWLATT, J.’s, decision at least proceeded on the basis that, having regard to the decisions of *Re Pooley* (4), *Re Thorley* (5) and *Re White* (6), such remuneration was bounty and no more, and, therefore, an “annual payment” within the terms of Case III of sched. D and also r. 19 of the All Schedules Rules. The view has (as I have said already more than once) been consistently followed ever since in regard to such remuneration. Counsel for the taxpayer carefully avoided any challenge of the correctness of *Baxendale v. Murphy* (2) or of the practice since followed, but he sought to say, first, that the situation had been materially changed by the effect of the Act of 1922 and that, accordingly, the case was no authority now against the view that a trustee’s remuneration was remuneration from an office of profit so as to bring it squarely within the terms of sched. E; and, secondly, that the result was, nevertheless, not to exclude the application of r. 19 of the All Schedules Rules, at any rate in a case in which the remuneration was in fact paid “out of profits or gains brought into charge to tax”.

I have already said that, in my judgment, the principle of *Baxendale v. Murphy* (2) does not depend on the absence of the word “office” in Case II of sched. D, and that, in any event, the office of a trustee is not an “office of profit” so as to bring his remuneration within the ambit of sched. E, I have the greatest difficulty in accepting the view that remuneration chargeable under sched. E as arising from an office of profit could be subject to the application of r. 19 or r. 21 of the All Schedules Rules, for remuneration so chargeable would not, in my judgment, be “income chargeable as such” or what SIR WILFRID GREENE, M.R., in *Re Hanbury, Comiskey v. Hanbury* (10) called (20 Annotated Tax Cases, 335) “pure income profit” of the character appropriate to the application of r. 19. To my mind, the distinction is well illustrated by the case of a professional trustee authorised by the trust instrument (in addition to any remuneration payable to him as a trustee merely) to charge for professional services. Such a case was that of *Jones v. Wright* (11), also before ROWLATT, J., for (as appears from ROWLATT, J.’s, judgment in that case) though the right of the solicitor-trustee

to send in his bill for professional services was derived from the benefit or privilege to that effect given to him by the testator, still the sum charged was remuneration for professional services and so formed part of his professional earnings in respect of which (subject to the appropriate deduction) he was liable to be independently assessed. The amount of the bill, in other words, is not "pure income profit" and has to be paid accordingly in full without any deduction in respect of tax under r. 19 or r. 21 of the All Schedules Rules.

I have earlier drawn attention to the passage in the judgment of HARMAN, J., in which he is reported as stating that at the time of *Baxendale v. Murphy* (2) income from an office of profit fell within the scope of Case III of sched. D, and from the reasoning of the following passage in the judgment it appears to me that he may have deliberately so intended. If the premise were correct, I should for myself find little difficulty in following the learned judge to his conclusion that the transfer of offices of profit to sched. E in 1922 would not of itself affect the existing applicability in such cases of r. 19 of the All Schedules Rules. But it no less follows that if (as is conceded) the premise is incorrect, the learned judge might well not have reached the conclusion that he did. I add that, in my opinion, the use of the word "source" in s. 49 (1) of the Act of 1948 ("income from any source of earned income"), to the significance (if any) of which I omitted to refer in the earlier part of this judgment, tends also to support the view which I have formed. It is an essential characteristic of the Income Tax Acts that attention is always directed to the "source" from which the income sought to be taxed is derived. In the case of a trustee entitled as such to remuneration by virtue of the trust instrument it is, in my opinion, both sensible and accurate to regard the "source" of his remuneration as being the bounty of the settlor or testator and his property held in trust, rather than the "office" which, as I have tried to show, is characteristically not of itself productive of income or profit.

There remains only to consider the alternative submission of counsel for the taxpayer that the remuneration in question is excluded from the operation of the Act of 1948, since it is earned income within the definition of s. 14 (3) (b) of the Act of 1918, as being "income from any property which is attached to or forms part of the emoluments of any office . . . of profit . . ." If the view which I have expressed above is well founded and the trusteeship is not an office of profit, it follows that s. 14 (3) (b) is necessarily inapplicable as well as para. (a), and it is unnecessary further to pursue this part of the argument. I think, however, that counsel is in any case faced with further and formidable difficulties. To bring the case within the paragraph it is necessary to hold that the office or the right to receive remuneration therefor is "property" within the meaning of the paragraph, and, though it is unnecessary for me to express any concluded opinion, I am not satisfied that so artificial a meaning ought to be given to the word "property" in the paragraph. The result is that I have reached a conclusion different from that entertained by HARMAN, J., and I think that the appeal should be allowed. The result provokes a feeling of some regret and of doubt whether such an item of income as trustee's remuneration could have been intended by Parliament as a fit subject for the special contribution levied on "investment income". But it is my duty to construe the language of the statutes as best I can, and so applying myself I have felt compelled to the view which I have stated.

ROMER, L.J.: I agree entirely with the conclusion at which the Master of the Rolls has arrived in this case and with the reasons on which that conclusion is based. I feel, however, that the contention of the Crown is, at first sight, so contrary to the view which would commend itself to the man in the street that I should like to endorse specifically the explanation of our decision which my lord has already given.

The testator in this case had established an organisation of considerable importance and, during his lifetime, enrolled the services of men who, by

experience and qualification, were peculiarly fitted to the task of supervising and controlling it after his death. One of these men was the appellant, Sir Henry Dale, whose talents in his particular field are admittedly of the highest order. Those talents were secured by the testator for the Wellcome Foundation on terms of reasonable remuneration, for few people can afford, in these days, to give their services for nothing. The remuneration accorded to Sir Henry Dale by the will was £1,000 per annum free of tax, and, having regard to the quality of Sir Henry's ability and the work which his acceptance of the trusteeship has involved, no one would say that that remuneration was excessive. It is, nevertheless, regarded by the Crown, for purposes of the special contribution, as not falling within the description of "earned income", and, in our opinion, the Crown is right. If, then, Sir Henry's remuneration is not earned income, the ordinary man would suppose that this court has held it to be income that Sir Henry has not earned, and his sense of justice would, in the absence of explanation, be affronted accordingly. In deciding that Sir Henry's remuneration is not "earned income" we are merely applying a principle that was laid down very many years ago and which it is too late now for this court to disturb. The principle is simple. The office of trustee is, par exemple, an office of honorary service and not an office of profit—so much so, indeed, that if a trustee makes a profit out of his trusteeship he gets into serious trouble. If, therefore, a testator attaches remuneration to the trusteeship of his will such remuneration is wholly benefaction. From this it follows that the remuneration accorded to Sir Henry Dale is bounty and nothing else and the bounty derives from the testator and not from the office of trustee. Accordingly, the remuneration cannot be described as "income arising in respect of any remuneration from an office . . . of profit". It may well be that posterity will think that the courts went too far in holding that remuneration expressly allowed to a trustee for his services should be regarded as wholly bounty, and that a more realistic approach to the position would have been to put an assessment on the value of the services which the trustee was to render to the trust and then compare that assessment with the value of the remuneration. If the remuneration was worth more than the annual value of the services the difference, and that only, should be treated as a legacy. If that method had been applied to the case of Sir Henry Dale it would be found, I imagine, that his services to the trust are worth at least (if not more than) the amount of his annual remuneration, and that consequently no part of that remuneration could, for any purpose, be regarded as gratuitous. By such a standard the Crown's claim to exclude the remuneration from the category of "earned income" could not succeed. On this, however, two observations must follow: (i) such an approach to the remuneration of a trustee, however valuable or indeed essential he may be to any particular trust, is inconsistent with principles of long standing which are binding on this court, and (ii) the approach, if adopted, would be disastrous to trusts in general for the reasons to which the Master of the Rolls has referred, namely, that, as a necessary and logical result, a trustee's remuneration would have to be paid without deduction of tax from trust income which had already been brought into charge.

Although, therefore, Sir Henry's remuneration is entitled to be regarded, from any ordinary standpoint, as earned in the fullest sense, it does not conform to the specialised description of "earned income" for the purposes of the Income Tax Act, 1918, and s. 49 of the Finance Act, 1948, and it is with those purposes, and those alone, that we are concerned in the present appeal.

SIR RAYMOND EVERSHED, M.R.: I would add that **BIRKETT, L.J.**, has intimated that he agrees with the judgment I have read.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Markby, Stewart & Wadesons* (for the taxpayer).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

WICKENS v. WICKENS.

[COURT OF APPEAL (Singleton, Denning and Hodson, L.J.J.), May 13, 14, 1952.]

Divorce—Insanity—Guardian ad litem—Official Solicitor—“Person of unsound mind”—Voluntary patient in mental hospital—Power of Official Solicitor to act—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 64 (4).

The power of the Official Solicitor to consent to act as guardian ad litem of a person entitled to defend or intervene in a cause, under r. 64 (4) of the Matrimonial Causes Rules, 1950, is not confined to cases of persons who have been found by judicial inquiry to be of unsound mind. It extends to any person who is in fact of unsound mind. The fact of unsoundness of mind must be established at some time or other, but not necessarily, before the Official Solicitor is appointed guardian ad litem. It can be established at a later stage—as, e.g., on a petition for divorce by the other party to the marriage, and it then operates retrospectively to the original appointment.

Per HODSON, J.: Orders appointing a guardian ad litem ought to be made only after sufficient prima facie evidence of unsoundness of mind has been given, because of the obvious disadvantages which may accrue to a respondent if such a prima facie case is not made out.

APPEAL by the wife against the decision of Mr. Commissioner GRAZEBROOK, K.C., dated Feb. 1, 1952, dismissing her petition for divorce on the ground of desertion.

The learned commissioner held that the husband, who was a voluntary patient in a mental institution, was unable to form, or maintain, an animus deserendi. The parties were married on Sept. 4, 1926, and in 1932 the husband became a voluntary patient at the Hellingly Hospital, Hailsham, where he had remained. After the wife's petition had been filed on Nov. 24, 1950, her solicitor wrote to the Official Solicitor, and on Jan. 2, 1951, an order was made by consent appointing the Official Solicitor guardian ad litem of the husband. The Court of Appeal allowed the wife's appeal and granted her a decree nisi on the ground that the husband was capable of forming an intention to desert, but the case is reported only on the question of the powers of the Official Solicitor to act as guardian ad litem to a person who had not been certified and was at all material times a voluntary patient in a mental institution.

Ifor B. Lloyd, Q.C., and D. Henderson for the wife.

Horner for the husband.

SINGLETON, L.J.: The first question which arises is: What is the position of the Official Solicitor in the circumstances of this case? At all material times the husband was a voluntary patient in a mental institution. He could have given notice that he wished to leave it at any time, and on three days' notice he might have left. By r. 64 (4) of the Matrimonial Causes Rules, 1950, it is provided:

“Where a person entitled to defend or intervene in any cause to which these rules apply is of unsound mind, the Official Solicitor shall, if he consents, be the guardian ad litem of that person.”

The wife's solicitor approached the Official Solicitor, and on Dec. 21, 1950, the Official Solicitor consented to act as guardian ad litem of the husband. That was followed by a summons, dated Dec. 28, calling on the parties to attend at the registry to show cause why the wife should not have an order by consent appointing the Official Solicitor guardian ad litem of the husband. That application, it was said, was made by consent, and on Jan. 2, 1951, an order was made appointing the Official Solicitor guardian ad litem.

We felt considerable difficulty on the question whether or not the Official Solicitor was entitled to appear as the guardian ad litem of the husband because the rule gives power to him, if he consents, to be the guardian ad litem only where

A the person concerned is of unsound mind. At that time there was nothing before the Official Solicitor to show that the husband was a person of unsound mind. We were informed that, in the ordinary course, if a petitioner's solicitor approaches the Official Solicitor on such a case the Official Solicitor may well think that he can act on the solicitor's request if there is no reason for doubt. The petition shows that the contention of the wife was that the husband was not of unsound mind in one sense at least. She contended that he had deserted her, that he was capable of forming an intention to desert her, and that he remained in desertion for years. As against that, it was set out in the petition that he was a voluntary patient in an institution, so that one might well assume that he was in some degree affected as to his mental capacity. The affidavit filed with the petition states that the particulars given are to the wife's knowledge true, so the Official B Solicitor could consider that affidavit. When we referred to the evidence given on the hearing of the petition it became abundantly clear that the husband was mentally affected to some considerable degree and that he must have been so when the Official Solicitor consented to act as his guardian ad litem. I have no doubt the practice which was followed is very convenient, and that in every case it is wholly to the good of the patient. At the same time I think it right to point out C that if the Official Solicitor does consent to act without satisfying himself to some degree of the patient's condition and on that a summons is taken out and an order is made in the registry without any further inquiry, the whole matter throughout is in the hands of the petitioner's solicitor, and that might result in an unsatisfactory position. One can imagine a case in which a person who has been in the mental home recovers and asks: "Who appointed the Official Solicitor my guardian ad litem? I did not know about it. I did not want a guardian ad litem." D It is possible that difficult questions might arise. I do not wish to go further into this part of the case, for I am satisfied that in the circumstances of the present case the Official Solicitor did that which was right and proper. I only stress the desirability for inquiries before consent to act is given.

E DENNING, L.J.: I agree. The husband was never served personally with the petition for divorce. The Official Solicitor acted on his behalf as guardian ad litem, and the petition was served on the Official Solicitor. Is that sufficient? Under r. 64 (4) of the Matrimonial Causes Rules, 1950, in order that the Official Solicitor may be appointed guardian ad litem, it is essential that the party should be "of unsound mind", but the meaning of that expression is not defined. F The rule is not confined to persons who have been found by judicial inquiry to be of unsound mind. It extends to any person who is in fact of unsound mind. The fact of unsoundness of mind must be established at some time or other, but I do not think it need be established before the Official Solicitor is appointed guardian ad litem. It can be established at a later stage, and then it operates retrospectively to the original appointment.

G That is what has happened in this case. We have seen evidence which shows that the husband has suffered for many years from chronic delusions. He is clearly a person of unsound mind, whatever the precise meaning of that expression be, and, therefore, he was a person for whom the Official Solicitor could properly be appointed as guardian ad litem. The proper procedure is this. Whenever there is reasonable ground for thinking that a person is of unsound mind, as, for instance, in this case, when he is a patient in a mental hospital, it is convenient H for the Official Solicitor at the outset to be appointed by consent guardian ad litem. The Official Solicitor will then investigate the man's state of mind, and, if he finds the man to be of unsound mind, he will continue to act. If, on the other hand, he finds him to be of sound mind, he will apply to be discharged. If he continues to act, it is desirable in the interests of all concerned that at some stage, sooner or later, the unsoundness of mind should be shown to the court. In my opinion, therefore, the procedure in this case complied with the rule. The husband was in fact of unsound mind, the Official Solicitor was properly appointed

guardian ad litem, and the unsoundness of mind was demonstrated to the court which tried the case.

HODSON, L.J.: The first point which arises in limine is that, on the face of the allegations in the petition, the husband is not a person of unsound mind. I do not take the phrase "a person of unsound mind" to be a term which refers only to a defined class of persons. There are obviously people in the world, particularly people without property, who, being of unsound mind, are cared for by their relatives and are not dangerous, and no question arises about their affairs unless they unfortunately become involved in litigation, but the court takes care, if they do, that their interests are protected. A guardian ad litem can be appointed, and the Official Solicitor can act, but there must be some material before such an appointment can be made. The difficulty in this case is that the material was exceedingly slender. It appears in the petition that the husband was a voluntary patient and throughout all the relevant period had been at a mental hospital, that statement was verified by affidavit, and on that affidavit the order was made. I think it important that orders appointing a guardian ad litem should be made only after sufficient *prima facie* evidence of unsoundness of mind has been given, because of the obvious disadvantages which may accrue to a respondent if such a *prima facie* case is not made out.

Appeal allowed. Decree nisi granted.

Solicitors: *G. Parry Jones*, Law Society Divorce Department (for the wife); *Official Solicitor* (for the husband).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

NOTE.

R. v. BIRMINGHAM COMPENSATION APPEAL TRIBUNAL OF MINISTRY OF LABOUR AND NATIONAL SERVICE.

Ex parte ROAD HAULAGE EXECUTIVE.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Devlin and Gorman, JJ.), May 20, 21, 1952.]

British Transport Commission—Transferred undertaking—Compensation to employee—Diminution of emoluments—"Expectation under customary practice to payment of compensation in event of discharge"—Transferred Undertakings (Compensation to Employees) Regulations, 1950 (S.I., 1950, No. 1083), sched. II, para. 8 (1) (i).

MOTION for an order of certiorari to remove into the High Court to be quashed a decision and award of the Birmingham Compensation Appeal Tribunal of the Ministry of Labour and National Service, dated Nov. 9, 1951.

The claimant, Cecil Joseph Hurst, was formerly employed as a managing director by two road haulage companies at a salary of £3,000 a year with an annual commission of £1,000, an entertainment allowance, and the use of a car, under a contract for seven years which expired in September, 1949. On July 1, 1949, the companies' undertakings were transferred to the Road Haulage Executive under the Transport Act, 1947, and the claimant was employed by the executive as a group manager at a salary of £1,200. But for the transfer of their undertakings, the claimant's former employers would have offered to him, on the expiration of his contract, a new contract on similar terms. The claimant being dissatisfied with the compensation awarded to him by the British Transport Commission, the matter was referred to the tribunal under the Transferred Undertakings (Compensation to Employees) Regulations, 1950, sched. I, para. 7.

The tribunal decided that the compensation to be paid to the claimant should be calculated in accordance with sched. II, para. 9 (1), of the regulations on the ground that, on the evidence, they were of the opinion that there existed in his case "an expectation under customary practice to the payment of compensation in the event of discharge", within sched. II, para. 8 (1) (i), to the regulations. As the regulations did not provide for any appeal, either on law or on fact, the tribunal set out in the award their reasons and the evidence which was before them so that there might be an opportunity of correcting any error of law on the face of the award. The evidence showed that the claimant's former employers had been in prosperous circumstances and were generous to their employees and to the dependants of a deceased employee, but there was only one case where a manager had been discharged. A payment of £500 by way of compensation had then been made to him.

Case referred to:

(1) *R. v. Northumberland Compensation Appeal Tribunal. Ex p. Shaw*, [1952] 1 All E.R. 122; [1952] 1 K.B. 338; 116 J.P. 54.

Beney, Q.C., and *Southall* for the applicants, Road Haulage Executive.

Arthian Davies, Q.C., and *F. A. Stockdale* for the respondent (the claimant).

THE COURT held that "expectation . . . to the payment of compensation in the event of discharge", within sched. II, para. 8 (1) (i), to the regulations, which would entitle a claimant, under para. 8 (2) (i), to have his compensation assessed in accordance with sched. II, para. 9 (1), was limited by the words "under customary practice." Assuming that these words referred to the custom of a particular firm and not to a trade custom, their ordinary meaning, and the meaning contemplated by the regulations, was, for example, where, apart from any trade custom, a firm had its own well-recognised custom that, if a workman had been employed on a weekly wage for a length of time, although he could, strictly, be given a week's notice, the firm would give him something additional. For the purposes of the case it was immaterial to determine whether "customary practice" within para. 8 (1) (i) meant something confined to the relationship between the workman and his own employers or whether it involved larger considerations of what was customary in a particular trade since, whether the wider or narrower meaning was contemplated, a single case of a manager receiving payment by way of compensation on discharge was not what the regulations contemplated by "customary practice," and there was no evidence in this case of an "expectation under customary practice to the payment of compensation in the event of discharge." Accordingly, as an error of law appeared on the face of the award, certiorari would issue to remove the order into the High Court to be quashed.

Solicitors: *M. H. B. Gilmour* (for the Road Haulage Executive); *Stibbard, Gibson & Co.*, agents for *Blackham, Maycock & Hayward*, Birmingham (for the respondent).

F.G.

HYDE v. PIMLEY AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.), May 1, 2, 21, 1952.]

Rent Restriction—Possession—Sub-letting in breach of covenant—Acceptance by landlord of rent from head lessee after knowledge of breach—Sub-letting with “consent of landlord”—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), sched. I, para. (d).

In 1941 premises to which the Rent Restrictions Acts applied, were let on a weekly tenancy on terms, inter alia, that the tenant should not assign or sub-let the premises without the landlord's consent. In 1947 the tenant sub-let the whole of the premises without consent. In November, 1950, the landlord learned of the sub-lease, but continued to accept rent. In June, 1951, the tenancy was determined by notice to quit. On a claim by the landlord under paras. (a) and (d) of sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, for possession, the county court judge held that by the acceptance of rent after knowledge of the tenant's breach the landlord had waived her right to forfeit the lease and could not rely on para. (a), but that, as the landlord had not given her consent to the sub-lease, she was entitled to claim possession under para. (d), and he made an order for possession against the tenant and the sub-tenants. On appeal by the sub-tenants,

HELD: the operation of para. (d) was excluded if at any time before the issue of proceedings, though not necessarily at or before the time of the sub-letting, the landlord's consent thereto had expressly or by implication been obtained; although the conception of consent to an act was not the same thing as waiver of its consequences, the conduct of the landlord in accepting rent with knowledge of the sub-letting, which amounted to a waiver of the covenant, also amounted to a consent to the sub-letting within para. (d) in the sense of being a negation of any objection thereto; and, therefore, the landlord was not entitled to possession.

Dicta of LORD NORMAND in *Dalrymple's Trustees v. Brown* (1945 S.C. 193) and of LORD WATSON in *Lord Elphinstone v. Monkland Iron & Coal Co.* (1886) (11 App. Cas. 337), applied.

Quaere whether, the landlord having waived the tenant's breach, the premises were “lawfully sub-let” within the meaning of s. 5 (5) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (as substituted by the Rent and Mortgage Interest Restrictions Act, 1923, s. 4), and s. 15 (3) of the Act of 1920.

FOR THE RENT AND MORTGAGE INTEREST RESTRICTIONS (AMENDMENT) ACT, 1933, sched. I, para. (d), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1060.

Cases referred to:

- (1) *Oak Property Co., Ltd. v. Chapman*, [1947] 2 All E.R. 1; [1947] K.B. 886; [1947] L.J.R. 1327; 177 L.T. 364; 2nd Digest Supp.
- (2) *Regional Properties, Ltd. v. Frankenschwerth*, [1951] 1 All E.R. 178; [1951] 1 K.B. 631.
- (3) *Dalrymple's Trustees v. Brown*, 1945 S.C. 190; [1945] S.L.T. 220; 2nd Digest Supp.
- (4) *Elphinstone (Lord) v. Monkland Iron & Coal Co.*, (1886), 11 App. Cas. 332; 31 Digest, Replacement, 437, 5647.
- (5) *Downie v. Turner*, [1951] 1 All E.R. 416; [1951] 2 K.B. 112.
- (6) *Norman v. Simpson*, [1946] 1 All E.R. 74; [1946] K.B. 158; 115 L.J.K.B. 107; 174 L.T. 279; 2nd Digest Supp.
- (7) *Roe v. Russell*, [1928] 2 K.B. 117; 97 L.J.K.B. 290; 138 L.T. 253; 92 J.P. 81; 31 Digest, Replacement, 695, 7868.

APPEAL by the sub-tenants from an order of His Honour JUDGE WILLES, made on Feb. 27, 1952, at Derby and Long Eaton County Court, in an action for possession.

A In 1941 the landlord, Mrs. Florence Lilian Hyde, let premises, to which the Rent Acts applied, on a weekly tenancy to the Derby Refugee Committee, of which the first defendant was the secretary. In 1947, in breach of a term of the tenancy, the committee sub-let the premises to the second and third defendants, Mr. and Mrs. Reiter. On Nov. 13, 1950, the landlord through her agents learned for the first time of the sub-letting, but she continued to accept rent as it accrued due until March, 1951. In June, 1951, the tenancy of the committee was determined by notice to quit. On a claim by the landlord for possession, the county court judge held that by acceptance of rent after knowledge of the breach she B had waived her right to forfeiture, and, therefore, could not rely on para. (a) of sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, but that, as she had not given her consent to the sub-lease, she was entitled to claim possession under para. (d) of that schedule, and he made an order for possession against the committee and the sub-tenants.

R. E. Megarry for the sub-tenants.

C Garrard (C. G. Lea with him) for the landlord.

Cur. adv. vult.

May 21. SIR RAYMOND EVERSHED, M.R., read the following judgment of the court. By this action the landlord, Mrs. Hyde, seeks possession of certain premises known as 17, Reginald Street, Derby. The first defendant to D the action is, and is sued as, the secretary of an unincorporated body called the Derby Refugee Committee, to whom the premises were let by the landlord on May 12, 1941, on a weekly tenancy for the purpose of providing temporary accommodation for refugees. One of the terms of this tenancy was that the lessees should not assign or sub-let the premises without the landlord's consent. The second and third defendants to the action are a Mr. and Mrs. Reiter, who acted as wardens or caretakers of the premises on behalf of the committee. By 1947 E the committee no longer needed the premises for the accommodation of refugees, and in September of that year they sub-let the whole of the premises to the Reiters. The committee did not obtain the landlord's consent to this sub-lease. The first intimation of the sub-lease that the landlord had was contained in a letter which was written to her agents by the hon. treasurer of the committee on F Nov. 13, 1950. The learned judge, in his judgment, said that the landlord had entrusted the management of her property to these agents for some years. Rent was subsequently accepted by the agents and the learned judge held that such acceptance operated as a waiver by the landlord of her right to forfeit the lease for breach of covenant. The judge expressed his view on this matter as follows:

G "After knowledge of the tenant's breach by sub-letting had so reached the [landlord's] agents, cheques for rent accruing due for the period down to March, 1951, were actually sent by the tenant to such agents, and passed through such agents' bank in the course of their duty to collect the [landlord's] rent. I think it is probable that in a firm such as this the actual receipt of the rent may not have come to the knowledge of a member of the H firm who knew of the contents of the letter of Nov. 13, and the consequences of subsequently accepting rent. But, notwithstanding this, I think it right to hold, treating this firm as though they were the landlords, that what happened constituted a waiver by their client of any right created by the committee's sub-letting of the house to the Reiters without the consent of the [landlord] or themselves."

In June, 1951, the tenancy of the committee was determined by notice to quit and on June 26 these proceedings were commenced, the landlord founding her

claim to possession on the breach of covenant above referred to. The learned judge, as already stated, held that the landlord had waived her right to forfeit the lease, and was, therefore, unable to rely on para. (a) of sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. He held further, however, that, as the landlord had not given her consent to the sub-lease, she was entitled to claim possession under para. (d) of the same schedule, and in the exercise of his discretion he made an order for possession both against the committee and the sub-tenants. The committee have not appealed against this order and the appeal which is before us has been brought by the Reiters. There has been no cross-appeal by the landlord in regard to the judge's conclusion on para. (a) of the schedule, and the sole question before us is, therefore, whether the learned judge was right in holding that the landlord was entitled to claim possession against the sub-tenants on the ground that she had not consented to the underlease, and that, accordingly, para. (d) of the schedule applied. A

The learned judge was of opinion that consent to the commission of a particular act was not the same thing as forgiveness of the act after it had been committed, and so far we agree with him. But from this premise he went on to conclude (and it is here that we find ourselves at variance with his view) that, if there has been in fact a sub-letting by a tenant of the whole premises without the consent of the landlord having been previously obtained, para. (d) of sched. I of the Act of 1933 comes into operation and no amount of subsequent "waiver" of the effect of what has been done will displace that operation. B

The question is one of the interpretation of the few words of the paragraph:

"the tenant without the consent of the landlord has at any time after July 31, 1923, assigned or sub-let the whole of the dwelling-house..." C

At first reading the words, no doubt, lend support to the judge's view, but we have come to the conclusion that they ought not to be so strictly construed. In the first place, the formula which has for many years been frequently used in leases—"without the consent of the landlord being first had and obtained"—is not adopted. There are instead the few simple words "without the consent of the landlord". Secondly, this court held in *Oak Property Co., Ltd. v. Chapman* (1) that, although before the issue of the proceedings there had been a sub-letting within the strict language of para. (d), the landlord could not invoke the paragraph if at the date of the summons the tenant had, in fact, regained possession of part of the premises—a conclusion which seems to indicate that the paragraph is not to be interpreted by a strict adherence to the tenses and times referred to. It is, moreover, clear from *Regional Properties, Ltd. v. Frankenschwerth* (2) (in which the language of the Lord President (LORD NORMAND) in the Scottish case of *Dalrymple's Trustees v. Brown* (3), was expressly adopted) that the landlord's consent may be implicit as well as express. LORD NORMAND'S language included the following sentences (1945 S.C. 193): D

"I am clear that the words 'without the consent of the landlord' in para. (d) of sched. I to the Act of 1933 mean without actual consent given by the landlord either expressly or by implication. That necessarily requires that the landlord should have had knowledge of the sub-lease." E

It remains, then, to determine whether the consent, express or implied, must have been given at or before the time of the sub-letting or may be given ex post facto. In this connection it is to be remembered that the paragraph applies in a case where by the terms of the contract of letting no consent is required at all. In such a case a tenant who had omitted at the time of sub-letting to note the possible effect of para. (d) might have failed then to ask for consent. It would, we think, be startling if, though the tenant later repaired the omission and obtained the approval of his landlord, nevertheless para. (d) applied to enable the landlord to invoke the jurisdiction of the court, nor does it seem to us a satisfactory answer to the example to say that the court in such a case F

would inevitably hold it unreasonable to make an order. In our judgment, therefore, it is in accordance with the fair construction of the paragraph and the principles generally applicable in Rent Act cases to hold that para. (d) is excluded if, in fact, at any time before the issue of the proceedings, though not necessarily at or before the time of the sub-letting, the landlord's consent thereto has expressly or by implication been obtained, and, although, as we have said, the conception of consent to an act is not the same thing as waiver of its consequences—and the former conception is necessarily appropriate where the act in question is not itself a breach of any obligation—still, the conduct of the landlord in the present case in accepting rent for a period of four and a half months with clear knowledge of the sub-letting which the judge held (and, as we think beyond doubt, rightly held) to amount to a waiver of the covenant, must inevitably amount also to a “consent” to the sub-letting in the sense of being a negation of any objection thereto, and all the more so since the sub-tenants were the same persons who had in another capacity been in fact the occupants of the premises ever since the tenancy began. For it seems clear that one object (at any rate) of para. (d) was to give some protection to a landlord against the risk of finding some person wholly unknown to him irremovably installed in his property. On the question of the construction of the paragraph we find some support for our view in the language of LORD WATSON in *Lord Elphinstone v. Monkland Iron & Coal Co.* (4) (11 App. Cas. 337):

“That a landlord has, by implication, consented to receive an assignee, or has so acted as to bar himself from alleging that he has not consented, must, in my opinion, be matter of inference from the whole circumstances of the case. I can easily conceive that the fact of the landlord having, in the full knowledge of the cedent's actings, refrained from making any objection to the assignee entering into possession, might, in the absence of other evidence, be conclusive . . .”

Counsel for the sub-tenants also put his case alternatively on the ground that, even if there were no consent within the meaning of para. (d), the landlord had by his conduct waived his right or remedy of application to the court by virtue of para. (d). The act complained of, he said, was a single act, whether giving rise to the court's jurisdiction under para. (a) or under para. (d) of the schedule, namely, the granting by the tenant of a sub-tenancy of the whole premises. Waiver of a non-recurring breach of covenant in a lease is, in truth, waiver, by affirmation of the continued existence of the term, of the right to which the breach gives rise of determining the lease and recovering possession of the land demised. Therefore (according to the argument), conduct in relation to one particular act which operates as a waiver of the right to claim possession so operates whether the right arises under the terms of the lease or contract itself or under para. (a) or para. (d) of sched. I to the Act of 1933, and, whether or not such conduct amounts to “consent” within the meaning of the latter paragraph. We prefer to base our judgment in the present case on the ground already stated that the landlord's conduct must in the circumstances amount to a “consent” on the landlord's part within the meaning of para. (d). That paragraph is, after all, expressed, not as providing a remedy for the landlord, but as a condition for the exercise by the court of its power to make an order for possession. No doubt, the circumstances of a particular case may be such as, in effect, to estop a landlord from asserting the facts necessary to show that the condition is fulfilled. On the other hand, if the lease or contract is still subsisting, the mere fact that there has been an assignment or under-letting without the landlord's consent will not give rise to any right in the landlord to claim possession, e.g., where by the terms of the lease or contract the tenant is at liberty to assign or under-let as he wills. In the circumstances we do not find it necessary to pursue further this part of the appellant's argument, except to say that, in

our opinion, *Downie v. Turner* (5), relied on by counsel for the sub-tenants, does not assist him to advance the argument.

Nor do we express any concluded view on the third way in which counsel put the case for the sub-tenants, which was based on s. 5 (5) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (as substituted by the Rent and Mortgage Interest Restrictions Act, 1923, s. 4), and s. 15 (3) of the Act of 1920 and was to the following effect. Even if the under-letting in question was "without the consent of the landlord", still, since the breach of contract occasioned by the sub-letting had, according to the judge's findings, been waived before the issue of the summons, the premises could be regarded as "lawfully sub-let" within the meaning of s. 5 (5) and s. 15 (3) of the Act of 1920: see *Norman v. Simpson* (6). Accordingly, though (on the hypothesis assumed) the landlord might be entitled to an order for possession against the tenant, he could obtain no such order against the sub-tenant. The point is, in our judgment, one of considerable difficulty. The language of s. 5 (5) and s. 15 (3) of the Act of 1920 fits ill (it must be confessed) with the language of para. (d) of sched. I to the Act of 1933. In *Dalrymple's Trustees v. Brown* (3) it appears (according to the report in Sessions Cases) that the point was clearly put in argument to the Inner House, but there is no reference to it in the judgments, and, since the House dismissed the appeal and affirmed the order for possession against both tenant and sub-tenant, it must be assumed that LORD NORMAND and his colleagues regarded s. 5 (5) and s. 15 (3) of the Act of 1920 as not available to the sub-tenant, and the premises as not being "lawfully sub-let" within the meaning of those sections, although there was no prohibition according to the general law of Scotland against assignment or under-letting on the tenant's part. In the English case of *Roe v. Russell* (7), EVE, J., sitting in the Court of Appeal, intimated his view ([1928] 2 K.B. 141) that an assignment or under-letting of the whole premises should be regarded as "unlawful" for the purposes of the Act, whatever the terms of the original contract, but the learned judge's language in the context in which it appears may, perhaps, be properly confined to the case of an assignment or under-letting by the statutory tenant. We do not find it easy, on authority or principle, to regard an assignment or under-letting of the whole premises by a contractual tenant as being for any purposes "unlawful" if by the terms of the contract there was no restriction on the tenant's power to assign or under-let, or if, the assignment or under-letting having been in breach of the tenant's obligations, the breach had been afterwards waived by the landlord. But it is, in the circumstances, unnecessary for us to express any conclusion on the point, and we, therefore, say no more about it. For the reasons we have given, we think that the landlord was not entitled to rely on para. (d) of the schedule, and as she was held also not to be entitled to rely on para. (a) we think her action should have been dismissed. The appeal must be allowed.

Appeal allowed.

Solicitors: *G. A. Hathway*, agent for *Flint, Bishop & Barnett*, Derby (for the appellants); *Hawley & Rodgers*, Loughborough (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

In the Estate of SEGALOV (deceased).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Wallington, J.), May 30, 1952.]

Costs—Taxation—Finality of taxation—Probate action—Order for payment by defendant of plaintiff's costs—Subsequent taxation of costs of administrator pendente lite—Accounts of administrator—Right of plaintiff to further order for payment of administrator's costs and accounts.

The plaintiffs obtained judgment in their favour in a probate action, and on Jan. 2, 1949, their solicitors lodged for taxation a bill of costs. The bill was duly taxed, the allocatur was signed on Nov. 21, 1949, and on the same day the plaintiffs obtained an order against the defendant for payment of the amount as taxed. On Apr. 19, 1950, they lodged for examination and certificate the accounts of the administrators pendente lite, and on June 16, 1950, two further bills of costs for taxation relating to the administrators' charges. On June 19, 1950, the plaintiffs obtained payment of the amount under the order of Nov. 21, 1949. On Sept. 25, 1950, the allocaturs on the two further bills were signed, and on Nov. 21 the registrar certified the administrators' accounts in which were fixed and allowed their remuneration and fee for passing the accounts. On appeal against the refusal of the registrar to make an order against the defendant for payment of the sums allowed on the further bills of costs and the administrators' remuneration and fee,

HELD: a successful litigant must lodge a bill for taxation which includes all the costs to the payment of which his judgment entitles him; the order dated Nov. 21, 1949, was a final order which could not be converted into an interim order nor substituted by another order to include the further cost and fees; there had been no slip or omission to justify an amendment of that order; the plaintiffs, having obtained taxation of their costs of action, were not entitled to tax any further bill.

AS TO TAXATION OF COSTS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 102, 103, paras. 192, 193.

Cases referred to:

- (1) *Silkstone & Haigh Moor Coal Co. v. Edey*, [1901] 2 Ch. 652; 70 L.J.Ch. 774; 85 L.T. 300; 39 Digest 79, 924.
- (2) *Davies v. Dysart (Earl)*, (1855), 21 Beav. 124; 25 L.J.Ch. 122; 26 L.T.O.S. 84; 52 E.R. 805; *on appeal*, (1856), 8 De G.M. & G. 33; 44 E.R. 301; 42 Digest 158, 1581.
- (3) *Chessum & Sons v. Gordon*, [1901] 1 K.B. 694; 70 L.J.K.B. 394; 84 L.T. 137; Digest, Practice, 475, 1556.
- (4) *Fisher v. Fisher*, (1878), 4 P.D. 231; 48 L.J.P. 69; 23 Digest 274, 3379.

SUMMONS adjourned into court.

Crispin for the plaintiffs.

C. Lawson for the defendant.

Cur. adv. vult.

May 30. WALLINGTON, J., read the following judgment. This appeal was argued before me in chambers and adjourned into court for judgment. On Nov. 23 and 24, 1948, HODSON, J., tried an action entitled *In the Estate of Lewis Segalov deceased*, in which Morris Hyman and Solomon Teff were plaintiffs and Pinkus Segalov was the defendant. The action concerned the testamentary dispositions of the deceased, Lewis Segalov. The plaintiffs propounded a will dated Apr. 12, 1946, and the defendant delivered a defence and counterclaim in which he pleaded that the will propounded by the plaintiffs ought to be pronounced against, alleging that the deceased was not of sound mind, memory, and understanding at the date of the said will. By way of counterclaim the defendant propounded an earlier will dated Feb. 5, 1935, of which will he

invited the court to decree probate. On Nov. 24, 1948, the learned judge pronounced for the will dated Apr. 12, 1946, and condemned the defendant in the costs incurred or to be incurred in the action on behalf of the plaintiffs. The writ in the action had been issued on June 11, 1947. On Apr. 30, 1947, Barclays Bank, Ltd., were appointed administrators pending suit, and up to the date of the judgment on Nov. 24, 1948, the bank carried out their duties as such administrators. They then had no further duties save to pass their accounts, which would include and provide for their remuneration. On Jan. 2, 1949, the plaintiffs' solicitors lodged for taxation a bill of costs headed: "Bill of costs of the plaintiffs to be taxed pursuant to the judgment of HODSON, J., dated Nov. 24, 1948", and indorsed on the outside "Plaintiffs' costs". That bill of costs was duly taxed by Mr. Registrar PEREIRA, who signed the allocatur on Nov. 21, 1949, allowing the costs in the bill at £433 16s. On the same day the plaintiffs' solicitors applied to the same registrar for, and obtained, an order dated Nov. 21, 1949, ordering the defendant within seven days from service to "pay . . . the plaintiffs the sum of £433 16s., being the amount of the plaintiffs' taxed costs as certified by the said registrar of this Division". After various proceedings based on that order, the plaintiffs obtained payment of the sum of £433 16s. on June 19, 1950. On June 16, 1950, the plaintiffs' solicitors lodged for taxation two other bills of costs. One of them bore the heading: "Bill of costs incurred by Barclays Bank, Ltd., acting as administrators pendente lite of the estate of the above named deceased". It was similarly indorsed. The other bill lodged was headed: "Costs, charges, and expenses incurred on behalf of Barclays Bank, Ltd., as administrators pendente lite in connection with the Palestine estate of Louis (sic) Segalov deceased". The indorsement on this bill was "Costs relating to the Palestine estate". Mr. Registrar COMPTON MILLER taxed each of these two bills of costs and allowed the first at the sum of £253 9s. 6d. He signed the allocatur on Sept. 25, 1950. He allowed the second of these bills at the sum of £66 10s. 4d., and signed the allocatur for that sum on the same date. On Apr. 19, 1950, the plaintiffs' solicitors had lodged for examination and certificate the accounts of the administrators pendente lite and filed the usual affidavit verifying those accounts. Mr. Registrar COMPTON MILLER duly examined and checked the accounts, and certified that he had vouched them. The only two figures in those accounts which are relevant to the matters raised before me are the two items, £210, which the registrar allowed as the remuneration of the bank as administrators, and the fee paid by them on passing the accounts, namely £5 16s. 6d. The date of the registrar's certificate of accounts was Nov. 21, 1950.

The matter comes before me by way of appeal from the refusal of Mr. Registrar COMPTON MILLER to make an order on the defendant to pay the amount of the two bills which he had taxed, and also the remuneration, etc., of Barclays Bank, Ltd., as administrators pendente lite. It will be seen that, according to the plaintiffs' case, the defendant, by reason of the judgment as to costs delivered by the learned judge at the trial of the action, became indebted to the plaintiffs for the following sums which have since then been ascertained by taxation and certification respectively: Bill of costs taxed and ordered to be paid on Nov. 21, 1949, £433 16s.; bill of costs taxed and allowed at £253 9s. 6d.; bill of costs taxed and allowed at £66 10s. 4d.; administrators' remuneration allowed at £210; fee on passing accounts, £5 16s. 6d.—making a total of £969 12s. 4d. Of this sum the first item was paid on June 19, 1950, leaving £535 16s. 4d. unpaid at some date or other for which no order to pay had been made or applied for. On Mar. 20, 1952, the plaintiffs applied to Mr. Registrar COMPTON MILLER for an order on the defendant to pay the above mentioned sum of £535 16s. 4d. The learned registrar having refused to make the order, the matter came before me by way of appeal from his refusal on a summons asking for: (i) an order for payment of that sum; (ii) if necessary, an amendment under the slip rule, R.S.C., Ord. 28, r. 11 converting the order of Nov. 21, 1949, into an interim order

instead of what, in my opinion, it is, and was intended to be, namely, a final order to pay the amount of the bill of costs for £433 16s.; (iii) in the alternative for a direction that the order of Nov. 21, 1949 (which was for payment of £433 16s.) be taken off the file and an order substituted therefor ordering the defendant to pay £969 12s. 4d. and to have credit for the sum of £433 16s. which he had paid on June 19, 1950; (iv) such other directions as the justice of the case might require; and (v) an order on the defendant to pay the costs of the application to the learned registrar and of the appeal to me.

In the course of their able arguments before me counsel referred to a number of authorities, and I shortly refer to them. Counsel for the plaintiffs cited *Silkstone & Haigh Moor Coal Co. v. Edey* (1) (relating to a trial before BYRNE, J., and an appeal from him to the Court of Appeal), in support of the proposition that in a proper case a taxing master's certificate may under the slip rule be taken off the file of the court and that the amounts thereby certified may then be included in the taxing master's final certificate of taxation. This is a proposition with which, if I may say so, I do not disagree. He also relied on *Davies v. Earl of Dysart* (2), for the proposition that a party and party bill of costs may be added to or varied after it has been brought into the office at any time before the taxation is concluded, a proposition with which I entirely agree. He relied very strongly on *Chessum & Sons v. Gordon* (3), in which items which had been omitted from a bill of costs carried in for taxation and taxed were allowed to be inserted under the slip rule, R.S.C., Ord. 28, r. 11. I do not feel any difficulty about such a proposition in any case in which the facts show (as the facts in that case clearly established) that the omitted portions (which were allowed to be inserted after taxation of the costs) have been omitted owing entirely to an accidental slip or omission. Counsel for the defendant referred to *Fisher v. Fisher* (4) as an authority for the proposition, which I, of course, accept, that the condemnation in costs of a party to a probate suit includes all the charges of an administrator pending suit.

I am of opinion that the plaintiffs are not entitled to any one of the orders for which they ask. It is clear, in my view, that the order of the learned trial judge was one which would probably have entitled the plaintiffs to recover against the defendant, by means of an order to pay, not only the sum of £433 16s. which they have in fact recovered, but also a further sum of £469 6s. made up of the administrators' costs and remuneration, £210, together with the fee on passing their accounts of £5 16s. 6d., and the amount of the costs taxed at £253 9s. 6d.

There was no reason why these costs and fees could not have been, and, in my opinion, they all ought to have been, included in a bill carried in for taxation at the time when the taxation of costs was first taken in hand. So soon as the judgment in the action was pronounced the duties of the administrators pendente lite ceased and the conduct of the affairs of the estate automatically came into the hands of the executors of the will pronounced for, namely, the plaintiffs in the action. There would have been no difficulty, in my opinion, in dealing with those matters at one and the same time so that the defendant would have known in or about the months of November or December, 1949, what was his liability for the costs which the learned trial judge had ordered him to pay. The foundation of the various alternative applications made on behalf of the plaintiffs appears to me to depend on whether, when they delivered and taxed the bill for the £433 16s., they omitted the other charges of which they now seek an order for payment, because, in so omitting them, they acted under an accidental slip or omission. In my opinion, they quite clearly did not so act, and there was not, in fact, an accidental slip or omission.

The affidavit made by one of the plaintiffs, a solicitor, an affidavit which he swore on Apr. 15, 1952, sets out in para. 4 the fundamental reason why his firm deliberately excluded the costs which they now seek to recover. This paragraph is in the following terms :

"After judgment, my firm brought in a bill of costs which excluded the costs referred to in para. 3 hereof, because there is always considerable delay in obtaining the accounts from bank administrators as such accounts had to be audited first. The plaintiffs did not think it wise to wait until such costs were ascertainable before bringing in a bill since they considered it their duty as executors to take immediate steps to recover the costs then ascertainable. Indeed, the plaintiffs appear to have been justified in that the defendant paid only after a bankruptcy petition had been presented against him by the plaintiffs."

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The rest of this affidavit is useful in elucidating the remaining facts, and I will read it.

"These costs (excluding those referred to in para. 3 hereof) were duly taxed and an order to pay was made against the defendant on Nov. 21, 1949 and paid by him on June 19, 1950. The accounts were subsequently received from the said bank and were taxed against the defendant, who was given notice of such taxation and who attended by his solicitors' clerk. Allocatur was made in respect of such additional costs on Sept. 25, 1950 which amount in all, as will be seen from the correspondence hereinafter referred to, to £535 16s. 4d., certain items having been taxed off as against the defendant, although, of course, recoverable out of the estate. The registrar, on application made to him, has declined to make a further order to pay against the defendant, and has said that, while he has every sympathy with the plaintiffs and agrees that the additional costs are chargeable against the defendant, he has no power to make any further order to pay. He says that the plaintiffs should have waited for their complete bill before taxing."

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Then he exhibits certain correspondence which I do not think assists the matter with which I am dealing.

A matter which is not without importance is the fact that in submitting to taxation and obtaining payment of the bill of costs allowed at £433 16s., the plaintiffs' solicitors acted in such a way as to make it clear to the defendant that that bill was the bill of costs which was taxable pursuant to the judgment of the learned trial judge in which he condemned the defendant in the plaintiffs' costs of the suit. It is impossible for me to entertain any doubt that on receipt of that bill and of the order to pay and the pressure for payment the defendant must have been satisfied that, having paid the amount of that bill, his liability for costs under the judgment had been satisfied.

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I now deal with the application in the various forms in which it is made to me: (i) I have, I hope, sufficiently indicated the reasons why, in my opinion, no order can now be made in respect of the sum of £535 16s. 4d. (ii) In my opinion, there is no basis on which it would be possible properly to convert the order of Nov. 21, 1949, from what it appears to be, and in fact and in law is on its face, namely, a final order to pay the sum of £433 16s. into an interim order. In my opinion, it would be wrong to deal with the order of Nov. 21, 1949, in any manner so as to clear the way for the making of an order which would indicate that anything more than £433 16s. was then due or could thereafter become due from the defendant for the plaintiffs' costs of action. (iii) As to the suggested substitution of another order for the order of Nov. 21, 1949, relating to the bill for £433 16s., I hold the view that an order for payment of the full sum of £969 12s. 4d. in place of the order on the record of Nov. 21, 1949, would be improper on a variety of grounds. Any such substituted order would require that the facts be set out in it, and those facts could not, in my view, justify the making of any such substituted order. I am clearly of opinion that the plaintiffs, having submitted and obtained taxation—and incidentally payment—of their costs of the action, were not entitled to tax, as between party and party, any further bill. It appears to me to be quite clear that a litigant in possession of a judgment against an opposite party to pay his taxed costs must lodge a bill for taxation which includes

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A all the costs to payment of which, when taxed, the judgment entitles him. He is not, in my opinion, entitled to select a portion of the costs, submit that portion for taxation as his costs of the action recoverable under the judgment, and, after obtaining an allocatur, make a selection of a further part of his costs and successfully apply for taxation of a bill for those further items as between party and party. Nor is he, having obtained taxation, entitled to an order to pay the amount of the allocatur. In this case it is true that the successive bills after the first were taxed by Mr. Registrar COMPTON MILLER and he signed allocaturs for the amounts, namely £253 9s. 6d. and £66 10s. 4d. Mr. Registrar PEREIRA, about ten months or a year earlier, had taxed the bill of costs for £433 16s. I do not know what, if anything, Mr. Registrar COMPTON MILLER knew about that earlier taxation at the time when he received and taxed the two later bills of costs. If they appeared to him to be lodged as solicitor and client bills—
B as, having regard to their titles, he might well have thought that they were—their taxation might have been useful. The same observation applies, in my view, to his allowance of the two hundred guineas fee for the administrators' remuneration. When I say that that taxation might have been useful I mean this: that no doubt the plaintiffs will have to pay their own solicitors the amount of their bills when taxed and the bills, having now been taxed, as I have said,
C by Mr. Registrar COMPTON MILLER, there will be no doubt between the plaintiffs and their solicitors about the amount for which the plaintiffs become liable to their solicitors. However this may be, it is quite clear, in my opinion, that the fact that those costs were taxed and the remuneration fixed and allowed cannot entitle the plaintiffs to an order on the defendant to pay them. It may well be
D that the plaintiffs' solicitors acted wisely in the course which they took in postponing two parts of their party and party bill of costs and charges as they did. Of this I know nothing except that in his affidavit the deponent expresses clearly his opinion that they did.

In my view, for reasons which I hope that I have sufficiently expressed, it is impossible for me to hold (i) that anyone concerned in these matters has acted under an accidental slip or omission, or (ii) that the plaintiffs are entitled to the order for which they now apply. Counsel for the plaintiffs appealed to me to reverse the order of the learned registrar and make the order for which they applied on the ground that in justice they are entitled to it and that if the order were refused (as the registrar had refused it) justice would fail. In my opinion, for the reasons already expressed, justice would be defeated if the order were made. In my opinion, this appeal must be dismissed with costs here and on
E the application to the learned registrar.
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Appeal dismissed.

Solicitors: *Teff & Teff* (for the plaintiffs) ; *Thornton, Lynne & Lawson* (for the defendant).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

REISS v. WOOLF.

[COURT OF APPEAL (Somervell, Jenkins and Morris, L.JJ.), May 29, 1952.]

Practice—Striking out pleading—Defence—Paragraphs to be struck out in default of further and better particulars within twenty-one days—Imperfect particulars delivered in time—No default warranting striking out of paragraphs—Automatic striking out on default.

On Feb. 8, 1952, a plaintiff obtained an order of a master that the defendant deliver "not later than four o'clock in the afternoon of the twenty-first day following the date hereof . . . the undermentioned further and better particulars of his defence and that in default thereof paras. 2 and 3 of the defence be struck out." Within the time limited the defendant delivered particulars which represented an attempt to comply with the order, but were not a full compliance, the defendant replying in respect of several matters that he could not give particulars until after discovery. On a summons to have the action transferred to the short cause list on the ground that paras. 2 and 3 of the defence had been automatically struck out,

Held: an order imposing conditionally a penalty, such as the striking out of a defence, must be precise in its terms or it will be inoperative: *Abalian v. Innous* ([1936] 2 All E.R. 834), applied; on construction, "default" in the order meant, not default in the sufficiency of one or more of the answers (which the order did not define with precision), but default in delivery within the prescribed time (which was so defined) of a document made in good faith which could fairly be entitled "particulars"; and, as such particulars had been delivered within the prescribed time, there had been no default, the paragraphs were not automatically struck out, and the transfer of the case to the short cause list must be refused.

Per curiam: unless there was a complete failure to comply with it, an order such as the present did not operate automatically, but must be the subject of a further application.

Decision of *DEVLIN, J.*, ante p. 3, affirmed.

AS TO PARTICULARS, see *HALSBURY*, Hailsham Edn., Vol. 25, pp. 275-282, paras. 465-467; and FOR CASES, see *DIGEST*, Pleading, pp. 184-207, Nos. 1561-1741.

Cases referred to:

- (1) *Abalian v. Innous*, [1936] 2 All E.R. 834; Digest Supp.
- (2) *Davey v. Bentinck*, [1893] 1 Q.B. 185, 187-188; 62 L.J.Q.B. 114; 67 L.T. 742; Digest, Pleading, 83, 699.
- (3) *Kaye v. Levinson*, [1950] 1 All E.R. 594; 2nd Digest Supp.

APPEAL by the plaintiff from an order of *DEVLIN, J.*, dated May 12, 1952, and reported ante p. 3.

The plaintiff claimed £1,000 payable under a written agreement contained in letters dated June 1 and 6, 1951. By para. 1 of the defence the defendant denied that the letters constituted an enforceable agreement. Paragraph 2 alleged that the agreement, if enforceable, was tainted with illegality, and para. 3 alleged that the purpose of the agreement was to secure the repayment of money lent to pay gambling debts and so was void under the Gaming Act, 1892. The plaintiff requested particulars under paras. 2 and 3, and, on receiving an unsatisfactory reply, took out a summons before the master for an order for the particulars. On Feb. 8, 1952, the master made an order allowing the particulars as follows:

"That the defendant do, not later than four o'clock in the afternoon of the twenty-first day following the date hereof, deliver to the plaintiff's solicitors the undermentioned further and better particulars of his defence and that in default thereof paras. 2 and 3 of the defence be struck out."

A The defendant delivered particulars within the time specified, but in respect of several of the matters covered by the order he stated that he was unable to give particulars until after discovery. On Apr. 25 the plaintiff, taking the view that this was a non-compliance with the order and that paras. 2 and 3 were automatically struck out, applied to the master for the action to be transferred to the short cause list, but the application was refused. The defendant contended that, a document containing further and better particulars having been delivered within the time limited by the order, there had been, if not a strict compliance with the order, no default within the meaning of the order. He submitted, further, that, even if there had been a default, the order did not operate automatically and a further order was necessary before the paragraphs would be struck out.

B DEVLIN, J., held that an order imposing conditionally a drastic penalty, such as the striking out of a defence, must define with precision the event on which the penalty was to operate, and, if it failed to do so, it would be inoperative; on construction, "default" in the order meant, not default in the sufficiency of one or more of the answers (which the order did not define with precision), but default in delivery within the prescribed time (which was so defined) of a document made in good faith which could fairly be entitled "particulars"; and, as C such particulars had been delivered within the prescribed time, there had been no default, the paragraphs were not automatically struck out, and the transfer of the case to the short cause list must be refused.

M. Waters for the plaintiff.

B. Finlay for the defendant.

D SOMERVELL, L.J. [after stating the facts]: The first question is: What does this order mean? Counsel for the plaintiff submits that paras. 2 and 3 are automatically struck out unless, possibly subject to the de minimis principle, every particular ordered is given. If his argument were right, the matter might go to trial and when the case was called on the defendant, who up to that time E had thought that the plaintiff had been satisfied with the further and better particulars he had delivered, might find that, unknown to him, the paragraphs of the defence on which he had hoped to rely had been struck out. The learned judge did not accede to the plaintiff's argument. He referred to a passage from the judgment of GREENE, L.J. ([1936] 2 All E.R. 838) in *Abalian v. Innous* (1). That was an appeal dealing with an order that an action be dismissed unless it F was fixed for trial within six years of the alleged loss. I agree with DEVLIN, J., that the same principle applies to an order striking out what are, or may be, the material paragraphs in the defence. In the *Abalian* case (1) the court came to the conclusion that such orders as they there had before them must be absolutely precise in their terms, and, unless they were so, they were inoperative. The learned judge, applying that principle, said (ante p. 5):

G "If 'default' means default in the sufficiency of one or more of the answers, I should not consider that the event was defined with precision. Whether or not it had taken place might be the subject of a genuine conflict of opinion which could only be resolved by further adjudication. If I thought this to be the right construction of the order, I should follow *Abalian v. Innous* (1) and treat it as inoperative. The order can conform H with the principle in that case only if it is treated as an order that is dealing with the time of compliance rather than with the mode of compliance. The order does fix a time very precisely, and I think it can and should fairly be construed as a time order. So construed, 'default' refers to default in the delivery of a document within the specified time. I do not, of course, mean that any document with writing on it will do. It must be a document made in good faith which can fairly be entitled 'Particulars'. It must not be illusory. That is the word used by Mr. Bankes in argument in *Davey v.*

Bentinck (2) ([1893] 1 Q.B. 186). That, in my judgment, is the test and not, as the plaintiff contends, whether each demand for particulars has been substantially met. Applying that test, I think there has been no default".

Then the learned judge refers to the other courses which are open to the plaintiff if the particulars are, in fact, insufficient. I have read that passage because it expresses my own opinion as to the construction of this order and I could not put it in clearer terms. For these reasons I think the appeal should be dismissed. A

The learned judge also went on to deal with the question whether under an order of this kind the paragraphs are struck out automatically or whether there has to be a fresh application. On that matter he accepted the contention for the plaintiff that if there was a default the order operated automatically. So far, at any rate, as a complete failure to comply is concerned, I would agree with that—that is to say, if no document which could possibly be described as particulars was delivered, but, if a document were delivered regarding which the question arose whether it was illusory, I think it might be the subject of a further application. In my opinion, this appeal should be dismissed. B

JENKINS, L.J.: I agree.

MORRIS, L.J.: I agree.

Appeal dismissed. C

Solicitors: *J. de Meza & Co.* (for the plaintiff); *Mendes da Costa, Greenwood & Co.* (for the defendant).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

JEROME v. BENTLEY & CO.

[QUEEN'S BENCH DIVISION (Donovan, J.), March 11, April 25, May 23, 1952.] D

Conversion—Conversion by agent after termination of authority—Sale to third party acquiring in good faith—Liability of third party to owner. E

The plaintiff, the owner of a diamond ring, entrusted it to T. who undertook to try to sell it on his behalf. The plaintiff was to receive £550 and T. any surplus of the proceeds. If the ring was not sold within seven days T. was to return it to the plaintiff. After the seven days had elapsed T., representing himself as the owner of the ring, sold it for £175 to the defendants, who bought it in good faith and re-sold it. T. was subsequently convicted of the larceny of the ring as a bailee. In an action by the plaintiff against the defendants for damages for wrongful conversion of the ring, F

HELD: at the time of the sale to the defendants T. was not an agent of the plaintiff to deal with the ring and was not in the position of a person who might be presumed as an agent to have authority to sell it; by the sale he converted the ring to his own use; and, therefore, he did not pass any property in it to the defendants, who were thus liable to the plaintiff. G

Watteau v. Fenwick ([1893] 1 Q.B. 346), and *Rimmer v. Webster* ([1902] 2 Ch. 163), distinguished.

Farquharson Brothers & Co. v. King & Co. ([1902] A.C. 325), and *Mercantile Bank of India, Ltd. v. Central Bank of India* ([1938] 1 All E.R. 52), applied. H

Commonwealth Trust v. Akotey ([1926] A.C. 72), not followed.

AS TO GOODS ENTRUSTED TO AGENT, see HALSBURY, Hailsham Edn., Vol. 1, p. 273, para. 454; and AS TO REVESTING OF PROPERTY IN STOLEN GOODS, see *ibid.*, Vol. 29, pp. 110-112, paras. 133-135.

Cases referred to:

(1) *Watteau v. Fenwick*, [1893] 1 Q.B. 346; 67 L.T. 831; 56 J.P. 839; 1 Digest 307, 305.

- (2) *Rimmer v. Webster*, [1902] 2 Ch. 163; 71 L.J.Ch. 561; 86 L.T. 491; 1 Digest 376, 823.
- (3) *Farquharson Brothers & Co. v. King & Co.*, [1902] A.C. 325; 71 L.J.K.B. 667; 86 L.T. 810; 1 Digest 377, 828.
- (4) *Commonwealth Trust v. Akotey*, [1926] A.C. 72; 94 L.J.P.C. 167; 134 L.T. 33; 39 Digest 636, 2322.
- A (5) *Lickbarrow v. Mason*, (1787), 2 Term Rep. 63 (100 E.R. 35); *on appeal*, (1790), 1 Hy. Bl. 357 (126 E.R. 209); *subsequent proceedings* (1794), 5 Term Rep. 683 (101 E.R. 380); 6 Digest 456, 2911.
- (6) *Mercantile Bank of India, Ltd. v. Central Bank of India*, [1938] 1 All E.R. 52; [1938] A.C. 287; 107 L.J.P.C. 25; 158 L.T. 269; Digest Supp.
- (7) *Johnson v. Crédit Lyonnais Co. Johnson v. Blumenthal*, (1877), 3 C.P.D. 32; 47 L.J.Q.B. 241; 37 L.T. 657; 42 J.P. 548; 1 Digest 332, 476.
- B (8) *R. v. Henderson*, (1871), 23 L.T. 628; 35 J.P. 325; 15 Digest 895, 9833.

ACTION for damages for wrongful conversion.

On Dec. 30, 1946, the plaintiff, who was a general dealer carrying on business at a shop in Kendal, showed a diamond ring, which he had bought two years previously with the intention of selling it at a profit, to a Major Tatham, who had come to the plaintiff's shop ostensibly to buy a present for his mother. Major Tatham could not pay the price of £550 asked for the ring, but he suggested that, as he moved in circles which were socially superior to those of the plaintiff, he could sell the ring for the plaintiff at a price up to £1,000. The plaintiff said he wanted only £550, and handed the ring to Major Tatham who signed a receipt for it in the following form:

D “Received from [the plaintiff] a blue-white platinum set diamond ring with baquet shoulders. Central stone weighing approximately 4.92 carats. (On approval).”

The arrangement was that Major Tatham was to try to sell the ring for the plaintiff, in his own name or in the name of the plaintiff, and, if it was sold, to pay him £550 for it, retaining any surplus for himself, and that he was to keep it for this purpose for seven days from Dec. 30, 1946, and, if it was not then sold, to return it to the plaintiff. On Jan. 11, 1947, Major Tatham visited the defendants' shop in Bond Street, London, signed a declaration that he was the owner of the ring, and sold it to the defendants for £175. The defendants sold it the same day to a Mr. Citroen for £215, and he sold it a few days later to a diamond trader for £230. Shortly afterwards Major Tatham sent the plaintiff a cheque for £550, which was returned marked “R.D.” On May 9, 1947, he was charged before the magistrates at Kendal with larceny of the ring as a bailee. He pleaded guilty, was convicted, and was bound over in the sum of £20 to be of good behaviour for two years. In May, 1948, the plaintiff made an offer to the defendants to accept £100 in full settlement of his claim against them in respect of the ring, and in July, 1948, he made a formal demand in writing for the return of the ring by the defendants, but the defendants replied that they had bought it in good faith and had re-sold it. The plaintiff submitted that after Major Tatham had converted the ring to his own use when the seven days had elapsed he could pass no property in it and the defendants were, therefore, liable in respect of it. The defendants contended that, if the plaintiff had placed a limitation of seven days on the authority of his admitted agent, Major Tatham, he should have communicated that limitation to the third party with whom the agent dealt, and, as he had not done so, he could not rely on that limitation and when the ring was sold to them on Jan. 11, 1947, the property in it passed to them.

Nahum for the plaintiff.

Stenham for the defendants.

May 23. **DONOVAN, J.**, stated the facts, found that the defendants bought the ring in the bona fide belief that Major Tatham was the owner, and continued: The plaintiff brings this action claiming £500 from the defendants as the value of the ring. The case, he says, is of the simplest. The ring was not Major Tatham's ring. After the seven days were passed and Major Tatham decided to convert the ring to his own use, and did so, he was a thief of the ring who could pass no property in it. No title to the ring, therefore, passed to the defendants, and, innocent though they may be, they must return the ring or pay its value. The position, he says, is just the same as it would have been if Major Tatham had obtained the ring by burglary and sold it to the defendants. Admittedly, in such circumstances they would have to return the ring or pay its value, however innocent they were. The defendants' answer is that Major Tatham was admittedly the agent of the plaintiff to sell the ring for seven days from Dec. 30, 1946. True, he sold it to the defendants on Jan. 11, 1947, and thus he exceeded his authority, but, if a principal, in circumstances such as these, places a limitation on his agent's authority, to entitle him to rely on it he must communicate that limitation to the third party with whom the agent deals, and here that was not done. The result, they say, is that the property in the ring passed to them on Jan. 11, 1947. They re-sold it long before Major Tatham was convicted, and, accordingly, did not unlawfully convert the ring to their own use.

The plaintiff's claim as originally pleaded was that Major Tatham was his agent to sell the ring, that he sold it to the defendants, that later he was convicted of larceny as a bailee, that still later the plaintiff demanded the ring from the defendants who refused to deliver it up, and that *thereby* the defendants converted the ring to their own use. So pleaded it seemed to me obvious that the claim must fail, for on the language of the plea the property would have passed to the defendants, and they could not convert it by a refusal to deliver it up long after they had parted with it. In order to allow the real issues between the parties to be settled, I permitted an amendment of the statement of claim so that it now alleges that Major Tatham wrongfully sold the ring, and, quite generally, that the defendants converted it to their own use.

The defendants cited the decision in *Watteau v. Fenwick* (1), in which the manager of a beerhouse ordered cigars and meat extract from some merchants, but failed to pay for them. The merchants sued the brewers, who were the manager's employers, for the price, and the brewers replied that their manager had no authority to buy anything from third parties except bottled ales and minerals. Nevertheless, judgment was given against the brewers. The reason given by **WILLS, J.**, was that a principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations as between principal and agent put on that authority. And this is so, he says, even where the supplier of the goods does not know of the existence of the principal. It is difficult to apply that reasoning to the present case. In the first place, beerhouse managers are a well-known class of agent. I suppose it is common knowledge that for certain purposes they are or may be the agents of the brewers who own the house. In relation to such managers it is easy to apply the phrase "the authority usually confided to an agent of that character". But Major Tatham belonged to no such well-known class of agent. He was simply a private individual, carrying on, so far as I know, no calling at all, to whom a ring had been entrusted for sale. One cannot usefully speak in his case of an act within the authority usually confided to agents such as he. Furthermore, at the time when he ordered the cigars and meat extract the beerhouse manager in *Watteau v. Fenwick* (1) was still an agent to buy *some* goods for the principal's business. He simply exceeded an existing authority to buy. When Major Tatham sold the ring he was not the plaintiff's agent at all except, perhaps, for the purpose of safe custody of the ring. Major Tatham did more than

exceed an authority to sell—he usurped it. I do not think, therefore, that this decision solves my problem.

In *Rimmer v. Webster* (2) a stockbroker fraudulently mortgaged some bonds left with him for sale by a client, and subsequently a question arose as to who was entitled to the bonds—the honest mortgagee, or the equally honest but defrauded client. The mortgagee won. The reason was that the client had given all the indicia of title to the stockbroker with the intention that he should deal with the property, though he only authorised the broker to sell the bonds and not to mortgage it. Nevertheless, that limitation could not be enforced against an innocent purchaser for value having no notice of the limitation. FARWELL, J., says ([1902] 2 Ch. 172):

“ But the course of action above mentioned is also consistent with an intention that the person to whom the indicia of title are entrusted should deal with them ; and if it is once proved, or admitted, that such was the intention, the case then falls to be decided in accordance with the principles governing the cases of authority given by a principal to an agent ; and the owner comes under a duty to the persons whom he intends to act on such authority to give them notice of any limit that he places on the authority, which he has by his own act made apparently co-extensive with absolute ownership ”.

So it is said here that the plaintiff gave Major Tatham the ring to sell, and if he put limitations on the authority, such as a period of seven days, he should have communicated that fact to any interested third party. I cannot help wondering how the plaintiff was to do this, for he did not know to whom out of the whole population Major Tatham would offer the ring. But the analogy between *Rimmer v. Webster* (2) and the present case breaks down, I think, on the circumstance that when he sold the ring Major Tatham was not an agent with limited authority. He had no authority to deal with the ring at all. Another distinguishing feature is that brokers in the ordinary course of business are employed to sell, buy, and raise money on, as well as keep in custody, the securities of their customers, and, accordingly, it may well be a reasonable assumption that a broker has full authority to deal with securities entrusted to him. Major Tatham, however, filled no similar role.

On behalf of the plaintiff I was referred to the decision in *Farquharson Brothers & Co. v. King & Co.* (3). There a dishonest clerk of Farquharson Bros. & Co., using a false name and abusing his authority, obtained some of his employers' timber from the dock company which warehoused it and sold the timber to King & Co. On becoming aware of the facts, Farquharson Bros. & Co. sued King & Co. for conversion. King & Co. said in effect: “ It is really your own fault. You gave the dishonest clerk the authority which enabled him to get the timber in the first place, and you put him in the position of being able to represent himself as the true owner ”. There was, however, no representation of authority made by Farquharson Bros. to King & Co., and the case, to quote the EARL OF HALSBURY, L.C., was simply this ([1902] A.C. 329):

“ A servant has stolen his master's goods, and the question arises whether the persons who have received those goods innocently can set up a title against the master. I believe that is enough to dispose of this case ”.

So it is, says the plaintiff, in the present case.

In *Commonwealth Trust v. Akotey* (4) Akotey was a grower of cocoa and sent a consignment of it to one Laing. Laing was to purchase it, but before he and Akotey had agreed on the price Laing dishonestly sold it for his own benefit to the Commonwealth Trust. Akotey then sued the trust for conversion of the cocoa, but the Privy Council decided against him by applying the principle enunciated by ASHHURST, J., in *Lickbarrow v. Mason* (5) in the following words (2 Term Rep. 70, cited [1926] A.C. 76):

"... wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it".

The Privy Council then said (*ibid.*):

"To permit goods to go into the possession of another, with all the insignia of possession thereof and of apparent title, and to leave it open to go behind that possession so given and accompanied, and upset a purchase of the goods made for full value and in good faith, would bring confusion into mercantile transactions, and would be inconsistent with law and with the principles so frequently affirmed, following *Lickbarrow v. Mason* (5)".

At first sight that seems strongly to support the defendants' case here, but the decision was not followed in a later case, *Mercantile Bank of India, Ltd. v. Central Bank of India* (6), decided by the Privy Council itself in 1937. In that case the Judicial Committee quoted ([1938] 1 All E.R. 59) the following statement of COCKBURN, C.J., in *Johnson v. Crédit Lyonnais Co. Johnson v. Blumenthal* (7) (3 C.P.D. 36):

"The case for the plaintiff rests on the general proposition of law—which as a general proposition cannot be contested—that the mere possession of the property of another, without authority to deal with the thing... otherwise than for the purpose of safe custody, as was the case here, will not, if the person so in possession takes upon himself to sell or pledge to a third party, divest the owner of his rights as against the third party, however innocent in the transaction the latter party may have been".

The decision of the Privy Council in the *Mercantile Bank of India, Ltd. v. Central Bank of India* (6) gave effect to that proposition.

That brings me to the circumstances in which Major Tatham sold the ring, the subject of the present dispute. On Jan. 11, 1947, his sole duty was to hand the ring back to the plaintiff, and he had no authority to deal with it in any way except for the purpose of its safe custody. He has admitted that he stole the ring as a bailee. In other words, when he entered the shop he intended fraudulently to convert the ring to his own use, and he accomplished that purpose. He then became a thief of the ring, just as did the accused in the somewhat similar case of *R. v. Henderson* (8). No one represented Major Tatham to the defendants as the plaintiff's agent with authority to sell the ring. The defendants knew nothing of the plaintiff. In fact, they made Major Tatham show his identity card and sign a declaration that the ring was his. So they dealt with him on the footing of a principal selling his own property.

It is said that, even on the footing that Major Tatham was a thief, the defendants are entitled to succeed on the dictum of ASHHURST, J., in *Lickbarrow v. Mason* (5). Everything, however, depends on the construction to be put on the word "enabled" in this passage. If I carelessly leave my front door unlocked so that a thief walks in and steals my silver, I have, in a sense, enabled him to steal it by not locking my door, but that does not prevent my recovering it from some innocent purchaser from the thief otherwise than in market overt. "Enabled" in this context means the doing of something by one of the innocent parties which in fact misled the other. This is clearly to be deduced from LORD LINDLEY's speech in *Farquharson Brothers & Co. v. King & Co.* (3) ([1902] A.C. 342). The plaintiff here did nothing which misled the defendants. In the circumstances I hold that no property in this ring passed to the defendants, and there is nothing to prevent the plaintiff from setting up his title as against them. Therefore, I decide in his favour. On the evidence before me I value the ring at £250, and I give judgment for the plaintiff in that amount.

Judgment for the plaintiff.

Solicitors: Pollard, Stallabrass & George Martin, agents for Douglas Clift, Lancaster (for the plaintiff); C. Butcher & Simon Burns (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

Re K (AN INFANT). TCHCOCK v. W. B. AND OTHERS.
JUDICIAL DIVISION (Lord Goddard, C.J., Hilbery and Devlin, JJ.),
May 27, 1952.]

Adoption—Dispensing with consent to order—“Consent . . . unreasonably withheld”—Matters to be considered—Attitude and wishes of dissenting parent—Relevancy of child’s welfare—Adoption Act, 1950 (c. 26), s. 3 (1) (c).

The father of an infant, who was two years old, was deserted by his wife, the mother of the infant, shortly after the marriage and was not allowed by her to see the infant or to know where he was. The father had a criminal record, but he had recently made good and wished to have the custody of the infant, which had been given to the mother by an order of the court. He had no home immediately available where the infant could be received, but he intended to put him in a nursery home where he could contribute to his maintenance until such time as he could have him with him. The mother wished to have the infant adopted, but the father refused his consent to an adoption order, wishing to carry out his parental duties to the infant, and wanting him to remain his child. The justices held that the father’s consent was unreasonably withheld within the meaning of s. 3 (1) (c) of the Adoption Act, 1950, and, therefore, could be dispensed with under the sub-section, and, being of opinion that it would be for the welfare of the infant if an adoption order was made, they granted the application for the order.

HELD: in determining whether consent was unreasonably withheld, within the meaning of s. 3 (1) (c) of the Act of 1950, the test was not the welfare of the child, but the attitude of the father, i.e., whether the father was unreasonable, as a father, in withholding his consent; if a father had an honest desire to keep his child, and could contribute to his upkeep, he could not be said to be withholding his consent unreasonably, notwithstanding that he had no home immediately available for the child; and, therefore, the order of the justices should be quashed.

FOR THE ADOPTION ACT, 1950, s. 3 (1), see HALSBURY’S STATUTES, Second Edn., Vol. 29, p. 470.

CASE STATED by Newport justices.

On June 4, 1949, Robert Hitchcock, the appellant (referred to hereafter as the father), and Isabella Hitchcock, the third respondent (referred to hereafter as the mother), were married. The father had a criminal record before the marriage, and on June 6, 1949, he was arrested for stealing money, with which he had bought dresses for the mother before the marriage, and was put on probation. Six weeks after the marriage the mother left him and had lived apart from him ever since. On Feb. 12, 1950, a son was born of the marriage, but the mother did not allow the father to see the infant, and refused to disclose to the father where he was or to send to the infant a cot and other articles which the father had bought for him. In March, 1950, she put the infant out to foster parents. In May, 1950, the father was sentenced to four months’ imprisonment for a breach of the probation order. On May 25, the mother obtained from a court of summary jurisdiction, sitting at Trowbridge, Wiltshire, an order for the custody of the infant, and the father was ordered to pay the weekly sum of one shilling for the infant’s maintenance. From Dec. 6, 1950, the father had been employed as a ward orderly in a hospital in Wiltshire, where he had shown himself a good worker and had proved himself very satisfactory. In April, 1951, he was found guilty of stealing a registered letter in September, 1950, and was put on probation for three years. On Apr. 17, 1951, he applied to the justices at Trowbridge to revoke the order of May 25, 1950, but his application was dismissed, and on July 18, 1951, an appeal by him from the order of the justices was dismissed by ROMER, J., who said that the father seemed to want

120 [JUNE 19, 1952] ALL ENGLAND LAW REPORTS [VOL. 2
to have the infant, but it was impossible to hand him over to him, and that it might be in the best interests of the infant that he should be adopted into a good home. He also said that, if the infant was not adopted, nothing in the proceedings before him would prejudice any future application by the father to have the infant.

At a court of summary jurisdiction, sitting at Newport on Nov. 16, 1951, and Dec. 4, 1951, an application was made by the first and second respondents (referred to hereafter as the adopters), under the Adoption Act, 1950, (a) for an adoption order in respect of the infant, and (b) that the court should, under s. 3 (1) (c) of the Act, dispense with the father's consent on the ground that it was unreasonably withheld. The grounds for alleging that the consent was unreasonably withheld were specified in the statement supplied to the court by the adopters under the Adoption of Children (Summary Jurisdiction) Rules, 1949, r. 1, as being that the mother had been given the legal custody of the infant by the order of the justices, dated May 25, 1950, and that the father's application to have the order revoked had been dismissed by the justices by their order of Apr. 17, 1951, which was affirmed by ROMER, J.

It was contended, *inter alia*, on behalf of the father (a) that he could not be held to have withheld his consent unreasonably when he genuinely desired the infant and had taken such steps as he could to help him and to be given the custody of him, and when, after his lapse into dishonesty, he had led an honest and industrious life and given reasonable indication of becoming a decent and honest parent, and (b) that it was in the interests of the infant that his natural father should have care of him. The adopters contended, *inter alia*, that the father was not a fit and proper person to care for the infant and that his opposition was in order to assert his own position and not because of paternal instinct.

The justices found that the father had always wanted the infant to remain his child, that he wished to carry out his parental duties to the infant, and that the mother had always wanted spitefully to prevent the father getting the infant, that the father had not available a home where the infant could be received immediately, and, if an adoption order were not made, it was his intention to put the infant in a nursery home where he could contribute to the infant's maintenance until such time as he could have the infant with him, and that the infant had already been in four different homes. They were of the opinion that the father's consent was unreasonably withheld and could be dispensed with, and, being satisfied that it would be for the welfare of the infant that the adoption order should be made, they granted the application.

Maude, Q.C., and *Huntley* for the father.

L. H. Collins for the respondents.

LORD GODDARD, C.J.: This is a Case stated by justices of the county borough of Newport, to whom an application was made under the Adoption Act, 1950, for their consent to the adoption by the first two respondents of an infant child, now aged two years, the issue of the marriage of Robert Hitchcock, who is the appellant, and Isabella Hitchcock, who is the third respondent. The case raises points of considerable importance.

[HIS LORDSHIP stated the facts, and continued:] Under the Adoption Act, 1950, s. 2 (4) (a), an adoption order cannot be made without the consent of both parents, if they are alive. By s. 3 (1):

"The court may dispense with any consent required by s. 2 (4) (a) of this Act if it is satisfied—(a) in the case of a parent or guardian of the infant, that he has abandoned, neglected or persistently ill-treated the infant; (b) in the case of a person liable by virtue of an order or agreement to contribute to the maintenance of the infant, that he has persistently neglected or refused so to contribute; (c) in any case, that the person whose consent is required cannot be found or is incapable of giving his consent or that his consent is unreasonably withheld."

Under r. 1 of the Adoption of Children (Summary Jurisdiction) Rules, 1949 (S.I., 1949, No. 2397), which continue in force by virtue of sched. V, para. II, to the Act of 1950, an application for an adoption order is to be made

“... by means of a statement in the form numbered 1 in sched. I to these rules, presented to the court by the applicant...”

A In the statement of application (form No. 1) the applicant can request the court “on the following grounds”, which then have to be set out, to dispense with the consent of anyone whose consent is required but who has not signified his consent. The statement of application is not served on any of the persons whose consent is required or on any of the other respondents. The notice which has to be served on them is form No. 3, in sched. I to the rules, which gives no information except that an application for an adoption order has been made in respect of the infant and will be heard on a certain day, and that, if the person to whom the notice is addressed does not consent to the making of the order, he is to give notice to the court before a specified day, so that a date and time may be fixed for him to attend and show cause why the order should not be made. If the parents or guardians consent, the justices can proceed to make the order, but, if consent is withheld, they have to consider the matter.

C In opening this case, counsel for the father suggested that the justices did not consider any ground for dispensing with the father's consent except that set out in the statement of application. We certainly cannot take that view because we do not find anything in the Act or rules which prescribes that the adopters must set out all the grounds on which they wish to ask for the consent to be dispensed with. It is a matter for the court to decide, and other persons, viz., the local authority, or guardian ad litem appointed by the local authority, or the adoption society, can be heard, so we do not think that there is anything in that point, but I call attention to the fact, because I do not think that it is altogether without significance that the only ground which was put forward by the adopters—and I should think it is highly likely that the adoption society assist in these matters—for asking that the consent might be dispensed with was:

E “... in view of the fact that the legal custody of the infant was given to ... the mother of the infant, on May 25, 1950, by an order made by the justices of the petty sessional division of Trowbridge in the county of Wilts, against which said order the [father] laid a complaint before the said magistrates on Apr. 17, 1951, who dismissed the said complaint ...”

F and that their decision was affirmed by ROMER, J., in the High Court. Thus the only ground on which the justices were asked to dispense with the consent was that the custody was in the mother and that the father had been refused custody both by the justices and by the learned judge. If that ground weighed with the justices in making the adoption order, it should, in my opinion, have had the lightest weight possible, for I do not think that it is really a matter G to be taken into account. In all the cases of broken homes where there are children, one parent or the other must have the custody to start with. Custody may be given by the justices, by the Divorce Court, or by the Chancery Division, or it may be given by this court if there is a habeas corpus proceeding with regard to the infant. Because one parent is given the custody of the child, it by no means follows that the other parent is never to have any rights, natural or H otherwise, in the child.

An adoption order, however, is an order of the most serious description as it removes the child once and for all from his natural parents and gives him to the adopted parents as though they were and always had been his natural parents. (I am not going into questions in regard to property rights and titles, intestacy, and matters of that kind, as they are immaterial for the present purpose.) A parent who has fallen on evil days, whether by his own fault or otherwise, may still be by no means a bad father. He may be devoted to his children. If he

is neglectful of them, there are plenty of proceedings by which he can be made to perform his parental duties, and the children may be placed in the care and protection of the local authority. Even then the father has some rights as a father. In the case of adoption, however, once the adoption order is made the parents can never see their child again unless by permission of the adopting parents, as, under s. 10 (1) of the Act of 1950, the adopters are solely and absolutely in charge of the child.

When there is a question of the custody or guardianship of an infant, the test which any court, whether the High Court or a court of summary jurisdiction, has to apply is the benefit of the child. It is for that reason, I think, that the justices went wrong in this case. I think that their minds have been so filled with considering what is for the benefit of the child that they have overlooked the fact that they are here making an adoption order, the effect of which is to extinguish wholly the parents' connection with the child. One of the contentions put forward before the justices on behalf of the adopters was:

"That the [father] had a grudge against society and should not have the infant as the [father] was not a fit and proper person to care for the infant, that the [father's] opposition was in order to assert his own position and not because of paternal instinct."

The findings of the justices seem to me to negative that contention wholly and absolutely. They have found that the mother refused to give to the father any information about the infant and always wanted spitefully to prevent the father getting the infant, and they might have found that she regarded the infant merely as a pawn in the dispute between herself and the father. In regard to the father, they found that he is a good worker and has always wanted the infant to remain his child and wishes to carry out his parental duties to the infant. They also found that he has not available a home where the child could be received immediately, and that, if an adoption order were not made, it was his intention to put the child in a nursery home where he could contribute to its maintenance until such time as he could have the child with him. If it is a question of guardianship or custody, the fact that one parent or the other has not at the time a home into which to put the infant is a most material factor. The mother in this case wants to get rid of the infant. The father does not. The father has not a home to which he can at once send the infant, but someone has to have the guardianship of the infant. Why, then, is it to be said that the only way of giving the infant the care and protection which he requires is to make an adoption order whereby the father, whom the justices have found to be honest in his desire to have the infant, is to be shut out from having any parental rights in the infant?

I cannot see that there is any evidence that the father is acting unreasonably. He is in no different a position from that of a man whose wife has died or has deserted him, and who is left with young children, and is in serious difficulty to know what to do with them. He may be put in great difficulty in finding accommodation or in finding someone to look after them, especially if his wages are not very high. I have never heard that put forward as a reason why the children should be taken away from him and made someone else's children, as would happen if adoption orders were made. In my opinion, the first requisite before an adoption order can be made is the consent of the parents. If they do not consent, the order may be made, notwithstanding their refusal, for the reasons which are set out in s. 3 (1) (a) and s. 3 (1) (b) of the Act of 1950. Under s. 3 (1) (c), the order can be made if a parent is unreasonably withholding his consent, but the mere fact that the adoption will be for the benefit of the child is not an answer to the question whether a parent is unreasonably withholding his consent. I am not going to attempt to lay down what would amount to an unreasonable withholding of consent within s. 3 (1) (c), because circumstances are so various that one cannot prophesy with regard to facts which are found

A in some other case. In the case which is now before us, I think that, as the justices find that the father has an honest desire to remain the parent of his child, and that he is working satisfactorily so that he has money which he can contribute to the upkeep of the infant, he cannot be said to be acting unreasonably in withholding his consent, notwithstanding that he may have to put the infant into some kind of institution, although it would, naturally, be better for the infant to have the benefit of a home life, if possible, rather than to be in an institution. For these reasons, in my opinion, we ought to reverse the decision of the justices in this case.

HILBERY, J.: I agree.

B DEVLIN, J.: I also agree. On the question whether "consent is unreasonably withheld", within the meaning of s. 3 (1) (c) of the Act of 1950, I think it is significant that s. 3 (1) (c) is to be contrasted with the proviso to s. 2 (3) of the Adoption of Children Act, 1926, which provided that:

C "... the court may dispense with any consent required by this sub-section if satisfied that the person whose consent is to be dispensed with ... is a person whose consent ought, in the opinion of the court and in all the circumstances of the case, to be dispensed with."

D That proviso gave an absolute discretion to the court, and, in exercising their powers under a section so worded, the justices would, no doubt, be right in regarding the welfare of the child as the matter of paramount importance. But s. 3 (1) (c) of the Act of 1950 is worded differently. It is unnecessary to speculate on the reasons for the change. The legislature may have considered that, while the welfare of the child is in the end of paramount importance, it would be best for the child to remain with his natural parents, if one of them wanted him. However that may be, it is plain that the prescribed test is no longer the welfare of the child. Attention has been drawn by LORD GODDARD, C.J., to the nature of s. 3 (1) of the Act of 1950 and to the fact that the circumstances in which consent may be dispensed with under s. 3 (1) (a) and s. 3 (1) (b) are where a parent has, by his own act of parental misbehaviour, disqualified himself from having his refusal of consent attended to. It is in that light that one has to construe the sub-section, and, in particular, the words "that his consent is unreasonably withheld", in s. 3 (1) (c). In my judgment, the test to be applied for the purpose of s. 3 (1) (c) is this: Is the attitude of a father, in refusing his consent, unreasonable, i.e., is the father being unreasonable as a father? If it is possible to say that a father could reasonably come to the conclusion that his child ought not to be adopted, it seems to me impossible to hold that his consent is unreasonably withheld. The welfare of the child is, of course, of indirect importance, because a father who has no regard for the welfare of his child in reaching such a decision is not reasonable, but the child's welfare is no longer the sole test. The test that has to be directly applied is an inquiry into the attitude of the father, and that, I think, was not really disputed by counsel for the respondents.

G That being so, there are two questions that fall to be asked. The first and obvious one is: Is consent being refused whimsically or arbitrarily or not in good faith, because, if so, a fortiori it would be unreasonable. On that the finding of the H justices is conclusive to the contrary, because they find:

"The [father] has always wanted the infant to remain his child and ... wishes to carry out his parental duties to the infant."

Of course, it does not follow, as counsel for the father said, that a father's desire to keep his child is necessarily conclusive that his decision to do so is reasonable. He may be a dipsomaniac or otherwise quite unfitted, however much he may want to do so. But if it is shown that he wants the child and is fit to be a father

and can support the child, it seems to me, *prima facie*, that it is impossible to say that a decision not to have his child adopted is unreasonable. The test is of the same sort as one would apply to the actions of a father in other similar circumstances—if, for example, a father, whose home has been broken up, refuses to board his children with relatives, the question one would ask would be: Is a father, in those circumstances, acting unreasonably?

The argument of counsel for the respondents that the father must satisfy the justices that he can provide a home for the child, either now or in the foreseeable future, is adding something which is not warranted by the Act. There may be all sorts of reasons why a father cannot provide a home for his child, either immediately or in the foreseeable future. The provision of a home might be an overriding consideration if the test were the welfare of the child, but, if the test is the reasonableness of the father, it is not enough that he is not in a position to say immediately and definitely that he can provide a home or to disclose his plans for providing one.

The *prima facie* conclusion can, of course, be displaced, but the burden of so displacing it lies on those who assert that the refusal is unreasonable. If they can bring evidence before the court which shows that the father's prospects of providing a home are quite illusory and there is no real chance of it, that would be a matter to be taken into consideration. Again, the test is the same. A father might say: "I want my child and I think I can find a home for it". But the presumption in his favour might be displaced if the justices consider this a satisfactory answer: "You want your child, but, having regard to the difficulties with which you are faced, to your past record, and to your situation, you will never be able to provide a home for him or bring him up as you ought, and you should realise, as a reasonable man, that it is in his best interests that you should part with him altogether".

I bear in mind constantly that we are dealing in this case not with the question whether we agree or disagree with the justices, but with the question whether there is any evidence on which they could reach their conclusion. They have not stated their reasons, but have merely expressed their opinion that the father's consent is unreasonably withheld and that they should dispense with it. When one looks at the Case, however, it seems to me they have set out facts which necessarily lead to the conclusion that the father wanted his child, was fit to be a father, and could support the child. They have set out no facts which rebut the *prima facie* inference or show that his decision to keep the child was an unreasonable one. Therefore, this is a case in which it can properly be said that the findings of the justices are not supported by the evidence which they have set out.

I wish to emphasise that, in my judgment, this is an exceptional case, as it is one in which the justices, who were dealing with a new Act, have not applied the right test. That, I think, is the conclusion which must inevitably be drawn when one looks at the case as a whole. As my Lord has said, they have applied the broader test of the welfare of the child; on that test, their conclusion may well be right. If one examines it in the light of the test which I have propounded, I think that their conclusion falls to the ground as not being supported by any evidence. In the ordinary case, once I am satisfied that the justices have applied the right test, I should be most reluctant to go through the evidence, as it is set out in the Case, to find that the justices' decision was unjustified. It is the universal rule of these courts that an appellate court does not interfere with the findings and conclusions of the justices or judges below, who have seen and heard the witnesses. That is particularly so in a case of this sort where an impression of reasonableness or unreasonableness obtained from the demeanour of a parent may not be easily translatable into the words of a Case Stated. But, for the reasons which I have given, and satisfied, as I am, that the justices have not applied the right test according to the true construction of

s. 3 (1) of the Act of 1950, I think that their decision in this case cannot be upheld.

Appeal allowed.

Solicitors : *Woodcock, Ryland & Co.*, agents for *Vicary & Knight*, Warminster (for the appellant); *David Morris*, Newport, Mon., *Withy, King & Lee*, Bath, and *Rider, Heaton, Meredith & Mills*, agents for *Sylvester & Muckett*, Trowbridge (for the respondents).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

B

JONES v. MANCHESTER CORPORATION AND OTHERS.

[COURT OF APPEAL (Singleton, Denning and Hodson, L.JJ.), May 19, 20, 21, 29, 1952.]

Tort—Joint tortfeasors—Contribution—Master's right to contribution by servant—Master himself responsible for damage—Liability of hospital board for negligence of doctor—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6 (2).

The second defendant, a physician who had been qualified for some five months, was employed by the third defendants, a hospital board, her duties including the administration of anaesthetics at the A. hospital. A patient was brought into the hospital suffering from burns to the face. Under the instructions of a surgeon, who was about to treat the burns, the second defendant administered to the patient nitrous oxide gas and oxygen by a mask held over the patient's face. It appeared that the presence of the mask prevented proper treatment of the burns, and so the doctors decided to cease administering the gas and to give an injection of pentothal. The second defendant gave the injection, but, owing to the fact that the patient was already partly anaesthetised and to the amount and method of administration of the drug, the patient died. In an action by the widow of the deceased patient for damages for negligence against the second and third defendants,

HELD (HODSON, L.J., dissentiente): an employer is not entitled to an indemnity from an employee if he has himself contributed to the damage done by the employee or bears some responsibility for it or if the negligence of some other and senior employee has contributed to the damage; in the present case the hospital board had been negligent in leaving the administration of a dangerous anaesthetic to an inexperienced doctor without adequate supervision, and their employee, the senior surgeon, had also been negligent; the second defendant had been guilty of a substantial degree of negligence and so was not entitled to a contribution amounting to a complete indemnity from the board; and under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (2), the contributions of the second defendant and the board should be in the proportion of one fifth and four fifths respectively.

H

AS TO LIABILITY OF HOSPITAL FOR NEGLIGENCE OF ITS SERVANTS OR AGENTS, see HALSBURY, Hailsham Edn., Vol. 22, p. 320, para. 605; and FOR CASES, see DIGEST, Vol. 34, p. 550, Nos. 86, 87.

FOR THE LAW REFORM (MARRIED WOMEN AND TORTFEASORS) ACT, 1935, s. 6 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 25, p. 360.

Cases referred to:

(1) *Ryan v. Fildes*, [1938] 3 All E.R. 517; Digest Supp.

- (2) *Eastern Shipping Co. v. Quah Beng Kee*, [1924] A.C. 177; 93 L.J.P.C. 72; 130 L.T. 462; 26 Digest 222, 1749.
- (3) *Weld-Blundell v. Stephens*, [1919] 1 K.B. 520; *affd.* H.L., [1920] A.C. 956; 89 L.J.K.B. 705; 123 L.T. 593; Digest Supp.
- (4) *The Koursk*, [1924] P. 140; 93 L.J.P. 72; 131 L.T. 700; 42 Digest 976, 72.
- (5) *Stephens v. Elwall*, (1815), 4 M. & S. 259; 105 E.R. 830; 1 Digest 683, 2927.
- (6) *Wright v. London General Omnibus Co.*, (1877), 2 Q.B.D. 271; 46 L.J.Q.B. 429; 36 L.T. 590; 41 J.P. 486; 34 Digest 134, 1043.
- (7) *Merryweather v. Nixan*, (1799), 8 Term Rep. 186; 101 E.R. 1337; 1 Digest 683, 2926.
- (8) *Dalton v. Angus*, (1881), 6 App. Cas. 740; 50 L.J.Q.B. 689; 44 L.T. 844; 46 J.P. 132; 34 Digest 158, 1234.
- (9) *Hughes v. Percival*, (1883), 8 App. Cas. 443; 52 L.J.Q.B. 719; 49 L.T. 189; 47 J.P. 772; 42 Digest 982, 124.
- (10) *Daniel v. Rickett, Cockerell & Co., Ltd. & Raymond*, [1938] 2 All E.R. 631; [1938] 2 K.B. 322; 107 L.J.K.B. 589; 159 L.T. 311; Digest Supp.
- (11) *Wilkinson v. Rea, Ltd.*, [1941] 2 All E.R. 50; [1941] 1 K.B. 688; 110 L.J.K.B. 389; 165 L.T. 156; 2nd Digest Supp.
- (12) *Cassidy v. Ministry of Health*, [1951] 1 All E.R. 574; [1951] 2 K.B. 343.
- (13) *Harmer v. Cornelius*, (1858), 5 C.B.N.S. 236; 28 L.J.C.P. 85; 32 L.T.O.S. 62; 22 J.P. 724; 141 E.R. 94; 1 Digest 433, 1239.

APPEAL by the third defendants, the Manchester Regional Hospital Board, from an order of OLIVER, J., dated July 25, 1951.

The plaintiff's husband sustained burns to his face in the course of his employment by the first defendants, and died as a result of negligent treatment by the second defendant, a surgeon, who was employed by the third defendants. Damages amounting to £5 were awarded against the first defendants for pain and suffering sustained by the deceased, and against that award there was no appeal. Damages amounting to £1,438 3s. 3d. were awarded against the second and third defendants jointly, and the third defendants were ordered to indemnify the second defendant. There was no appeal against the award of damages, but the third defendants appealed against the order that they should indemnify the second defendant and claimed an indemnity or contribution from the second defendant.

Beney, Q.C., and *Cantley* for the third defendants.

Nelson, Q.C., and *C. T. B. Leigh* for the second defendant.

Cur. adv. vult.

May 29. The following judgments were read.

SINGLETON, L.J.: William Jones was employed by the Manchester Corporation as a stoker in their cleansing department. On Jan. 11, 1950, he was emptying a sack of paper through a hole in the floor when there came a back-draught which caused flames to shoot up through the hole. Jones was burned about the face, and he was taken to the Ancoats Hospital where his death occurred the same day. In due course an action was commenced against the Manchester Corporation by his widow, in which she claimed damages on her own behalf and on behalf of her children, alleging negligence against the corporation. Subsequently, Dr. Olive Cynthia Wilkes and the Manchester Regional Hospital Board were added as defendants, it having become clear that the death of Jones did not occur through the burns. Dr. Wilkes was a house surgeon at the Ancoats Hospital, which is administered by the hospital board. It was claimed that she was negligent in regard to the administration of an anaesthetic, that the death of Jones was caused thereby, and that she and the hospital board were responsible in damages therefor. It is unnecessary to say more about the case against the corporation than that the plaintiff recovered £5 damages against

them in respect of pain and suffering caused to Jones before his death. Both Dr. Wilkes and the hospital board denied negligence throughout. The case was heard before OLIVER, J., at Manchester Assizes on July 19 and 20, 1951, and on July 25 he gave judgment for the plaintiff against both, assessing the damages at the sum of £1,438 3s. 3d. After hearing further evidence and argument, the learned judge ordered that the whole of the damages and the plaintiff's costs should be borne by the hospital board. On Nov. 3, 1950, the hospital board's solicitor had served on Dr. Wilkes, or upon her advisers, a contribution (or indemnity) notice stated to be issued pursuant to Ord. 16A, r. 12. On July 23, 1951 (after the evidence had been given, but before judgment) Dr. Wilkes's solicitors wrote to the hospital board's solicitor saying that in the event of judgment being given against her she would claim an indemnity, or contribution, against the hospital board. This appeal relates only to the position as between Dr. Wilkes and the hospital board; the submission made on behalf of the board being that, far from the board being held responsible to indemnify Dr. Wilkes, the order ought to have been that Dr. Wilkes should indemnify the board.

It is desirable that I should say something as to the facts. When Jones arrived at the hospital he was seen by two young doctors, Dr. Sejrurp, who obtained his qualifications in 1947, and Dr. Wilkes. Dr. Wilkes obtained her degrees in 1949, and had been appointed to the hospital some five months before the date of the death of Jones. On that day she was acting as anaesthetist. She had passed her examinations as surgeon and doctor, but she had no special qualifications as an anaesthetist and not much experience. As the learned judge pointed out, for many years anaesthetists have been regarded as a special branch of the profession. It is a fact that to anaesthetise a human being, to deprive him of consciousness, is to take a considerable step. If the matter is handled by experienced people very little danger exists, but to allow inexperienced people to practise that without supervision is a serious thing. The two young doctors decided to clean up the face, on which the burns were, under an anaesthetic. Jones got on to the operating table. He was in perfectly good health. He was suffering pain from his burns, but he was not in a serious condition otherwise. He got on to the operating table himself at about a quarter-past five. When he was on the table Dr. Wilkes first applied nitrous oxide gas with oxygen by means of a mask over his face. It is, perhaps, strange, and it shows the inexperience of those concerned, that they should have taken that course when the operation involved attending to his face, for it meant that the face would be covered with the mask. When it was realised that the mask would be in the way for that which Dr. Sejrurp had to do, it was decided to change and to give an injection of pentothal. Pentothal is one of the barbituric group. It is dangerous—there is no question about that—and though as time has gone on it has become much more used than it was some time ago, it is still a drug which ought to be administered with great care. Dr. Wilkes sent the nurse for pentothal. She brought it. By that time Jones had been under gas for some minutes. He was not conscious, and he could not be asked to count. One of the recognised practices when pentothal is injected into a patient is to ask the patient to count, so that it is possible to tell when the stage of complete anaesthesia is reached. The dose of pentothal which was administered by Dr. Wilkes was the ordinary dose which is given to a person who has not had any other anaesthetic—ten cubic centimetres. At the time that the injection was given the patient was not conscious. He may have been semi-conscious; he had been, according to the judge's finding, under gas for some three to five minutes. Ten cubic centimetres of pentothal was taken into the syringe, and the whole of the ten cubic centimetres was injected by Dr. Wilkes in two lots—first, approximately half the amount, then there was a pause the length of which is all-important, and then the other half of the ten cubic centimetres was injected. By the time that was completed the patient was dead.

[His LORDSHIP examined the evidence. He said that OLIVER, J., was satisfied

that the death of Jones was caused through negligence in the administration of the anaesthetic. It was not quite clear on which ground, or grounds, he based his finding, but it might be that there were three at least: (a) the speed at which pentothal was administered; (b) the amount of pentothal injected, having regard to the fact that the patient had not recovered consciousness after the administration of nitrous oxide; (c) failure to watch the patient carefully during the administration of the pentothal; and he continued:] The order against which this appeal is directed is in these terms:

"And it is further ordered that the defendants Manchester Regional Hospital Board do indemnify the defendant Wilkes against all damages and costs the said defendant Wilkes is called upon to pay to the plaintiff and that in the event of the said defendant Wilkes paying to the plaintiff the said sum of £1,438 3s. 3d. and costs as aforesaid the said defendant Wilkes be at liberty to sign judgment against the said defendants Manchester Regional Hospital Board the amount of the judgment debt and costs so paid."

I think it is clear that OLIVER, J., having given judgment against both Dr. Wilkes and the hospital board, was not granting an indemnity arising from, or through, the contract between those parties, but was applying s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935. Under sub-s. (2) the court has power to exempt any person from liability to make contribution, or to direct that the contribution shall amount to a complete indemnity.

In *Ryan v. Fildes* (1) TUCKER, J., said ([1938] 3 All E.R. 525):

"This section makes it clear that the order as to contribution and the extent of the contribution is within the discretion of the court, because the language is 'may recover contribution'."

OLIVER, J., at the end of his judgment, said:

"So far as the application is concerned that she should contribute or that she should indemnify the board, I will not order her to contribute to the extent of a penny piece."

Under the order Dr. Wilkes is absolved from paying any part of the damages or costs recoverable by the plaintiff, or, perhaps, I should say that, if she is called on to pay, she can recover from the hospital board anything she pays.

The submission made on behalf of the hospital board is that the order is wrong, and that on the facts as found by the judge the board ought to have been granted an indemnity against Dr. Wilkes, or, at least, that she ought to have been ordered to contribute towards the damages awarded to the plaintiff. The claim of the board is based, in the first place, on the contractual relationship between the parties, from which, it is said, there must be implied an undertaking to indemnify the board in respect of any negligence on the part of the doctor for which the board is found responsible. There was on the record a plea by which the board denied that Dr. Wilkes was their servant, or that they had any right of control over her in relation to medical treatment given by her, and, in particular, in relation to the administration of the anaesthetic. No such point was raised on the trial or in this court, and the case was argued on the basis that the relationship of master and servant existed as between the board and Dr. Wilkes. I find it difficult to deal with the claim under this head without further elucidation as to what was the contract between the parties.

In *Eastern Shipping Co. v. Quah Beng Kee* (2), LORD WRENBURY said ([1924] A.C.182):

"A right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other. There are, for instance, cases in which the state of circumstances is such that the law

attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances, he ought to do."

Dr. Wilkes had been qualified about five months. She was appointed after an interview. There is nothing to show what the board knew of her, except that she had obtained her medical degrees. I suppose it may be said that they were
A entitled to expect that she had the knowledge and skill of a newly qualified doctor, and that she would exercise that degree of skill. I think, too, that in such circumstances there must be implied an undertaking by the board that they would provide some reasonably competent person to work with her, or to guide her in case of difficulty. A newly qualified doctor cannot know much of drugs such as pentothal or of the dangers arising therefrom, and it is not reasonable,
B or safe, that he or she should be left without guidance or help on such matters. That was the view which OLIVER, J., took. He said:

"I think to put a weapon like a barbituric within reach of a girl who has only been qualified for five months and expect her to handle it accurately, with sufficient knowledge and experience—to watch the way a patient has
C to be watched—is simply asking for trouble. I cannot help it if it is common practice."

Dr. Sejrup was with her at the time of the giving of the anaesthetic. He, too, was a house surgeon at the hospital. He was senior to Dr. Wilkes, and he had been qualified just over two years. According to the evidence given by Mr. Dafforne, Dr. Sejrup was in charge of the operation, and he was a person to
D whom Dr. Wilkes might apply for help or instruction in case of need. It does not appear from the evidence that he had much more knowledge of the danger of the use of pentothal than had Dr. Wilkes. It was he who decided to start with the mask and nitrous oxide, a wholly unintelligible and futile proceeding which, maybe, was the originating cause of the trouble. After it was appreciated that it would be difficult to clean the patient's face when the mask was on it, a
E change was decided upon. "Jointly we had to turn to a drug such as pentothal, because of the mask", he said; and he gave evidence to the effect that all was done quite properly. It did not cross his mind that the administration of pentothal to a man who was substantially "doped" with another drug was an
F unwise thing to do. He had made a statement from which it appeared that the speed at which the injection of pentothal was given was too great, or that there was not sufficient interval between the two shots of it. I am unable to see that there is any difference between the responsibility of Dr. Sejrup and of Dr. Wilkes. It was the hand of the latter by which the drug was administered, but they were both together, and both had agreed upon a course of action. Dr. Sejrup was the senior, and he was a servant of the hospital board. So far as we know, neither
G of these young doctors had been given any instruction as to the danger of using pentothal when a patient was still partly unconscious from the use of nitrous oxide, or of the great need for careful watching in such a case. OLIVER, J., considered that blame attached to the hospital by reason of the system or lack of system. I cannot help feeling that Dr. Sejrup displayed a lack of care or was wanting in knowledge, and he was acting as casualty officer on the day in question. I realise that he is not a party to the proceedings, and that there was no allegation
H against him on the pleadings, but he gave evidence and the court is entitled to consider the answers he gave on the issue between Dr. Wilkes and the hospital board. He was a servant of the board.

The case of the plaintiff in the action was based upon negligence in the administration of the anaesthetic. On the judge's finding both Dr. Wilkes and the hospital board were liable in damages to the plaintiff. It may well be that in the ordinary simple case a servant must indemnify his master against his wrongful acts for which the master is made liable. A chauffeur who, through negligence,

causes damage for which his employer is held responsible may well be liable to his master. On the other hand, if the chauffeur is young and inexperienced, and is suddenly told to drive another and bigger car, or lorry, which he does not understand, and an accident follows, it is by no means certain that the employer would be entitled to an indemnity.

On the facts of the present case it cannot be said that the death of Mr. Jones was solely caused by negligence on the part of Dr. Wilkes, though that was the basis of the claim against the board. There were other contributory causes on the part of the board or of their servants. The judge was not bound to accept the evidence of Dr. Evans that it was not unreasonable to expect one of Dr. Wilkes's experience to carry out the duties put upon her. Dr. Evans, indeed, at the end of his evidence said that a very hard task was put upon her.

In SALMOND ON THE LAW OF TORTS, 10th ed., at p. 78, I find this passage:

"It would seem clear on principle that in all cases of true vicarious liability the person held vicariously liable for the tort of another should have a right of indemnity as against that other. Thus, a master who has paid for the negligence of his servant should be able to sue that servant for indemnity. That this is generally so cannot be doubted, but in *Ryan v. Fildes* (1) TUCKER, J., was prepared to believe that there might be cases in which it was not."

The employer cannot have a right of indemnity if he himself has contributed to the damage or if he bears some part of the responsibility therefor, and the same reasoning applies if some other and senior employee's negligence has contributed to the damage. On the facts of this case I feel bound to reject the claim of the hospital board to an indemnity against Dr. Wilkes. I mentioned in the course of the argument the desirability of pleadings and of discovery if a question such as this was to be raised. Without this it is not easy to determine the true terms of the contract between the parties. All that we know is that Dr. Wilkes was appointed a house surgeon at the hospital a short time after she had been qualified, and after an interview. There is no evidence to show that she was ever instructed, or advised, at the hospital as to the use of drugs.

The next question for consideration is whether the learned judge was right in ordering that Dr. Wilkes was entitled to a contribution from the hospital board which was equivalent to a complete indemnity. TUCKER, J., in *Ryan v. Fildes* (1), spoke of this as within the discretion of the court. And, indeed, this court has set its face against interference with the proportion of responsibility determined by the judge of first instance. The circumstances are, however, somewhat unusual. The action was based on negligence on the part of Dr. Wilkes, and it was only on the finding of negligence against her that the action could succeed against the board and against her. None the less, the judge, in determining the measure of responsibility as between her and the board, was entitled to take into consideration all the relevant matters proved before him. If he had accepted the evidence of Dr. Wilkes he might have been justified in deciding as he did, but he did not accept her evidence. Her case—and it was supported by the hospital board—was that she was not negligent, and that she had followed the recognised practice. The findings of the judge seem to me to show that she did not take the usual time over the anaesthetic, or allow a pause of the length of time which she knew was necessary, and, further, that she did not observe the patient with the care that she should have used, difficult though it may have been in view of his condition. In those respects she was not following that which she had been taught. When these matters are looked upon, it is impossible to say that Dr. Wilkes has no share in the responsibility for the damage, or that her share is only nominal. It seems to me that the judge did not pay sufficient attention to his findings against Dr. Wilkes, and that it would not be right for this court to say that the whole of the responsibility falls upon the hospital board. I do not consider that this is a case in which either party is entitled to an indemnity against the other. I regard it as one proper for the application of s. 6 of the Act of 1935, and

I would say that on the facts the proportion of responsibility for the damage should be held to be twenty per cent. on Dr. Wilkes and eighty per cent. on the hospital board. The appeal should be allowed to that extent.

DENNING, L.J.: On Jan. 11, 1950, William Jones was burned on the face. He was taken to the Ancoats Hospital in Manchester, where he was accepted for treatment. By accepting him for treatment, the hospital authorities became under a duty to use reasonable care and skill in their treatment of him. They could not, and did not, themselves perform this duty. They entrusted it to a house surgeon, Dr. Sejrup, who had been qualified for two years, and to a house physician, Dr. Wilkes, who had been qualified for five months. These two did not perform the duty properly, with the result that the patient died.

[HIS LORDSHIP stated the facts and continued:] At the outset it is important to notice the state of the pleadings. In the statement of claim it was alleged that Dr. Wilkes herself was negligent and that the hospital authorities were responsible for her negligence because she was acting as their servant, but it was not alleged that anyone else was negligent, nor that the hospital authorities were negligent themselves. In answer to that claim it would be no defence for Dr. Wilkes or the hospital authorities to say that she had not sufficient experience to undertake the task, or to say that the surgeon in charge was also to blame. The patient was entitled to receive all the care and skill which a fully qualified and well-experienced anaesthetist would possess and use. If Dr. Wilkes failed to exercise that care and skill, she would be liable to the patient or his widow for the consequences, no matter that the hospital authorities knew that she had not sufficient experience for the task and were much to blame for asking her to do it without proper supervision. If the hospital authorities were to blame in that respect, it would be no answer to the widow's claim, but it might be very relevant in their claim over against Dr. Wilkes. There were, however, unfortunately, no pleadings on this question of indemnity or contribution. The parties dispensed with them. The court has, therefore, to deal with all the issues to which the proved facts give rise.

The first issue is whether the hospital authorities are in law entitled as of right to an indemnity from Dr. Wilkes. The hospital authorities contend that, in English law, if a master is made liable for the negligence of his servant, he is entitled to indemnity from that servant. I know that has often been assumed to be the law: see *SALMOND ON TORTS*, 7th ed., p. 105, and the Report of the Law Revision Committee, 1934, Cmd. 4637, p. 7. But I know of no case in which it has been actually decided. In the absence of express stipulation, I cannot see any contractual basis for such an indemnity. A servant promises, no doubt, to do his duty to his master to the best of his ability, but he does not promise to indemnify him against liability to third persons, and I see no reason why any such promise should be implied. The master's claim against the servant, if it exists at all, must, I think, be based, not on a promise of indemnity, but in damages for breach of contract. The servant, it can be said, promises to do his work with reasonable care, and if he fails to do so, with the result that the master is made liable to a third person, the master can recover the amount as damages. That is how it was put by *WARRINGTON, L.J.*, in *Weld-Blundell v. Stephens* (3) ([1919] 1 K.B. 536), but the difficulty about that way of putting it is that, although the servant is alone negligent, nevertheless in the eye of the law the master and the servant are both tortfeasors. They are, indeed, joint tortfeasors: see per *SCRUTTON, L.J.*, in *The Koursk* (4) ([1924] P. 155). This is shown by the fact that they could, even in the old days, be sued jointly for the one cause of action: *Stephens v. Elwall* (5), per *LORD ELLENBOROUGH, C.J.* (4 M. & S. 261). If the plaintiff only sued one of them and obtained judgment, it was a bar to an action against the other: *Wright v. London General Omnibus Co.* (6). As they were joint tortfeasors, it followed at common law that, if one of them was made to pay, he could not claim contribution or indemnity

from the other, for there could be no contribution between joint wrongdoers: *Merryweather v. Nixan* (7). There were, of course, some exceptions to that rule, but, so far as I know, no exception was ever introduced to allow a master to claim contribution or indemnity from his servant.

The true position is, I think, illumined by the parallel case of an independent contractor. When the principal is made responsible for breach of duty, owing to the default of the independent contractor, the principal has a right of indemnity if he has expressly stipulated for it in the contract: see *Dalton v. Angus* (8) (6 App. Cas. 829); *Hughes v. Percival* (9) per LORD BLACKBURN (8 App. Cas. 446). But in the absence of express stipulation he has no right of indemnity at common law, but only a right to contribution under the statute. The reason is because the principal is a tortfeasor jointly with the independent contractor: *Daniel v. Rickett, Cockerell & Co., Ltd & Raymond* (10); *Wilkinson v. Rea, Ltd.* (11) ([1941] 2 All E.R. 60, 61)). It is true that in those cases the principal himself is under a duty of care which he cannot get rid of by delegating it to an independent contractor, but that is also the position in most cases of master and servant. It is certainly the position in these hospital cases. The hospital authorities are under a duty of care and skill to the patient which they cannot escape by delegating it to a doctor on the staff: *Cassidy v. Ministry of Health* (12). The result is that at common law, even if the negligence is only that of one doctor alone, nevertheless the hospital authorities are joint tortfeasors with him and cannot at common law claim contribution or indemnity from him. Their claim can only rest under the Law Reform (Married Women and Tortfeasors) Act, 1935. It is significant that there is only one case in the books where a master has recovered indemnity from a servant, and he did not then recover at common law, but only under the Act of 1935. That was *Ryan v. Fildes* (1), where TUCKER, J., said that it was a matter for the discretion of the court, and he pointedly observed that there might be cases where

“the court would not think it right to make an order, either for contribution or indemnity, as between a master and his servant.”

That is, I think, the true position. In the absence of an express contract on the matter, the master has no right at law to an indemnity or contribution from his servant. It is entirely a matter for the discretion of the court under the Act of 1935 whether it should order any, and, if so, what, contribution or indemnity between them.

Such is the position when one particular servant alone is negligent. All the more so when the hospital authorities themselves, or other members of the staff, are also negligent. The hospital authorities cannot come down on every negligent member of the staff for a full indemnity. Such a course could only be justified if the hospital authorities could be regarded as innocent parties who have been made vicariously liable without any fault in them. But the law does not regard them as innocent. It says that they are themselves under a duty of care and skill, and, if that duty is not fulfilled, it regards them as tortfeasors and makes them liable as such, no matter whether the negligence be their personal negligence or the negligence of their staff.

In all these cases the important thing to remember is that when a master employs a servant to do something for him, he is responsible for the servant's conduct as if it were his own. If the servant commits a tort in the course of his employment, then the master is a tortfeasor as well as the servant. The master is never treated as an innocent party. This is well seen by taking a simple case where two cars are damaged in a collision by the fault of both drivers. One is driven by a servant, the other by an owner-driver. The owner-driver can obviously only recover a proportion of the damage to his own car from the owner of the other one, and likewise the owner of the chauffeur-driven car can only recover a proportion of the damage to his car. He cannot recover the whole damage from the owner-driver. He cannot claim as if he was an innocent person

A damaged by the negligence of the two drivers. He can only claim upon the footing that he himself is a tortfeasor and that the damage is partly the result of his own fault within the Law Reform (Contributory Negligence) Act, 1945. Now suppose that a third person was injured in the collision, so that the owners of both cars are liable in tort to the injured person for his full damages. The owner of the chauffeur-driven car obviously cannot recover a full indemnity from his servant or from the owner-driver. He cannot claim as if he were an innocent person who has suffered damage as the result of the negligence of the two drivers. He can only claim as a tortfeasor for contribution under the Act of 1935.

B My conclusion, therefore, is that the hospital authorities in this case were themselves tortfeasors who have no right to indemnity or contribution from any member of their staff except in so far as the court thinks it just and equitable, having regard to the extent of that person's responsibility for the damage. In considering what is just and equitable, I think the court can have regard to extenuating circumstances which would not be available as against the injured person. Errors due to inexperience or lack of supervision are no defence as against the injured person, but they are available to reduce the amount of contribution which the hospital authorities can demand. It would be in the highest degree unjust that hospital authorities, by getting inexperienced doctors to perform their duties for them, without adequate supervision, should be able to throw all the responsibility on to those doctors as if they were fully experienced practitioners. Applying this principle to the present case, I find it very difficult to place much blame on Dr. Wilkes. She was not in charge of the operation. D Dr. Sejrup was. Moreover, he was, in his own words, "responsible for the administering of anaesthetics." He decided to use nitrous oxide. That was the first mistake, or, at any rate, the cause of all the trouble. Then they decided together to use pentothal. If that needed special care and skill, he was the one who should have told her what was necessary, because he was, according to the general superintendent, one of the doctors available for her to consult. She administered the pentothal under his eyes and to his entire approval. E In these circumstances it seems to me that her share in the responsibility is much less than his. But the responsibility of the hospital authorities is, I think, more than that of either of them. It is obvious that mistakes of this kind should not occur. They should so run their hospital that they do not occur. They should not leave patients in inexperienced hands without proper supervision. The judge took a strong view about this. I am very reluctant to interfere with his decision, but F there is one matter which does affect my mind. It is this. Counsel for Dr. Wilkes admitted to us that she was negligent to a degree which was inexcusable even in an inexperienced person. He admitted that, in injecting the pentothal, she must be taken to have allowed only ten seconds between the first five cubic centimetres and the second five, whereas she knew she ought to have allowed G thirty seconds. In view of this admission, I agree with my Lord that she should bear some share of the responsibility, and that it should be put at one fifth. I agree, therefore, that the appeal should be allowed to that extent. In leaving the case I cannot help remarking that at one time masters used to insure their servants against liability. This case shows that we are approaching a time when servants will have to insure their masters.

H **HODSON, L.J.** [after stating the facts]: The case was contested throughout on the issue, aye or no: Was Dr. Wilkes negligent in the administering of an anaesthetic?, and the board supported her on this issue. On Nov. 3, 1950, the board delivered a notice under Ord. 16A, r. 12, to Dr. Wilkes claiming, in the event of their being found liable to the plaintiff: (1) a contribution or indemnity under s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935; (2) damages for breach of contract in such sums as the plaintiff might recover against the board. The claim in contract was put as follows:

"In the capacity of house surgeon at Ancoats Hospital you were at all material times the servant agent or officer of the defendants Manchester Regional Hospital Board and under duty to them by reason of your contract with or your relationship to them to exercise reasonable skill and care in and about all acts done by you in such capacity, and you were in breach of such duty in the respects alleged against you in the amended statement of claim and by reason of such breach have caused damage to the said board in such sums (if any) as the said board may be found liable to pay to the plaintiff by way of damages or costs in this action."

After the evidence had been given, but before judgment, the doctor gave notice that she would ask for an indemnity from the board. By consent, no pleadings were ordered upon either of the notices. The board contends that the learned judge was in error, having found that the death was caused by the negligence of Dr. Wilkes, in ordering the board as her employers to indemnify her, and further contends that relief should be given to the board itself in the terms of its own notice. The contract between the board and Dr. Wilkes was not in dispute. She was employed as house surgeon and physician at the Ancoats Hospital as from July 23, 1949. She was fully qualified as a bachelor of medicine and surgery, and her training included the administration of anaesthetics, including pentothal. Part of her duty was to administer anaesthetics when required in the casualty department of the hospital. If occasion arose in the event of a casualty serious enough to require a more experienced anaesthetist, she had the power to call in a senior anaesthetist. This was the only qualification of this part of her duty. She had given anaesthetics on about a hundred occasions, including about twenty occasions when she used pentothal. She had been in the service of the board five or six months when the fatality occurred.

The whole case made by the plaintiff, supported by the defendant corporation and contested by Dr. Wilkes and her employers, was that she had been negligent in giving the anaesthetic. No separate allegation was made against the board as to itself, Dr. Sejrup, or any other servant. The learned judge decided the case on the issues raised and contested before him by making an explicit finding of negligence against Dr. Wilkes. [His LORDSHIP referred to the evidence]. Taking into account that a judge is, in a proper case, entitled to reject uncontradicted evidence, particularly that which may be described as opinion evidence, I cannot agree that the learned judge was right in attributing negligence to the board. The operation was comparatively simple and there was nothing apparent in the condition of the patient to call for exceptional measures to be taken. In the circumstances, there was, in my opinion, no evidence to justify a finding that a qualified doctor such as Dr. Wilkes should not be entrusted with the use of an anaesthetic of a kind which is in regular use without the supervision of a specialist or more experienced practitioner.

A subsidiary point was raised in this court which was not mentioned in the court below, namely, that Dr. Sejrup, the operating surgeon, had the opportunity of preventing Dr. Wilkes from giving the pentothal in excessive quantity or at so great a speed and neglected to do so, so that his negligence should be attributed to the board. No charge of negligence having been made against him at any time, I do not think that the finding of negligence against the board, which was never pleaded, can be supported by finding an act of negligence against another servant of the board, such act also not having been pleaded in answer to the notice given, or at all.

In my judgment, the contractual position of Dr. Wilkes vis-à-vis the board is clearly established by the evidence. The legal position is stated in the judgment of WILLES, J., in *Harmer v. Cornelius* (13) (5 C.B.N.S. 246):

"When a skilled labourer, artisan or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the

task he undertakes—spondes peritiam artis. Thus, if an apothecary, a watchmaker or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts. The public profession of an art is a representation and undertaking to all the world that the professor possesses the requisite ability and skill. An express promise or express representation in the particular case is not necessary."

A In *Weld-Blundell v. Stephens* (3), WARRINGTON, L.J., said in the course of his judgment ([1919] 1 K.B. 536):

"... it may well be that if a servant by his negligent act inflicts an injury on a third person who recovers damages therefor from the master, the latter may recover the amount from the servant in an action against him for breach of his duty. But in such a case the right of action against the master and his legal liability themselves result from the servant's negligent act, and but for that act would not have existed."

B

In the present case, in my judgment, proof of an express provision to exercise reasonable skill is unnecessary. The breach of duty to exercise reasonable skill and care alleged in the notice given under Ord. 16 has been proved, and the board is, in my opinion, entitled to the relief asked for by the notice given under Ord. 16A, r. 12, because the damages which the board may have to pay flow directly from Dr. Wilkes's breach of contract. There is, in my opinion, no room for the operation of the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, and no question arises as to the modification of the common law position by the provisions of that section. I would, therefore, allow the appeal to the full extent on the ground that the defendant, Dr. Wilkes, is in breach of a term necessarily implied in her contract of employment by the board.

D

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *P. W. H. Revington*, Manchester (for the third defendants); *Le Brasseur & Oakley* (for the second defendants).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

E

GROUNSELL v. CUTHELL AND ANOTHER.

[QUEEN'S BENCH DIVISION (Ormerod, J.), May 22, 23, 1952.]

Writ—Defect in indorsement—Cure by statement of claim—Summons to set aside service—Statement of claim delivered after service, but before hearing, of summons.

F

A plaintiff issued a writ in an action the indorsement of which was defective through lack of particularity. A defendant entered a conditional appearance and issued a summons for the service of the writ to be set aside. After the issue of the summons, but before the hearing, the plaintiff delivered a statement of claim which cured the defect in the writ.

G

HELD: (i) in deciding the summons the facts to be taken into account were those as they existed at the time of the hearing, and as the statement of claim, delivered as a matter of right, had by that time cured the defect in the indorsement of the writ, the service of the writ would not be set aside.

H

(ii) in any event the discretion of the court could properly be exercised in favour of the plaintiff because it did not appear that, as a result of the exercise of that discretion, the defendant might be deprived of a defence.

Hill v. Luton Corporation ([1951] 1 All E.R. 1028), applied.

AS TO SETTING ASIDE SERVICE OF WRIT, see HALSBURY, Hailsham Edn., Vol. 26, p. 36, para. 52; and FOR CASES, see DIGEST, Practice, pp. 380, 381, Nos. 875-880.

Cases referred to:

(1) *Marshall v. London Passenger Transport Board*, [1936] 3 All E.R. 83; Digest Supp.

(2) *Batting v. London Passenger Transport Board*, [1941] 1 All E.R. 228; 2nd Digest Supp.

(3) *Hill v. Luton Corpn.*, [1951] 1 All E.R. 1028; [1951] 2 K.B. 387; 115 J.P. 340.

APPEAL by the second defendant against the refusal of a master to make an order setting aside the service of the writ in the action on the ground of an admitted defect in its indorsement. The plaintiff contended that the defect had been cured by the delivery, after the issue of the summons but before the hearing, of a statement of claim which admittedly set out the cause of action in sufficient terms.

Cumming-Bruce for the plaintiff.

J. C. B. W. Leonard for the second defendant.

ORMEROD, J.: The action in which the writ was issued was for damages under the Fatal Accidents Acts, 1846 to 1908, and under the Law Reform (Miscellaneous Provisions) Act, 1934, and it arose out of the death of one Kenneth Harry Grounsell, following an accident on Feb. 12, 1951. The writ was issued on Jan. 22, 1952, and was served on Apr. 23, 1952. The indorsement of the writ stated that "the plaintiff's claim is for damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Acts, 1846 to 1908, arising out of the death of the late Kenneth Harry Grounsell, due to the negligence of the defendants." The second defendant, Mr. Raymond P. Linley, at once entered a conditional appearance to the writ and issued a summons asking for the service of the writ to be set aside on the ground that the indorsement was defective in that it did not set out with sufficient precision the cause of action against the defendants. It was admitted by counsel for the plaintiff that the writ was defective. After the issue, but before the hearing, of the summons, however, a statement of claim was delivered by the plaintiff to the defendants which admittedly set out in sufficient terms the cause of action against the defendants. At the hearing the master came to the conclusion that the service of the writ should not be set aside as any defect in the indorsement had been rectified by the delivery of the statement of claim, such delivery being a step which the plaintiff was entitled to take as a matter of right without an order from the court.

The defendant submits that the writ should be set aside for these reasons:— (i) it was admittedly defective and the defect had not been made good at the time the summons was issued; (ii) the order setting aside the service of the writ should or should not be made according to the facts as they existed at the time the summons was issued and not at the time the summons came on for hearing; and (iii) an order refusing to set aside the service of the writ at the date of the hearing could only be made by the exercise of the discretion of the court and the court should not exercise that discretion in a case of this kind where the time for the issue of the writ had expired, on the ground that to do so might deprive the defendants of a defence. In support of that *Marshall v. London Passenger Transport Board* (1) and *Batting v. London Passenger Transport Board* (2) were referred to. The plaintiff contended (i) that he had a right without recourse to the court to deliver a statement of claim; (ii) that he was not asking the court for any privilege or concession or exercise of discretion; (iii) that the facts on which the order should or should not be made were those which existed at the time of the hearing of the summons; and (iv) that, following the decision of *DEVLIN, J.*, in *Hill v. Luton Corpn.* (3), the defect in the writ had been made good by the delivery of the statement of claim and there was no ground for setting it aside.

The matter was dealt with at considerable length by *DEVLIN, J.*, in *Hill v. Luton Corpn.* (3), in which the facts differed from those in the present case in only one aspect, i.e., although the writ there was defective in almost exactly the same way as in this case, the statement of claim was served at the same time

as, and with, the writ. DEVLIN, J., held that the plaintiff had a right to deliver the statement of claim with the writ, that that delivery cured any defect in the writ, that the defendant in consequence knew within the prescribed period what he had to meet in the way of a charge of negligence, and that it was immaterial whether he knew that from one document, the writ, or from two documents, the writ and the statement of claim. The matter was exhaustively considered by DEVLIN, J., and I have no hesitation in adopting his reasoning, but he expressly left open the question what should happen if the application to set aside were made before the delivery of the statement of claim, and the question here resolves itself into a very small point. By delivering his statement of claim the plaintiff delivered particulars which were sufficient to acquaint the second defendant with the charge which he had to meet, and, provided he did it in time, he cured any defect in the indorsement of the writ through insufficiency of particulars or lack of precision in the way in which it was drafted.

The question is whether this matter should be considered by the court on the facts as they existed at the time the summons was issued or at the time when it was heard. No authority was quoted to support the contention of either side, and I myself have not been able to find any authority which concludes the matter. I have come to the conclusion that the matter should be considered as at the date of the hearing of the summons and that the facts to be taken into account are those which existed at that time. The statement of claim had then been delivered, not as a result of an order but as a matter of right, by the plaintiff, and, as that statement of claim sufficiently cured any defect in the indorsement, I have come to the conclusion that this appeal should be dismissed and the service of the writ should not be set aside.

If I am wrong in that, the question arises whether this was a case where the court should exercise its discretion in favour of the plaintiff and still allow the service of the writ to remain. In his judgment in *Hill v. Luton Corpn.* (3) DEVLIN, J., referred to a class of case in which the court had determined that it would not grant the plaintiff aid if to do so would deprive the defendants of a defence otherwise open to them. It is argued in this case that, if the discretion of the court is exercised in favour of the plaintiff and the writ is not set aside, the defendants would thereby be deprived of a probable defence to the action. I am not satisfied that that is so. Counsel for the second defendant did not argue before me the question of what might happen supposing the service of this writ was set aside, but I find it difficult to understand why, if it were set aside, the plaintiff should not immediately be able to re-serve the writ and, of course, cure any defect in the indorsement of the writ by delivering a statement of claim at the same time as he served the writ. There is no question here of that not being possible because of time. Time had not expired because several months remained in which to serve the writ [R.S.C. Ord. 9, r. 1]. In those circumstances, although I think the matter is not entirely without doubt, if I had come to a different conclusion regarding the time at which the circumstances should be taken into account in determining whether or not an order should be made, I should feel that this was a case where the discretion of the court could properly be exercised in favour of the plaintiff, because this does not appear to me to be a case in which, as a result of the exercise of that discretion, the defendant might be deprived of a defence in the action. It follows that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Redpath, Marshall & Holdsworth*, agents for *J. Steele Carr & Co.*, Sheffield (for the plaintiff); *Peacock & Goddard*, agents for *Browne, Jacobson & Hallam*, Nottingham (for the second defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

WALKER v. WALKER.

[COURT OF APPEAL (Singleton, Birkett and Hodson, L.JJ.), March 26, 1952.]

Divorce—Desertion—Parties living under same roof—Occupation of separate rooms—Wife performing no household duties for husband—No verbal communication.

The husband and the wife were married in 1918. From 1945 until the husband presented a petition for divorce in 1951 on the ground of his wife's desertion, the parties lived in the same house, but the wife withdrew into a separate bedroom which she kept locked. She performed no household duties for the husband, who had to do his own washing, mending, and ironing. As his wife would do no cooking for him, the husband had his meals out as often as possible, and only cooked for himself on Sunday mornings, always at a time when the wife was not using the kitchen herself. When the parties wished to communicate with one another, they did so by written notes. The wife rejected an attempt by the husband at reconciliation, saying that she was not coming back to live with him.

HELD: the facts were such that the parties were not living together in one household, and the wife had deserted the husband.

Smith v. Smith ([1939] 4 All E.R. 533), applied.

AS TO WHAT CONSTITUTES DESERTION, see HALSBURY, 1952 Supplement, Divorce, paras. 964-969; and FOR CASES, see DIGEST, Vol. 27, pp. 308, 309, Nos. 2855-2867, and Digest Supps.

Cases referred to:

- (1) *Wilkes v. Wilkes*, [1943] 1 All E.R. 433; [1943] P. 41; 112 L.J.P. 33; 168 L.T. 111; 2nd Digest Supp.
- (2) *Smith v. Smith*, [1939] 4 All E.R. 533; [1940] P. 49; 109 L.J.P. 100; 162 L.T. 333; 2nd Digest Supp.
- (3) *Littlewood v. Littlewood*, [1942] 2 All E.R. 515; [1943] P. 11; 112 L.J.P. 17; 167 L.T. 388; 2nd Digest Supp.
- (4) *Hopes v. Hopes*, [1948] 2 All E.R. 920; [1949] P. 227; [1949] L.J.R. 104; 113 J.P. 10; 2nd Digest Supp.
- (5) *Angel v. Angel*, [1946] 2 All E.R. 635; 176 L.T. 90; 111 J.P. 14; 2nd Digest Supp.
- (6) *Wanbon v. Wanbon*, [1946] 2 All E.R. 366; 2nd Digest Supp.
- (7) *Baker v. Baker*, [1952] 1 All E.R. 297; 116 J.P. 91.
- (8) *Powell v. Powell*, [1922] P. 278; 92 L.J.P. 6; 128 L.T. 26; 27 Digest 309, 2860.
- (9) *Jackson v. Jackson*, [1924] P. 19; 27 Digest 308, 2852.

APPEAL by the husband from an order of Mr. Commissioner BLANCO WHITE, K.C., dated Dec. 7, 1951, dismissing the husband's petition for divorce on the ground of his wife's desertion. The learned commissioner found on the facts that there was not such a degree of separation between the parties as to constitute two households. The husband appealed.

L. J. A. Pile for the husband.

The wife did not appear.

SINGLETON, L.J.: I will ask BIRKETT, L.J., to give the first judgment.

BIRKETT, L.J.: This is an appeal from a judgment of Mr. Commissioner BLANCO WHITE, K.C., given on Dec. 7, 1951, dismissing the petition of the husband for a decree of divorce on the ground of his wife's desertion.

Describing his relations with his wife, the husband said in evidence that in 1945:

"She separated from me. She deserted me. It is true that we lived

under the same roof, but nevertheless she deserted me. She occupied her own bedroom upstairs and locked it."

The learned commissioner accepted the truthfulness of the husband, who, therefore, established that there was that separation to start with, namely, that the wife occupied a separate bedroom upstairs while he occupied a separate bedroom downstairs, and they both locked their doors. The husband further said: "She did nothing for me at all", and the learned commissioner elucidated the rather pitiful facts that the husband had to do the washing of his clothes himself—his shirts and collars—the ironing, and, presumably, the mending; he had to cook for himself and was driven to have his meals out as often as he could, even on a Sunday night. Apparently, the only cooking that he did in the house was on Sunday morning when he prepared his dinner. He did that always at a time when the wife was not using the kitchen. When they wanted to communicate with one another, it was done by little notes, and a small collection of those notes was put before the learned commissioner to indicate the degree of severance which had taken place between these parties. The husband said that there was an occasion when he had asked his wife if there was any chance of a reconciliation so that they could live together again. He said:

"Yes, I asked her how long this was going on, and she said: 'If you think I am coming back to live with you, then you have got another think coming'."

That language is not unimportant—"If you think I am coming back"—meaning quite clearly, I should have thought, "I have gone away from you", and I think it may be said: "I have deserted you"—"then you have another think coming." The husband also said that his wife locked the coal-house and he had to buy an electric fire. As indicating the complete severance between the two I will refer to these questions and answers:

"Q.—Did she ever have dinner with you? A.—No. Q.—Did she ever offer you —? A.—Never once. Q.—Did your wife contemplate moving somewhere else? A.—Yes. Q.—How did you come to know about that? A.—Well, a neighbour of mine — Q.—You cannot tell us what the neighbour told you. A.—Well, she had bought a house in September. Q.—Had your wife bought a house? A.—Yes, either the wife, or the boy between them, but that was in September."

There was evidence that she had been earning money and that the son was earning money and contributing.

What is the effect of the authorities? *Wilkes v. Wilkes* (1) decided by HODSON, J., as a judge of first instance and later approved in the Divisional Court and in the Court of Appeal, affords some guidance, although the facts of one case can never afford a complete parallel with the facts of another. In that case for more than a year preceding the husband's actual departure from his wife the parties were living under the same roof, but during the whole of that time they had no common life. The husband, after saying to his wife in March, 1937: "This is the end", never slept with her again, and he refused to share her sitting-room or to have meals with her. All those things were present in the present case, except for the fact that the wife paid the instalments due on a mortgage of the house which was in the husband's name, and the husband from time to time took food from the wife's store and ate it. The lives of the husband and wife were separate; the wife's attempts at reconciliation were at all times refused; and HODSON, J., held that the common home had been put an end to by the husband more than a year before he left the house and that the wife's case for desertion was proved. In his judgment HODSON, J., said ([1943] 1 All E.R. 434):

"In the circumstances I think that the case falls on the same side of the boundary line as *Smith v. Smith* (2), rather than on the other side of the

line, on which falls *Littlewood v. Littlewood* (3) . . . I find that the common home had been put an end to by the husband in March, 1937. At that moment the marriage had come to an end; even although he did not actually leave the house until over a year later. The wife has made out a case of desertion . . .”

In *Hopes v. Hopes* (4) BUCKNILL, L.J., said ([1948] 2 All E.R. 923):

“In *Angel v. Angel* (5), LORD MERRIMAN, P., in giving judgment in the Divisional Court on an issue of desertion, referred to *Smith v. Smith* (2) and *Wilkes v. Wilkes* (1), and said that these cases were rightly decided as instances of what must necessarily be the rare class of case where it is possible for one spouse or the other to assert desertion in spite of the fact that the spouses are physically living in the same house.”

In *Wanbon v. Wanbon* (6) PILCHER, J., said ([1946] 2 All E.R. 366):

“It is very rare, I think, that the court can find facts on which it is proper to order a decree nisi in a desertion case where the parties have lived not only under the same roof but in the same household in the way these parties have lived. There have, of course, been cases where husband and wife have occupied different storeys in the same house where it has been held that the one has deserted the other, although they have been living under the same roof. In this case, although there was only one household, I am satisfied on the facts that the petitioner is entitled to the decree nisi which he seeks.”

In *Hopes v. Hopes* (4) BUCKNILL, L.J., said ([1948] 2 All E.R. 924):

“I must respectfully say that I find it difficult to reconcile this case [*Wanbon v. Wanbon* (6)] with the principle laid down in the cases as to what constitutes desertion.”

DENNING, L.J., said, apparently interpreting the words “one household” (ibid., 925):

“If that means that, although living at arms’ length, they were still sharing the same living room, eating at the same table and sitting by the same fire, then I cannot agree with the finding of desertion.”

HARMAN, J., said that the leading case, and the real test, was *Smith v. Smith* (2).

The last case to which I want to refer is *Baker v. Baker* (7), a decision of WILLMER, J. In that case on an undefended petition for divorce brought by a husband against his wife on the ground of desertion it was proved that for more than three years before the presentation of the petition the parties had lived in the same house, which belonged to them both, but each occupied a separate bedroom and sitting-room and cooked their own food separately. During that time the husband had not paid any allowance to the wife. They shared the kitchen and the passages and other parts of the house and did not speak except for the business necessities of the day. On these facts it was held that it could not be said that the parties had ceased to be one household and had become two separate households, and, therefore, desertion had not been proved. Clearly that was a finding of fact, and so the question before us on the undisputed facts, is: Is this a case where there has been two households in the language used in the authorities? In *Smith v. Smith* (2) SIR BOYD MERRIMAN, P., said ([1939] 4 All E.R. 537):

“I have come to the conclusion that this case is on what I may call the *Powell v. Powell* (8) side of the line rather than the *Jackson v. Jackson* (9) side of the line, and that, in circumstances in which it is impossible to describe the parties as living together—indeed, where the only element of living together is that they were actually existing in one house, though there was no physical separation between the parts of the house in which they were living—the case is one of desertion, and is not one in which the

wife is precluded from asserting desertion by the mere fact that they were residing in the same house."

If *Smith v. Smith* (2) is the leading case, how do the facts in this case stand in relation to it? The only element of living together was that the husband and the wife were actually residing in one house and there was no physical separation between the parts of the house in which they were living. They were compelled to cook their meals in the same kitchen, and the only thing the husband did in that way was to cook his meal on Sunday morning at some time different from the time at which the wife used the kitchen. To say that these people were in any sense living together—that in any sense there was one household—is impossible on the facts in this case. There was the imperative need to use the same kitchen, as, indeed, for all I know, there was the imperative need to use the same water closet or anything else which was essential, but in no other sense could it be said here that there was one household. In my judgment, on the facts as found by the learned commissioner, there ought to have been a decree.

HODSON, L.J.: I agree.

SINGLETON, L.J.: I agree.

Appeal allowed.

Solicitors: *Webster, Butcher & Johnson* (for the husband).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

D DOWELL v. DOWELL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Pearce, J.), April 25, 1952.]

Justices—Husband and wife—Maintenance—Wilful neglect to maintain—Maintenance agreement—Covenant by wife not to sue providing payments punctually made—No default in payment—Deterioration in wife's financial position.

On Dec. 22, 1949, a husband and wife entered into an agreement whereby the husband agreed to pay a certain sum each week as maintenance for the wife and for the child, and the wife undertook not to take any proceedings for maintenance so long as the payments were punctually made. Owing to ill-health the wife was forced to give up work and asked the husband for an increase of maintenance. The husband refused to accede to this request, but at no time was he in default in his payments under the agreement. On a summons by the wife alleging that he was guilty of wilful neglect to maintain,

HELD: the punctual performance of the obligation to make weekly payments was not conclusive of the matter, and the wife was entitled to have the amount reviewed in the light of the existing circumstances.

Tulip v. Tulip ([1951] 2 All E.R. 91), applied.

EDITORIAL NOTE: This case is of importance in two respects: (i) in *Tulip v. Tulip* the deed of separation did not contain an undertaking by the wife not to sue; and (ii) it applies the decision in *Tulip v. Tulip* to courts of summary jurisdiction.

AS TO MAINTENANCE, see HALSBURY, Hailsham Edn., Vol. 10, p. 838, para. 1340; and FOR CASES, see DIGEST, Vol. 27, pp. 558, 559, Nos. 6134-6150.

Cases referred to:

(1) *Tulip v. Tulip*, [1951] 2 All E.R. 91; [1951] P. 378.

(2) *Morton v. Morton*, [1942] 1 All E.R. 273; 111 L.J.P. 33; 166 L.T. 164; 106 J.P. 139; 2nd Digest Supp.

APPEAL by the husband against a decision, dated Jan. 16, 1952, of the justices for the Woodbury petty sessional division of Devon whereby they found him guilty of wilful neglect to provide reasonable maintenance for his wife and child.

Besley for the husband.

P. M. Wright for the wife.

LORD MERRIMAN, P.: This is an appeal by a husband from a decision of the justices for the Woodbury petty sessional division of Devon sitting at Exmouth, given on Jan. 16, 1952, whereby they found the husband guilty of wilful neglect to provide reasonable maintenance for his wife and the child of the marriage, and ordered him to pay the sum of £3 a week for the wife and £1 a week for the child, of whom she was awarded the custody. The case raises in a neat form the question which was discussed in the Court of Appeal in *Tulip v. Tulip* (1). This marriage, which took place in September, 1926, had for many years been drifting to disaster, and on Dec. 22, 1949, the parties entered into an agreement. It was not a separation agreement. It was simply a maintenance agreement under which the husband agreed to pay, and the wife agreed to accept for her support and maintenance, the weekly sum of £2 for joint lives *dum casta*, with an additional sum of 10s. a week for the support and maintenance of the child. The date of the first payment was stipulated, and the wife covenanted out of that weekly sum of £2 10s. in all, or otherwise, to support and maintain herself and child, indemnify her husband against all debts, and so forth, and not in any way at any time to pledge the husband's credit. She also more particularly agreed that so long as he should punctually make the weekly payments mentioned she would not commence or prosecute any proceedings against the husband in respect of the maintenance of herself and the child, but with the stipulation that, on the husband's failure to make the payments as and when the same became due, the wife should be at full liberty at her election to pursue all and every remedy in this regard either by enforcement of the provisions of the agreement or as if the agreement had not been made. In other words, she had the option to sue on the agreement or to adopt any other legal remedy that was open to her. In spite of the punctual performance of his obligations under the agreement, on Dec. 11, 1951, almost two years after the signing of the agreement, the wife took out the summons on which this order was made, charging the husband with wilfully neglecting to provide reasonable maintenance for her and for the infant child whom the husband was legally liable to maintain. It is clear that, though nothing was said one way or the other about the obligation of the wife to work or her intention of working, it was contemplated that she might support herself by work, for the arrangement was that she should support herself out of the specified sum "or otherwise", and, in fact, she did go to work. By the summer of 1951, owing to health reasons, she was unable to go on working, and from the point of view of her own ability to supplement this amount, there was a change of circumstances for the worse. Meanwhile, the husband was carrying on a business in partnership with his father, and as a result of under-drawings had accumulated a considerable share in the capital of the business. In other words, the justices came to the conclusion that, whereas the wife's circumstances had changed for the worse, the husband's potentialities, at any rate, were a good deal better than he would have them believe.

The question arises whether a man who has punctually performed obligations to pay an agreed sum of money, settled so recently as two years ago, for the maintenance of his wife and child, a sum which, admittedly, was fixed with the help of a solicitor who acted for both parties with perfect propriety, the wife expressly stating at the time that she was entirely contented with it, can fairly be said wilfully to have neglected to provide reasonable maintenance for the wife and the child for whom specifically this sum was provided. By a letter dated Nov. 12, 1951, the wife demanded an increase of maintenance. The letter said that she found that the allowance of £2 10s. a week which was being paid to her

under the deed was insufficient to maintain her and the child. The gist of it is in the sentence:

“ Our client is unable to work to support herself. Unless your client is prepared to increase the payments we are instructed to apply to the justices for an order.”

Within a month the application was made. Meanwhile, there had been no sort of answer on the husband's part to that request, so, if it was a reasonable request in the circumstances, there is, at least, *prima facie* evidence of a wilful neglect.

- The whole matter was so fully reviewed in *Tulip v. Tulip* (1), in which a decision of this court in *Morton v. Morton* (2) was approved, that it would be idle to go through it at length. Manifestly, we are bound by that decision, and the justices recognised, as I think, that they were bound by it and they attempted to apply it. The point of the decision is that, important as is the fact of an agreement between parties settling an amount of maintenance, and, in particular, settling it so recently as had been done in this case, and even more important as is the fact that the agreement has been punctually and faithfully performed, both the justices and the Divorce Division, under the provisions of the Law Reform (Miscellaneous Provisions) Act, 1949, s. 5 (1), now re-enacted in the Matrimonial Causes Act, 1950, s. 23 (1), have jurisdiction to deal with the question of wilful neglect to provide reasonable maintenance. The jurisdiction is absolute, and cannot be bargained away, but it is a question for the discretion of the court in each case, taking all the circumstances into account, whether there has been wilful neglect to provide reasonable maintenance in spite of the punctual performance of the agreement. In my view, it would be very difficult for us to differ from the conclusion at which the justices have arrived on the facts of this case. They fully recognised that the punctual payment of the agreed sum is very strong evidence that reasonable maintenance has been provided, but that it is only very strong evidence and is not conclusive, and, after recognising that the onus on the wife is high, they conclude by saying that, in view of the facts they have found to exist in this case and the circumstances of the wife's position at the date of the application, the husband had wilfully neglected to provide reasonable maintenance, and, therefore, they ordered him to pay the sum I have already mentioned, which, in substance, is an increase of 30s. in all over the amount provided by the agreement. It is plain that the points to which they attributed most importance were the ill health of the wife, which had compelled her to give up her work as a cook, and the lack of candour in the account given by the husband and by his father of the husband's financial position, and they also were plainly influenced by the fact that a man who was himself in a great deal better position than he pretended to the court was content to rest on this agreement, although to his knowledge his wife had been obliged to have recourse to public assistance. It being unquestionable that the matter was at large to the justices, I am not prepared to interfere with the way in which they have exercised the discretion entrusted to them, and I think this appeal fails.

- PEARCE, J.: I agree with all that my Lord has said. The justices have given their reasons in a clear, careful and comprehensive judgment. They rightly founded themselves on the principles set out by the learned President in this court in *Morton v. Morton* (2) and by the Court of Appeal in *Tulip v. Tulip* (1) which approved *Morton v. Morton* (2). Once the correct principles are applied, as they have been in this case, the matter becomes a question of fact. In my view, there was evidence on which the justices could come to the conclusion at which they did, and I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Nicholls & Nicholls*, Exmouth (for the husband); *Arnold Carter & Co.*, agents for *Dunn & Baker*, Exeter (for the wife).

[Reported by A. T. HOOLAHAN, ESQ, Barrister-at-Law.]

R. v. EAST KERRIER JUSTICES. *Ex parte* MUNDY.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Devlin, JJ.), May 29, 1952.]

Justices—Procedure—Retirement—Note from police officer obtained by justices' clerk and taken into retiring room—No statement in court as regards contents—Presence of clerk in retiring room—Certiorari to quash conviction.

After justices had retired with their clerk to consider their decision on an information preferred before them by a police officer the clerk returned to the court, spoke to a police officer, received a piece of paper from him, and took it back into the retiring room. Neither the defendant nor others present in court knew what the paper contained, which, in fact, was the particulars of a previous conviction of the defendant. On the return of the justices into court, they announced that they convicted the defendant and called for evidence of any previous conviction, and evidence of the previous conviction recorded against the defendant was given.

HELD: as neither the defendant nor anyone in the court knew what the paper contained it could not be said that justice had manifestly been seen to be done, and the conviction must be quashed.

R. v. Bodmin JJ. Ex p. McEwen ([1947] 1 All E.R. 109), applied.

Davies v. Griffiths ([1937] 2 All E.R. 671), distinguished.

Semble, aliter if the justices had announced in open court that the paper had contained only particulars of the defendant's previous conviction and had been seen by the justices after they had decided to convict.

Per curiam: the justices' clerk should not retire with the justices when they are about to consider their decision, but should remain in court until they either return or send for him if requiring his advice on a point of law.

AS TO GROUNDS FOR CERTIORARI TO QUASH, see HALSBURY, Hailsham Edn., Vol. 9, pp. 880-889, paras. 1484-1493; and FOR CASES, see DIGEST, Vol. 16, pp. 417-431, Nos. 2763-2918.

Cases referred to:

- (1) *R. v. Bodmin JJ. Ex p. McEwen*, [1947] 1 All E.R. 109; [1947] K.B. 321; [1947] L.J.R. 338; 111 J.P. 47; 2nd Digest Supp.
- (2) *Hastings v. Ostle*, (1930), 143 L.T. 707; 94 J.P. 209; Digest Supp.
- (3) *Hill v. Tothill*, [1936] W.N. 126; Digest Supp.
- (4) *Davies v. Griffiths*, [1937] 2 All E.R. 671; 157 L.T. 23; 101 J.P. 247; Digest Supp.

MOTION for certiorari.

The applicant, Cyril Vivian Mundy, was convicted by a petty sessional court sitting at East Kerrier, Cornwall, of having driven a motor vehicle on a road without due care and attention, contrary to s. 12 (1) of the Road Traffic Act, 1930. He was fined £5, and his driving licence was suspended for three months. He applied for an order of certiorari to quash the conviction on the ground that, after the justices had retired with their clerk to consider their decision, the clerk returned, spoke to a police officer, and took a piece of paper received from him into the retiring room. The justices subsequently returned to the court and announced the conviction. The applicant contended that this invalidated the conviction because the justices appeared to have received evidence otherwise than in open court.

Laskey for the applicant.

McCreery for the prosecutor.

LORD GODDARD, C.J.: I am not going to comment strongly on the conduct of the justices in this case because, in my view, they intended to act properly, but I think they made a mistake. When they retired, the clerk retired with them. He later came out of the retiring room and was seen to speak to a

A police officer, from whom he received a piece of paper which he took back with him into the room. The justices then returned into court, and, without saying anything more, they announced that they convicted the applicant and called for evidence of previous convictions, if any. The police officer proved a previous conviction. The clerk told the court the penalty which could be imposed and the justices announced their decision—a fine of £5 and three months' suspension of the applicant's driving licence. It is said that the communication required by the justices and the taking of the piece of paper into their room invalidated the conviction because it was doing something behind the back of the applicant and receiving evidence otherwise than in court. As we pointed out in *R. v. Bodmin JJ. Ex p. McEwen* (1), it will invalidate a conviction if evidence is given or appears to be given to justices otherwise than in open court because the defendant has no means of dealing with it.

B In *Hastings v. Ostle* (2) LORD HEWART, C.J., said (143 L.T. 709):

C “It is clear . . . that after retiring to their ante-room to consider their decisions in the first series of cases, the justices sent for alleged information as to previous convictions . . . for fishing offences. It is also clear that they did not send for this information until they had come unanimously to the conclusion that the charges against all of the appellants had been proved. The justices sent for the information with reference to previous convictions of any fishing offences for the purpose of considering what would be the appropriate penalty for each appellant. Their clerk left the room and returned, having received from the superintendent of police information of two previous convictions for this class of offence against two of the appellants, and one against the third appellant. They did not go into the full police reports about the appellants. The justices then returned into court and announced their decision, and the appellants were each fined £5 for that offence. In these circumstances it is quite clear that the justices took a course which they ought not to have done. The proper course to pursue was to have returned into court, when they had decided to convict, and then publicly and openly, in the presence of the appellants, made inquiries into the appellants' previous convictions, in which case the appellants and each of them would have had the opportunity of dealing publicly with the matter.”

F It seems to me that in that case the court quashed the conviction, not because of information which had been taken into the justices' room, but because, when the magistrates returned into court, they did not require the previous convictions to be proved.

In *Hill v. Tothill* (3), LORD HEWART, C.J., said ([1936] W.N. 126):

G “It appeared that the justices had privately informed themselves of a previous conviction of the defendant, when deciding upon the sentence to be imposed, and that on returning into court they convicted and pronounced sentence upon the defendant without requiring the previous conviction to be proved.”

H That again was held to be a ground for quashing. In *Davies v. Griffiths* (4) the justices, sitting in court and conferring among themselves before they announced their decision, asked for proof of previous convictions. After receiving them they retired and then came back into court and announced the conviction and penalty. The court refused to quash the conviction because everything had been done in open court.

In the present case in the first instance the information with regard to the previous conviction was conveyed to the justices in their room, and that, the court thinks, was wrong and ought not to have been done. Nothing was said in court as to what the justices had sent for, and for all the applicant knew any statement might have appeared on that piece of paper, even (though, of course,

it was not) a statement by the police officer of something he had forgotten to say in evidence. The justices after receiving it came back into court and asked for formal proof of the previous conviction, and in that they were acting quite rightly. It is possible that, if they had announced in court at the time that the only piece of information which had been conveyed to them was the fact of that previous conviction and that they had made up their minds before then to convict, we might have dealt with the case as the court did in *Davies v. Griffiths* (4), but that was not done. In fact, until the affidavit in this case was filed by the justices the applicant did not know what had happened, and, in particular, he did not know that the justices had made up their minds to convict before the information with regard to the previous conviction had been conveyed to them. In those circumstances, and not without some hesitation, I have come to the conclusion that we ought to quash this conviction.

Another matter which I feel bound to mention is this. Although I cannot for the moment trace the authority, I think it has certainly been said more than once in this court that it is not right that the justices' clerk should retire with the justices. It has been said over and over again that the decision must be the decision of the justices, not the decision of the justices and their clerk, still less the decision of the clerk, and, if the clerk retires with the justices, people will inevitably form the conclusion that the justices' clerk may influence the justices, or may take some course which it is for the justices alone to take. The justices can always send for the clerk if they require advice on a point of law because that is what the clerk is there for, but it is not desirable, and it is not, I would say, regular, for a clerk to retire with justices as a matter of course at the time they are considering the facts. He should remain in the court until the justices either return into court or send for him. Whether we should have quashed the conviction on the ground that the justices' clerk retired with them (although I believe it has been done in one case), I need not say. But we think it is undesirable and we hope that in future justices' clerks will not retire with their bench, unless their advice is required. For these reasons I think the conviction should be quashed.

HILBERY, J.: I have felt the greatest doubt whether we should quash this conviction, but my Lord's analysis of the cases and the reasons which he has given have persuaded me that we should take that course, and I, therefore, agree.

DEVLIN, J.: I agree, also after some little hesitation because I think the authorities on the matter are not entirely clear, but I agree entirely with everything the Lord Chief Justice has said. I should like to state what I believe to be the principle on which the court is acting. We are not dealing with a case of actual injustice. If we were, that would be the end of the matter, and clearly the conviction would be quashed. We are dealing with an infringement of the rule that justice must not only be done, but must also manifestly appear to be done, and, accordingly, we are dealing with matters of form. The courts have held in the past that it is important not only that justice should be done, but also that it should be seen to be done, and that a person who has been found guilty by the justices should know there has been no actual injustice. It is preferable that he should go free rather than that that rule should be infringed. When the court is considering whether to quash a conviction or exercise its discretion in upholding it in a case of this kind, what is important is what appears to have been done in the course of the proceedings, and that is why I think *Davies v. Griffiths* (4), which at first sight appears to be very similar to this case, is rightly distinguished by counsel for the applicant by the course that was taken there. In that case, too, the justices considered previous convictions when they retired, but when they came back a point was taken in court, and the report says that the solicitor appearing for the appellant ([1937] 2 All E.R. 672)

“objected that the course [the justices] had adopted in not announcing in court [their] decision to convict before hearing the previous convictions was irregular, but [they] informed him that [they] had come to a decision during [their] first retirement before [they] had been acquainted with the appellant’s previous convictions.”

In other words, the error was publicly corrected, and no person who sat in the court, unless he was going to suggest that the justices had acted in bad faith (and that was not suggested), could have left after the hearing under the impression that some injustice had been done. If he believed the statement made in open court, then no injustice had been done. The error of form, if I may so put it, was publicly put right in the course of the proceeding which he had heard. The vital distinction here, to my mind, is that the error was not put right. The matter was not raised in court. The applicant was defending himself, and, on the face of it, as my Lord has said, it appeared that some piece of paper, nobody knowing what it contained, had been taken into the justices which might have influenced them in arriving at their decision. An order of certiorari is the natural step to take in such case and it was not until the affidavit was given this morning to counsel for the applicant that anybody knew what the justices’ explanation was. That explanation, which the court has unhesitatingly accepted, shows that the error was made in good faith, but, as it was not given in open court at the time of the proceedings, it leaves those proceedings still tainted with the fact that an injustice was apparently done. On those grounds I agree that the conviction should be quashed.

Order for certiorari granted.

Solicitors: *Balderston, Warren & Co.*, agents for *R. C. Henderson*, Falmouth (for the applicant); *Barlow, Lyde & Gilbert*, agents for *Stephens & Scown*, St. Austell (for the respondents).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

RECKNELL v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Danckwerts, J.), April 24, 1952.]

Income Tax—Special contribution—“Investment income”—Dividends on shares acquirable only by employees—Income Tax Act, 1918 (c. 40), s. 14 (3) (b)—Finance Act, 1948 (c. 49), s. 49 (1).

The taxpayer, a departmental manager of a company, held shares in that company of a class which could be acquired only by employees and were intended as an incentive to employees holding them to work hard in the interests of the company. An employee did not acquire shares automatically by virtue of his employment, but only if the executive committee of the company decided to give him an opportunity to acquire them. He did not lose them automatically by death, retirement, removal, or otherwise ceasing to be an employee, but in such events the executive committee had a right to arrange a sale and transfer of his shares. The taxpayer was assessed to special contribution on the basis that his dividends from the shares held by him were “investment income” within the meaning of s. 49 (1) of the Finance Act, 1948.

HELD: the shares were attached to the employment held by the taxpayer within the meaning of s. 14 (3) (b) of the Income Tax Act, 1918, since it was only by virtue of his holding the employment that he could acquire and retain them, and, therefore, the income in question was “earned income” within s. 14 (3) (b) and not “investment income” within the meaning of s. 49 (1) of the Finance Act, 1948, and the taxpayer was not liable to special contribution in respect thereof.

FOR THE INCOME TAX ACT, 1918, s. 14 (3) (b), see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 16; and FOR THE FINANCE ACT, 1948, s. 49 (1), see *ibid.*, p. 843.

Case referred to:

- (1) *Dale v. Inland Revenue Comrs.*, [1951] 2 All E.R. 517; [1951] Ch. 893; *reversd.* C.A. ante p. 89.

CASE STATED by the Special Commissioners of Income Tax.

The Special Commissioners held that neither the shares nor the income therefrom were attached to or formed part of the taxpayer's emoluments as departmental manager employed by the company, within the meaning of s. 14 (3) (b) of the Income Tax Act, 1918, and that, therefore, the income ranked as investment income for the purpose of the special contribution. The taxpayer appealed.

Heyworth Talbot, Q.C., and *H. M. Allen* for the taxpayer.

Graham-Dixon, Q.C., and *Sir Reginald Hills* for the Crown.

DANCKWERTS, J.: The question is whether the income of certain shares, of which the taxpayer is the holder, has to be included in his investment income for the purposes of the special contribution imposed by Part V of the Finance Act, 1948. Section 47 (1) of that Act provides:

"In the case of individuals whose total income for the year 1947-48 exceeded £2,000 and whose aggregate investment income for that year exceeded £250, there shall subject to the provisions of this Part of this Act be charged a special contribution (in this Part of this Act referred to as 'contribution') of an amount determined in accordance with the following Table . . . "

Then certain rates of tax are set out in the table. The income with which I am concerned is the aggregate investment income for that year exceeding £250. Section 48 provides for the ascertainment of income and total income in these terms:

"Subject to the provisions of this Part of this Act, income from any source and total income shall be ascertained for the purposes of this Part of this Act as they are ascertained for the purposes of surtax; and subject as aforesaid income shall be treated for the purposes of this Part of this Act as income of an individual if it would be so treated for the purposes of surtax."

That brings in the ordinary provisions of the Income Tax Acts in regard to the ascertainment of an individual's income for the purpose of the imposition of surtax. Section 49 (1) contains this definition of investment income:

"Subject to the provisions of this section and of sched. X to this Act, in this Part of this Act the expression 'investment income' means income from any source other than a source of earned income".

The result is that this special contribution is to be levied on income other than earned income. It becomes material, therefore, in accordance with s. 68 (2) of this Act, to ascertain what is the meaning of "earned income" in the Income Tax Acts. For that purpose it appears only to be necessary to refer to s. 14 (3) of the Income Tax Act, 1918, which provides:

"For the purposes of this section the expression 'earned income' means . . . (b) any income from any property which is attached to or forms part of the emoluments of any office or employment of profit held by the individual . . . "

The taxpayer was at all material times employed by a limited company under which he held the position of a departmental manager. Under the company's articles of association there was a certain class of shares called "A" shares, which were intended to provide by their issue to employees of the company an incentive to those employees to work hard in the interests of the company. There

were some two hundred thousand of those shares. They were to receive a larger proportion of the profits of the company compared with other shares, so that a large dividend might well be payable, and was, in fact, paid in certain years, on those shares. There were twenty votes for each share, so that the voting rights of those "A" shares provided a majority of the voting power among the members of the company. The material article defining the position of the "A" shareholders is art. 25 of the company's articles of association, which provides:

"With respect to the 'A' shares the following provisions shall have effect:

(i) The 'A' shares shall in the first instance be issued in accordance with the terms of the agreement referred to in art. 3 hereof and subject thereto and except as otherwise provided by this article no 'A' shares shall be issued to or held by any person who is not a director, local director, manager or employee of the company and no 'A' share shall be capable of being transferred except in accordance with this article. (ii) 'A' shares may be transferred at the par value thereof as between persons entitled to hold them provided the consent of the executive committee is first obtained".

Pausing there, the executive committee was a committee of the directors and vice-presidents of the company, who really managed the company's affairs and whose decision comes in with respect to a number of matters in regard to the transfer and issue of these shares.

"(iii) In the event of the holder of any 'A' shares ceasing by death, retirement, removal or otherwise to be a director, local director, manager or employee of the company, the executive committee of the company shall have the right at any time thereafter (but subject to the provisions of sub-cl. (xi) of this article) to arrange and call for or make a sale and transfer of all or any of the 'A' shares held by him subject to and in accordance with the following provisions of this article. Until the executive committee shall have arranged a sale of any such shares the same shall be retained by the holder or his personal representatives."

Then there are various provisions providing for the purchase and transfer of these shares within the limits allowed by that article of the company. It is to be noticed that the right of the executive committee of the company to require shares to be given up arises on the death, retirement, removal or ceasing otherwise to hold the office or employment mentioned in the article, but it is a right given to the executive committee, and the executive committee is not compelled to exercise that right. In certain cases former directors, managers or employees of the company were allowed to continue to hold shares of this nature after they had retired. In the present case the taxpayer acquired from time to time fifteen hundred of these "A" shares, which produced during the material year an income of £450, and that income was included in the assessment for the purposes of the special contribution on the footing that it was investment income and not earned income, and was, therefore, properly assessed under the provisions of the Finance Act, 1948.

Evidence was given before the Special Commissioners as to the manner in which these shares were allotted. It was stated that the committee did not allow such shares to be purchased as a matter of course, but in addition to taking into consideration the number of such shares which were available at any given time the committee were also guided by what they thought of an employee by comparison with his colleagues. There was no fixed maximum of shares or scale of holding of shares according to the position held by the employee, but in general it could be said that the more important the appointment held by an employee the more shares he was allowed to acquire and hold. There was no obligation on any employee to purchase any "A" shares, and his future prospects in the company would not be jeopardised if he did not take up the "A" shares offered to him. Nevertheless, the offer of shares to a junior employee was regarded by the

executive committee as an honour, and, if he refused them when offered, it would probably be assumed that he was not interested in the company. In considering their offer of "A" shares to an employee the executive committee looked at his remuneration and at his existing "A" shareholding (if any) and weighed them together in the light of the value of his services to the company. At times an employee might approach the committee with an offer to buy "A" shares; at other times a hint might be given by a member of the committee to the employee that an offer to purchase, if made, would be favourably considered. The witness considered that the shares were an incentive to an employee to do his best for the company, as also was the additional remuneration payable under an article of the articles of association. In the case of the taxpayer, if he had been unable to purchase the "A" shares offered to him from time to time as appearing in the Stated Case, the company would certainly have either given him an increase in salary or assisted him to purchase the shares. The company did occasionally assist employees to purchase "A" shares. Then the Stated Case refers to dividends.

In coming to their decision the Special Commissioners, after setting out certain contentions, say:

"We accept the evidence that the company's 'A' shares were intended to be held only by the higher employees of the company and were in fact so held, subject to the discretion of the executive committee of the company under art. 25 (iii) and the working of the five-years' time limit under art. 25 (xi). Furthermore, we do not doubt that, if the taxpayer had not been a higher employee of the company, he would not have been given the opportunity of acquiring the said holding of 'A' shares."

Those two statements which I have read I think are two conclusions of fact. Then they go on to say:

"We hold, however, on the evidence in this case that neither the property, i.e. the shares, nor the income therefrom, i.e. the dividends, are attached to or form part of the appellant's emoluments as departmental manager, within the meaning of s. 14 (3) (b) of the Income Tax Act, 1918."

That last statement I take to be a conclusion of law based on the two findings of fact which immediately precede it. The question is whether that conclusion of law is correct and is a correct application of s. 14 (3) (b) of the Income Tax Act, 1918. In my opinion, it is not.

The section is rather oddly worded. On behalf of the taxpayer it is argued that you can read s. 14 (3) (b) as stating that any property income which forms part of the emoluments of any office is to be treated as earned income, and, therefore, in the present case the income of the shares in question is part of the emoluments of the office or employment which was held by the taxpayer. That seems to me a very difficult method of applying the words which are found in the clause, and I think it is inconsistent with certain observations made by HARMAN, J., in *Dale v. Inland Revenue Comrs.* (1) In that case, in his concluding observations HARMAN, J., says ([1951] 2 All E.R. 520):

"Counsel for the taxpayer took a further point under s. 14 of the Income Tax Act, 1918, saying that the case also came under s. 14 (3) (b) as being income from any property which is attached to or forms part of the emoluments of an office. In my judgment, though I need not decide it, I am inclined not to accept that proposition because it seems to me that one must construe s. 14 (3) (b) as if the relative 'which' governed the word 'property' and not the word 'income', so that para. (b) only applies to income from property attached to or forming part of the emoluments of an office."

That construction of the clause agrees with the view I have taken of it, and it seems to me that, if one gives that construction to the clause in question, it is impossible to say that the income received by the tax-payer in respect of these

shares is part of the emoluments of any office or employment of profit held by him.

A That is not an end of the matter because the clause deals with income from any property which—" which property " that is to say—is attached to any office or employment of profit held by the individual. It has been argued on behalf of the Commissioners of Inland Revenue that those words are not satisfied unless the person concerned acquires the property by virtue of obtaining the office or employment in question and automatically, as I understand the argument, loses the property on giving up that office or employment of profit, whether by death, retirement or any other event. It seems to me that is too narrow a construction of the words in question. It seems to me that in the present case the shares in question are attached to the office or employment held by the taxpayer, because it was only by virtue of holding an office which came within the offices B or employments described in art. 25 of the company's articles of association that he became qualified to be allotted any of these shares at all, and on retirement he would become disqualified, though it is true the executive committee might not at once call on him or his executors to give up the shares in question. But the right would accrue to the executive committee to require the taxpayer, immediately on ceasing to be employed by the company, to part with those shares C in accordance with the provisions of art. 25. That being the situation, it seems to me that these shares are attached to the office or employment of, to quote the words of the article, "director, local director, manager or employee of the company". They are allotted to the person in question by virtue of his holding such employment, and they can be taken away from him by the executive committee against his will as soon as he gives up that employment. It seems to me, D therefore, on a reasonable construction of the words of the clause, that they are attached to the office or employment in question, notwithstanding that the acquisition of and the parting with the shares are not automatic on the attainment of the office or relinquishing it. Therefore, it seems to me that the words of s. 14 (3) (b) of the Income Tax Act, 1918, are satisfied by the conditions in the present case, and that this is not income which is assessable to the special contribution E imposed by the Finance Act, 1948, it not being income from a source other than a source of earned income, because by virtue of s. 14 (3) (b) of the Income Tax Act, 1918, it is included in the expression "earned income".

Appeal allowed.

Solicitors: *Freshfields* (for the taxpayer); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

RAYMOND & REID v. GRANGER.

[QUEEN'S BENCH DIVISION (Hilbery and Devlin, JJ.), May 30, 1952.]

Arbitration—Extension of time fixed by agreement—Application to Divisional Court of Queen's Bench Division—Arbitration Act, 1950 (c. 27), s. 27.

An application under the Arbitration Act, 1950, s. 27, for an extension of the time prescribed in an agreement within which to commence arbitration proceedings must be made to a Divisional Court of the Queen's Bench Division and not to a single judge in open court.

FOR THE ARBITRATION ACT, 1950, s. 27, see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 113.

MOTION for an extension of time within which to commence arbitration proceedings under a trading agreement. Questions were raised whether the application should be made to a Divisional Court of the Queen's Bench Division or to a judge in open court and whether the application had been made with sufficient promptitude.

Stable for the applicants.

M. R. E. Kerr for the respondent.

HILBERY, J.: This is a motion dated May 22, 1952, for an extension of time to give notice of application for arbitration under a traders' agreement dated Sept. 25, 1950, and made between the applicants and inter alios the respondent. The first point that arises is whether, under s. 27 of the Arbitration Act, 1950, this motion should be made to the Divisional Court or brought before a single judge in open court. Section 27 of the Arbitration Act, 1950, is a reproduction of the old s. 16 (6) of the Arbitration Act, 1934, which empowered "the court" to extend the time for commencing arbitration proceedings. The only difference between the two sections is that, instead of the words "the court" which appeared in s. 16 (6) of the Act of 1934, the words "the High Court" appear in s. 27 of the Act of 1950, under which the motion comes before us. The Court of Appeal laid down in a practice note which appeared on Apr. 3, 1943 ([1943] W.N. 74) that:

"The power to extend the time for giving notice of arbitration in certain cases is conferred by s. 16 (6) of the Arbitration Act, 1934, on 'the court', not 'the court or a judge', and, therefore, applications for extension of time under that sub-section must be made to the Divisional Court, not to a master or judge in chambers."

A note has appeared in the supplement to vol. 2, p. 64, of the ANNUAL PRACTICE, 1951, under the sub-title of "The High Court" in the notes to s. 27 of the Arbitration Act, 1950, stating that the application is to a single judge in court. No authority is given for that statement, and it does not seem to me that the mere addition of the word "High" before the word "Court" in s. 27 makes any substantial difference between that section and the section in the earlier Act. The section in the earlier Act was construed as meaning, by the words "the court", the Divisional Court of the Queen's Bench Division, and it appears to me that there is no reason to give a different construction to s. 27 of the Act of 1950, merely because the word "High" is put in front of "Court". In my view, the right practice under s. 27 is to make the application to a Divisional Court of the Queen's Bench Division.

DEVLIN, J.: I agree.

[THE COURT held further that an application for extension of time under s. 27 of the Arbitration Act, 1950, must be made promptly, and that, as the applicants had delayed for more than three months after negotiations with a view to arbitration had broken down, without explanation of the delay by affidavit or otherwise, the application would not be entertained.]

Application refused.

Solicitors: *Cosmo Cran & Co.* (for the applicants); *Thomas Cooper & Co.* (for the respondents).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

STIRLING v. GILBERT.

[COURT OF APPEAL (Somervell, Jenkins and Morris, L.J.J.), May 7, 8, 23, 1952.]

Rent Restriction—Standard rent—House divided into two flats—No evidence of letting of house or flats before 1928—Lower flat let in 1928 for one year at 25s. a week—Lower flat again let in 1937 at 17s. 6d. a week—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (a) (as amended by Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 3 (1), sched. I).

A house situated outside the metropolitan police district, the rateable value of which was at all material times £26 or £28, contained two flats, the lower of which was assessed in 1934 at £16. There was no evidence of any letting of the whole house or of any part of it before 1928. In that year the lower flat was let for one year at a rent of 25s. a week. At the expiration of the tenancy the house was left empty. In 1937 and subsequently the lower flat was let at 17s. 6d. a week. The flat was not registered for the purposes of de-control under s. 4 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938. On an application by the tenant for the determination of the standard rent of the lower flat,

HELD: in the circumstances prima facie the landlord was in possession of the whole house between the passing of s. 2 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, and 1928; the landlord had failed to displace that case, and so in 1928 the whole house had become de-controlled; the letting of the flat as a separate dwelling did not bring it under control and s. 4 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, had no application to it; and, therefore, the flat first became controlled under the provisions of s. 3 (1) of the Rent and Mortgage Interest Restrictions Act, 1939, and under that sub-section and s. 12 (1) (a) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by sched. I to the Act of 1939, the standard rent of the flat was that at which it was let on or before Sept. 1, 1939, namely, 17s. 6d.

AS TO STANDARD RENT, see HALSBURY, Hailsham Edn., Vol. 20, p. 312, para. 369 and 1951 Supplement; and FOR CASES, see DIGEST, Replacement Vol. 31, pp. 668–674, Nos. 7663–7695, and Digest Supps.

Cases referred to:

- (1) *Schaffer v. Ross*, [1939] 4 All E.R. 363; [1940] 1 K.B. 418; 109 L.J.K.B. 285; 162 L.T. 37; 31 Digest, Replacement, 642, 7491.
- (2) *Hall v. Rogers*, (1925), 133 L.T. 44; 41 T.L.R. 341; 31 Digest, Replacement, 641, 7484.
- (3) *Fox v. Marshall*, [1938] 4 All E.R. 773; 31 Digest, Replacement, 728, 8108.
- (4) *Rynolds v. Phillips*, [1939] 3 All E.R. 678; 108 L.J.K.B. 742; 161 L.T. 215; 31 Digest, Replacement, 728, 8112.
- (5) *Ford v. Langford*, [1949] 1 All E.R. 483; [1949] L.J.R. 586; 31 Digest, Replacement, 668, 7662.

APPEAL by the landlord from an order of His Honour JUDGE GLAZEBROOK, made at Southend County Court on Mar. 13, 1952, on an application by the tenant to determine the standard rent of one of two flats in a dwelling-house.

The rateable value of the whole house was £26 in 1914 and £28 in 1929. There was no evidence that the house had been let before 1928. In 1928 the lower part of the house was let as a flat to a Mrs. Hayes for one year at 25s. a week. In 1934 the lower flat was assessed for rating purposes at a value of £16. When Mrs. Hayes left the lower flat the house was empty, but in 1937 the lower flat was let for 17s. 6d. The county court judge held that as there was no evidence that the house was let in 1923, in which case it would be de-controlled under s. 2 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, the flat became

controlled under the Rent and Mortgage Interest Restrictions Act, 1939, and the standard rent was that at which it was let in 1937, i.e., 17s. 6s.

A. R. Campbell for the landlord.

Dennis Lloyd for the tenant.

Cur. adv. vult.

May 23. The following judgments were read.

SOMERVELL, L.J.: This is an application by a tenant for the determination of the standard rent of the lower of two flats at 57, Woodfield Park Drive, Leigh-on-Sea. The landlord is administrator of the deceased owner. It is common ground that the flat is let as a separate dwelling-house within, and is subject to, the Rent Acts. The landlord contends that the standard rent is to be determined by a letting at 25s. in 1928. The tenant contends that the standard rent is to be determined under the Rent and Mortgage Interest Restrictions Act, 1939, as what is called a "new control", as distinguished from an "old control", house. On this basis it would be determined by a letting in 1937 at 17s. 6d. The learned registrar decided in favour of the landlord, though from his note he doubted later whether he had been right. The learned judge decided in favour of the tenant and the landlord appeals.

The house containing the two flats was for most of the relevant period, that is, from 1914 to the present day, rated as a single unit at either £26 or £28. When rated for a short period separately the rateable value of the lower flat was £16. There is no dispute as to the facts, but before detailing them it is necessary to set out the provisions of the Acts which are relevant. The house was, qua rateable value, within the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The provision with regard to standard rent in that Act (s. 12 (1) (a)) is as follows:

"The expression 'standard rent' means the rent at which the dwelling-house was let on Aug. 3, 1914, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or in the case of a dwelling-house which was first let after the said Aug. 3, the rent at which it was first let."

There was no evidence here whether the house was let at any time before the letting in 1928. This court decided in *Schaffer v. Ross* (1) that for the Act to apply it was not necessary that the house should have been let at the commencement of the Act. A subsequent letting will bring it within the Acts. It also seems to me that where there is no evidence of how the house was dealt with at or before 1914, or, indeed, as here, down to a date subsequent to the Act of 1920, the court is entitled to treat the rent of the first letting of which there is evidence as the standard rent even if there is no positive evidence of no previous letting. If, therefore, there had been no further legislation the landlord would succeed. The Rent and Mortgage Interest Restrictions Act, 1923, s. 2 (1), provided that where the landlord was in possession at the passing of the Act, or later came into possession of the dwelling-house, the Act of 1920 should cease to apply. In other words, the house became de-controlled. Section 2 (3) provided as follows:

"For the purposes of this section, the expression 'possession' shall be construed as meaning 'actual possession', and a landlord shall not be deemed to have come into possession by reason only of a change of tenancy made with his consent."

These provisions were operative, so far as this flat was concerned, until 1939. Section 2 (3) came before the courts in *Hall v. Rogers* (2) which decided that a mere entry by the landlord's agent without having been handed the key by the previous tenant who had left is not enough. In the present case the landlord is seeking to establish that the flat remained controlled.

The next Act, the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, was clearly based on the view that the contingent de-control under the Act of 1923, while satisfactory for houses of intermediate rateable value, known as class "B", was unsatisfactory with regard to the others. We are concerned with a house in England outside the metropolitan police district or the city of London. All such houses with a rateable value above £35 known as class "A" were de-controlled. On the other hand, the provisions of the Act of 1923 with regard to de-control ceased to apply to houses with a rateable value less than £13, known as class "C". The Act of 1923 continued to apply in the present case to the lower flat.

The Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, applied the principle of the Act of 1933 within class "B". The upper range of class "B" houses, in the area with which we are concerned, those with a rateable value above £20, were de-controlled. The lower class "B" houses were left within the Act of 1923 subject to a provision as to registration. That was to be found in s. 4 (1):

"If the landlord of any dwelling-house let as a separate dwelling immediately before the passing of this Act, being a dwelling-house of which the rateable value on the appointed day did not exceed the respective amount mentioned in s. 2 of this Act, claims that by virtue of the provisions of s. 2 of the Act of 1923 the principal Acts had ceased to apply to the dwelling-house before the passing of this Act, he shall within three months after the passing of this Act make to the council of the county borough or county district in which the dwelling-house is situated application in the prescribed form for the registration of the dwelling-house."

On the evidence as to rateable value it seems to me that this flat was a "lower class B" house and was within the registration provisions. If, therefore, it had become de-controlled the landlord could not thereafter rely on this. Admittedly there was no registration.

A further question was raised whether we are concerned with the flat or the whole house. If the whole house had come into the actual possession of the landlord prior to 1938 it would have become de-controlled and the provisions as to registration would not have applied to the lower flat: *Fox v. Marshall* (3); *Rynolds v. Phillips* (4). I will, however, assume that we are concerned with the flat as a separate dwelling-house. Section 7 (1) of the Act of 1938 was relied on by the landlord. It reads as follows:

"If any question arises in any proceedings whether the principal Acts apply to a dwelling-house, it shall be deemed to be a dwelling-house to which those Acts apply unless the contrary is shown."

But I do not think this assists. In the first place, there is no dispute here that the flat is subject to the Acts. The question is which part of them. In the second place, we are concerned with two rival standard rents, and the onus is, I think, on the landlord who is seeking to establish the higher figure. The last Act was that of 1939. It is not disputed that, if the landlord cannot establish the 25s., the proper figure is 17s. 6d. under that Act.

I will now state such facts as there are. (i) Nothing is known until 1928 except the rateable value. (ii) A Mrs. Hayes occupied the lower flat at a rent of 25s. in 1928 and 1929. She was there about a year. When she came the landlord had some furniture in the upper flat. This was moved out and a tenant came in who left shortly before Mrs. Hayes. When Mrs. Hayes left both flats were empty. She did not depose to any knowledge of any previous or succeeding tenant. (iii) There were lettings of the lower flat in 1937, i.e., the one at 17s. 6d. and also later in 1940. It is unfortunate that notes which counsel had made and agreed as to what the learned judge said were not submitted to him. The only note we have of his is to the following effect:

"Held no evidence house let in 1923, therefore standard rent is 17s. 6d."

It is said this is a non sequitur. I agree that the mere fact that the flat was not let in 1923 is not conclusive. The learned judge not having been asked to elaborate his reasons in view of the points taken on the appeal, it would be unfair to read too much into this. The points of law were, I think, sufficiently taken before the learned judge, and, in my view, the issue is one to be decided by inference from the admitted facts with assistance from considerations of onus. On Mrs. Hayes' evidence and the absence of earlier history I would have said the probabilities were that the flat had come into the actual possession of the landlord at some time between 1923 and the letting to Mrs. Hayes. In the circumstances of this case I think the onus is on the landlord to displace that probability. The only fact on which he can rely is the absence of registration in 1938, assuming it was applicable. I do not think that is enough. The landlord seems to have kept no records and may well have not troubled to register. The case is curious in that the landlord is seeking to show that at a particular date the house was controlled. I am not satisfied that this house was controlled in 1928. I would dismiss the appeal.

JENKINS, L.J.: I agree that this appeal fails. There is no evidence of any letting of the whole house or of any part of it before 1928. In that year the lower flat was let to Mrs. Hayes. When Mrs. Hayes took possession of the lower flat the landlord, Mrs. Biro, had some furniture upstairs, which she was moving to another house. Mrs. Hayes was there for about a year. An old lady came to the upper flat a week or so after Mrs. Hayes moved in and left about a week before Mrs. Hayes. When Mrs. Hayes left the lower flat the house was empty. There is evidence of subsequent lettings though these do not form a continuous series. I am prepared to assume in the landlord's favour that Mrs. Biro did not at any time after the letting to Mrs. Hayes in 1928 come into actual possession of the lower flat so as to bring into operation the de-controlling provisions of s. 2 (1) (read in conjunction with s. 2 (3)) of the Act of 1923 if those provisions had not already taken effect before the letting to Mrs. Hayes in 1928. But this avails the landlord nothing if in fact Mrs. Biro was in actual possession of the whole house at the passing (on July 31, 1923) of the Act of 1923 or came into such possession at any time between that date and the date of the letting to Mrs. Hayes. If that was, indeed, the case, then de-control under s. 2 (1) of the Act of 1923 took effect with respect to the whole house either on July 31, 1923, or on Mrs. Biro subsequently coming into possession of the whole house between that date and the date of the 1928 letting, and, so far as the house as a whole was concerned, control was not reimposed by the Act of 1938 inasmuch as the house as a whole was above the so-called "lower class B" limits of rateable value to which control was restricted by s. 2 (1) of the Act of 1938 and to which the provisions of s. 4 (1) of the same Act, reimposing control in default of registration of de-control by virtue of s. 2 (1) of the Act of 1923, were confined. If the whole house did become de-controlled under s. 2 (1) of the Act of 1923, whether on July 31, 1923, or between that date and the letting to Mrs. Hayes in 1928 as being in the actual possession of Mrs. Biro, the subsequent letting of the lower flat as a separate dwelling did not have the effect of bringing the lower flat into control, and (although the lower flat as distinct from the whole house was within the so-called "lower class B" limits of rateable value) the provisions of s. 4 (1) of the Act of 1938 as to registration and re-control in default thereof had no application to the separate dwelling in the shape of the lower flat thus for the first time carved out of a house already de-controlled in its entirety: see *Fox v. Marshall* (3); *Rynolds v. Phillips* (4).

The difficulty thus confronting the landlord could, so far as I can see, only be surmounted by assuming in his favour that the letting to Mrs. Hayes followed on a previous letting or series of lettings, going back to some date prior to the passing of the Act of 1923, and comprising either the whole house or one or other or both of the two flats let separately, so that Mrs. Biro was never in actual

possession of the whole house during the period from the passing of the Act of 1923 down to the letting to Mrs. Hayes in 1928. On this assumption the lower flat (being within the so-called "lower class B" limits of rateable value) would either have remained continuously under the old (that is, pre-1939 Act) control, or (on the hypothesis that Mrs. Biro was on July 31, 1923, or at some time between that date and the letting to Mrs. Hayes in 1928 became, in actual possession of the lower flat as distinct from the house as a whole) would have been de-controlled by virtue of s. 2 (1) of the Act of 1923 but once more subjected to old control by the Act of 1938 owing to the omission of the landlord to register its de-control under the provisions of s. 4 (1) of that Act: cf. *Schaffer v. Ross* (1). But I see no justification for this assumption. There is nothing in Mrs. Hayes' evidence to suggest that she succeeded a previous tenant of the lower flat, and the presence upstairs of furniture of Mrs. Biro's which she was moving to another house when Mrs. Hayes went in makes it reasonably plain that Mrs. Hayes was not succeeding a previous tenant of the whole house. It is on the whole improbable (though, of course, not impossible) that, if Mrs. Hayes had in fact been succeeding a previous tenant of the lower flat, she would not have been made aware of this in one way or another. Again, it is possible that Mrs. Biro had previously let the lower flat reserving the upper one for her own occupation, which would account for the presence of her furniture upstairs, but I think the most likely explanation is that Mrs. Biro, having previously been in occupation of the whole house herself and having decided to move, cleared the lower flat of her belongings and let it to Mrs. Hayes, and was in process of clearing the upper flat of her belongings with a view to letting it also (as she shortly afterwards did) when Mrs. Hayes moved into the lower one. Accordingly, so far from justifying any assumption to the contrary, the evidence, so far as it goes, seems to me to raise a *prima facie* case of actual possession by Mrs. Biro of the whole house prior to the letting to Mrs. Hayes in 1928.

Counsel for the landlord placed considerable reliance on s. 7 (1) of the Act of 1938 which provides:

"If any question arises in any proceedings whether the principal Acts apply to a dwelling-house, it shall be deemed to be a dwelling-house to which those Acts apply unless the contrary is shown."

When s. 7 (1) of the Act of 1938 was enacted the reference therein to the "principal Acts" meant (by virtue of s. 1 (1) and s. 16 (3) of the Act of 1933, and s. 8 (2) of the Act of 1938) the Rent and Mortgage Interest (Restrictions) Acts, 1920 to 1925, as amended by any subsequent enactment, including the Acts of 1933 and 1938. It must now be read in conjunction with s. 7 (4) of the Act of 1939 which provides that:

"References . . . in the Rent and Mortgage Interest (Restrictions) Act, 1938, to the principal Acts . . . shall, unless the context otherwise requires, be construed as references to the principal Acts . . . as amended by any subsequent enactment, including this Act."

The question contemplated by s. 7 (1) of the Act of 1938 as originally enacted was simply the question whether a particular dwelling-house was controlled or not, and the effect of the sub-section was to put the onus of proving that a particular dwelling-house was not controlled on the person alleging that it was not, that is, generally speaking, the landlord. The position was complicated by the Act of 1939 which brought into control many dwelling-houses which either had never been controlled before, or, having at one time been controlled, had become de-controlled under the Acts of 1923, 1933 and 1938. The result was that two questions might thenceforth arise with respect to a particular dwelling-house, that is, (i) whether it was controlled at all, and (ii) if so, whether it was already controlled under the legislation as it stood before the passing of the Act

of 1939, or was brought into control for the first time, or, alternatively, re-controlled, by virtue of the Act of 1939—in other words, whether it was an “old control” or a “new control” dwelling-house.

Counsel for the landlord argued that since the passing of the Act of 1939 the effect of s. 7 (1) of the Act of 1938 has been to raise a presumption not merely that any dwelling-house with respect to which the question arises is controlled unless the contrary is shown, but also that it is subject to “old control” unless it is shown either not to be controlled at all or to be subject to “new control”. I am not satisfied that this is the case. Section 7 (1) of the Act of 1938, read in conjunction with s. 7 (4) of the Act of 1939, must, as it seems to me, be considered as providing that, if any question arises in any proceedings whether the Acts of 1920 to 1925, as amended by any subsequent enactment, including the Acts of 1933, 1938 and 1939, apply to a dwelling-house, it shall be deemed to be a dwelling-house to which those Acts apply unless the contrary is shown. In other words, if the question arises whether, having regard to all the relevant legislation, including the Act of 1939, a particular dwelling-house is controlled or not, there is to be a statutory presumption in favour of control unless the contrary is shown. Control having been established, or the presumption of control not having been rebutted, with respect to a given dwelling-house it may be material for certain purposes (for example, standard rent) to determine whether it is controlled by virtue of the pre-1939 legislation or by virtue of the Act of 1939, but it seems to me that the presumption is exhausted when the simple question of control or no control has been answered in favour of control, and the further question of “old” or “new” control is one with respect to which there is no statutory presumption one way or the other, and one which is subject to the ordinary rule of onus of proof, that is, in this context, that the onus of proving “old” as opposed to “new” control or vice versa rests on the person alleging it.

If I am wrong in this and s. 7 (1) of the Act of 1938, read in conjunction with s. 7 (4) of the Act of 1939, does extend the presumption to deeming an admittedly controlled house to be subject to “old” control unless it is shown to be subject to “new” control, I do not think it can reasonably be held to go so far as to constrain the court, when the question has been fully investigated and the facts so far as established make a *prima facie* case in favour of de-control under the pre-1939 legislation (as I think they do in this case), to assume without evidence the existence of further and wholly imaginary facts which, if proved, would rebut the *prima facie* case of de-control. This view is supported by *Ford v. Langford* (5), although it was not strictly necessary for the purpose of determining the question there in issue, that is, whether s. 7 (1) of the Act of 1938 extended to raising a presumption that a person who alleged he was a tenant and not a service occupier had paid rent, to limit the presumption raised by s. 7 (1) so narrowly as to hold it in all cases confined to the question whether the particular dwelling-house is within the financial scope of the Acts. For these reasons I agree that the appeal should be dismissed.

MORRIS, L.J.: I agree. In my judgment, this case depends very largely on determining what inferences can reasonably and properly be drawn from the somewhat meagre available evidence. If at the date of the passing of the Act of 1923 or between that date and the time in 1928 when the lower flat was let to Mrs. Hayes, the late Mrs. Biro was or became in actual possession of the whole house, then by the operation of s. 2 (1) of the Act of 1923 the whole house became de-controlled. The rateable value of the whole house was above the figure of £20: see Act of 1938, s. 2 (1) (c); and, accordingly, the absence of registration would not bring into play the provisions of s. 4 (1) of the Act of 1938. If the whole house became de-controlled under s. 2 (1) of the Act of 1923 before the letting to Mrs. Hayes, then the letting to her of the lower flat did not then bring the lower flat within control: see *Fox v. Marshall* (3) and *Rynolds v. Phillips* (4).

It is provided by s. 7 (1) of the Act of 1938 that if any question arises in any proceedings whether the principal Acts apply to a dwelling-house it shall be deemed to be a dwelling-house to which those Acts apply unless the contrary is shown. But a consideration of the provisions of that section does not, in my view, help to solve the present problem. It is provided by s. 3 (1) of the Act of 1939 as follows:

A “Without prejudice to the operation of the two preceding sections in relation to any dwelling-house to which the principal Acts applied immediately before the commencement of this Act, the principal Acts, as amended by the last preceding section, shall, subject to the provisions of this section, apply to every other dwelling-house of which the rateable value on the appropriate day did not exceed . . . (c) elsewhere, £75 . . .”

B See also s. 7 (4). In the present case it is common ground that there is control and the only question is whether such control existed before the Act of 1939 or was by that Act imposed. I consider that the learned county court judge must have proceeded on the basis that unless the whole house was de-controlled before the letting to Mrs. Hayes he was not prepared on the evidence to hold that there was any later de-control. Though the available evidence as recorded is somewhat limited certain facts emerge. Prior to 1934 there does not appear to have been rateable assessment save as to the house as a whole. There is no evidence of any letting prior to that to Mrs. Hayes in 1928. When Mrs. Hayes went into the lower flat the owner of the house, the late Mrs. Biro, had some furniture upstairs which she was moving to another house. Within a week or so after that an old lady went to the upstairs flat. From all these circumstances a very reasonable inference was that prior to the letting to Mrs. Hayes the whole house had been in the actual possession of Mrs. Biro. I see no sufficient reason for accepting any different view. Accordingly, I consider that the conclusion reached by the learned county court judge should be upheld.

E *Appeal dismissed.*
Solicitors: *Cassavetti, Coustas & Co.* (for the landlord); *Watson & King* (for the tenant).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

DU JARDIN v. BEADMAN BROTHERS, LTD.

[QUEEN'S BENCH DIVISION (Sellers, J.), April 2, 3, May 1, 2, 28, 1952.]

Factor—Mercantile agent—Possession of goods—Possession obtained by trick—Title of innocent purchaser—Factors Act, 1889 (c. 45), s. 9—Sale of Goods Act, 1893 (c. 71), s. 25 (2).

One G. offered to buy a Standard motor car from the defendants for £710, and to obtain immediate possession of it, as he said to sell it to a prospective customer, he paid the defendants £10 in cash, gave them a cheque for the balance, and left his Hillman car as security pending the clearing of the cheque, when it was intended that the property in the Standard car should pass. Later that day and without the defendant's permission he resumed possession of the Hillman car. In breach of an express condition that the Standard car should not be sold until the cheque had been cleared, G. sold it to the plaintiff who took it in good faith and without notice or knowledge of any defect in G.'s title or authority to sell or deliver it to him. Possession of the car was subsequently taken by the police in connection with a charge against G. and after his conviction on the hearing of summonses under the Police (Property) Act, 1897, justices directed its return to the defendants. On a claim by the plaintiff for the detinue or conversion of the car,

HELD: though G. had obtained possession of the car by larceny by a trick, he had obtained possession of it "with the consent of the seller", i.e., the defendants, within the meaning of the Factors Act, 1889, s. 9, and had transferred the car to the plaintiff, who had received it in good faith and without notice of any right of the defendants, and, therefore, the plaintiff was entitled to recover possession of the car.

Oppenheimer v. Frazer & Wyatt ([1907] 2 K.B. 50), not followed.

Folkes v. King ([1923] 1 K.B. 282), and *Pearson v. Rose & Young, Ltd.* ([1950] 2 All E.R. 1027), applied.

Cases referred to:

- (1) *Oppenheimer v. Frazer & Wyatt*, [1907] 2 K.B. 50; 76 L.J.K.B. 806; 97 L.T. 3; 1 Digest 335, 495.
- (2) *Lake v. Simmons*, [1926] 2 K.B. 51; 95 L.J.K.B. 586; 135 L.T. 129; revsd. H.L., [1927] A.C. 487; 96 L.J.K.B. 621; 137 L.T. 233; 35 Digest 97, 64.
- (3) *Folkes v. King*, [1923] 1 K.B. 282; 92 L.J.K.B. 125; 128 L.T. 405; Digest Supp.
- (4) *Pearson v. Rose & Young, Ltd.*, [1950] 2 All E.R. 1027; [1951] 1 K.B. 275; 2nd Digest Supp.
- (5) *R. v. Pear*, (1779), 1 Leach 212; 15 Digest 868, 9530.

ACTION for the return of a motor car or its value and for damages for its detention, and, alternatively, for damages for the conversion of the car.

On May 12, 1951, a man of the name of Greenaway called at the defendants' garage and saw Mr. Edgar Beadman who had not known him before and whose employers, the defendant company, had had no dealings with him. Greenaway offered to buy for £710 a Standard car belonging to the defendants and then in their showrooms or garage. That offer was accepted. His cheque for that amount being refused, he said he wished to take the car away immediately to show to a prospective buyer and offered to pay £10 at once and to leave a Hillman Minx car, in which he had arrived at the defendants' premises, as security for the balance. Mr. Beadman assented, but said the Standard car was not to be sold by Greenaway until his cheque had been cleared, and that, if the cheque was cleared by the bank the following Tuesday, the defendants would release the Hillman car to Greenaway. He handed over the Standard car, the registration book, and a receipt containing the words "Standard D/H

1947 (Nov.). Seen and approved at the agreed price of £710", and showing the cash payment of £10 and the payment by cheque of £700, but making no reference to the security. Later that day Greenaway resumed possession of the Hillman car. The cheque given by Greenaway was worthless. On May 15 Greenaway sold the Standard car to the plaintiff for £300 and a car belonging to the plaintiff in exchange. The plaintiff received the car and the registration book and paid the money in two instalments. Subsequently Greenaway was convicted of fraud in connection with the transaction, and the police took possession of the car. After the conviction the plaintiff issued a summons and the defendants a cross-summons under the Police (Property) Act, 1897, on the hearing of which justices sitting at Enfield directed that the car be returned to the defendants. The plaintiff demanded delivery of the car from the defendants and on their refusal issued the writ in the action. The defendants contended that, as there was only an agreement for the sale of the car and as actual possession was obtained fraudulently by means of a trick, Greenaway never had any title to transfer to the plaintiff, who could not, therefore, rely on s. 9 of the Factors Act, 1889, or s. 25 (2) of the Sale of Goods Act, 1893, because possession of the car was not obtained with the consent of the defendants.

Weitzman, Q.C., and Leonard Halpern for the plaintiff.

Wilmers for the defendants.

Cur. adv. vult.

May 28. **SELLERS, J.**, read a judgment in which he stated the facts and found as a fact that the conduct of Greenaway was fraudulent throughout, that the defendants, believing it to be an honest transaction, intended the property to pass when the cheque was met, that they knew that Greenaway was taking the Standard car to show to a prospective customer and let him take it with the registration book and receipt, and that the plaintiff when buying the Standard car acted in good faith and had no notice or knowledge of any defect in Greenaway's title or authority to sell or deliver the car to him. He continued: In these circumstances, notwithstanding the fraudulent conduct of Greenaway throughout, unless authority requires me to hold otherwise, I would find that Greenaway, having agreed to buy the Standard car, obtained possession of it with the consent of the defendants and that he sold and delivered it to the plaintiff, who received it in good faith and without notice of any lien or other right of the defendants in respect of the car. If these findings are correct, the plaintiff obtained a good title under s. 9 of the Factors Act, 1889.

It was not disputed before me that Greenaway had, at least, agreed to buy the car. If he had bought it, that is, if the property had passed, it would have been a case of obtaining the car by false pretences, which would have created a voidable contract. In that case, it was conceded, the plaintiff would have obtained a good title. But, as there was only an agreement for sale and the actual possession of the car was obtained fraudulently by means of the trick—the deception of granting security which Greenaway never intended to give—it was submitted that Greenaway never had any title to transfer to the plaintiff and that the plaintiff could not rely on s. 9 of the Factors Act, 1889, or s. 25 (2) of the Sale of Goods Act, 1893, because the possession of the car was not obtained with the consent of the defendants.

Counsel for the defendants referred to the long-standing divergence of views on the words "with the consent of the owner" or "the seller" in the Factors Act, 1889, s. 9. He submitted that it was open to this court to take either view, and that the preferable one was that expressed in *Oppenheimer v. Frazer & Wyatt* (1) where all the members of the Court of Appeal expressed the opinion that, where there was larceny by a trick, in the eyes of the law it was stealing and the person who so obtained the goods could not be said to have obtained them "with the consent of the owner". Counsel relied also on the dissenting

judgment of ATKIN, L.J., in *Lake v. Simmons* (2) in the course of which he said ([1926] 2 K.B. 71):

"The truth is that the supposed consent in the physical delivery of the chattel to the thief is no consent where the circumstances constituting larceny by a trick exist, and is no consent whether you view the transaction in a criminal or a civil proceeding."

These are opinions of great weight, but there is also powerful authority to the contrary. As VISCOUNT SUMNER put it in *Lake v. Simmons* (2) ([1927] A.C. 510):

"On the bearing, which apparent consent, obtained by a trick, may have on the 'consent', which is mentioned in s. 2 of the Factors Act, 1889, there has been so signal and so indecisive a conflict of authoritative opinion, that I should be loth to offer any conclusion of my own, unless it was quite clear that the point was necessary to the decision of this case. I think it is not."

That case was decided in the House of Lords on other grounds, and the question remains undetermined by that tribunal. But the plaintiff relied on *Folkes v. King* (3), in which both BANKES, L.J., and SCRUTTON, L.J., held that, as the plaintiff in that case consented to a mercantile agent having possession of a car, it was immaterial whether the latter committed larceny by a trick, and also on *Pearson v. Rose & Young, Ltd.* (4) in which the Court of Appeal recently, after a full argument, reviewed the authorities on the point. These two cases arose under s. 2 (1) of the Factors Act, but whatever interpretation is to be given to the word "consent" in s. 2 (1), it must, I think, also be given to the word in s. 9 of that Act and s. 25 (2) of the Sale of Goods Act, 1882.

If I were inclined to take a view contrary to that so lately expressed by the Court of Appeal in *Folkes v. King* (3) I would have had to consider carefully how far it was open to me to do so now that the present Court of Appeal has expressed its preference for and approval of one of the earlier views which have been so long in conflict. I find myself, however, in full accord with the view now taken and particularly with those extracts from the judgment of BANKES, L.J., and SCRUTTON, L.J., in *Folkes v. King* (3) which appear in the judgment of SOMERVELL, L.J. ([1950] 2 All E.R. 1030) with which conclusion and the reasons given for it he agrees in preference to the contrary opinions to which he had already referred. DENNING, L.J., holds as follows ([1950] 2 All E.R. 1032):

"... the fact that the agent is guilty of larceny by a trick does not prevent the operation of the Factors Act any more than the fact that he has been guilty of larceny as a bailee."

In those circumstances, I do not feel justified in going through the cases again in this judgment.

Counsel for the defendants submitted that the Court of Appeal in *Pearson v. Rose & Young, Ltd.* (4) had been inconsistent in that, in respect of the log book, the court had found no consent of the owner to the agent's possession because the agent had obtained it by a trick. I am inclined to think, on the contrary, that this illustrates the real point. In each circumstance the inquiry is whether the possession was obtained with the consent of the owner (or the seller) and it is his knowledge and intention which have to be assessed. The question which the court put to itself was: Did the owner of the car mean to leave the registration book with Hunt (the agent)? And the answer on the facts was "No". The answer that there was no consent to Hunt's possession of the log book was based, not on Hunt's fraudulent intention, but on the owner's conduct, knowledge, and intention. On the facts of the present case, I find it impossible to hold that the defendants did not consent to Greenaway having possession of the Standard car. To hold otherwise would, in my opinion, be wholly unreal.

In *Folkes v. King* (3), SCRUTTON, L.J., said ([1923] 1 K.B. 305):

"I do not think Parliament had any intention of applying the artificial distinctions of the criminal law to a commercial transaction, defeating it if there were larceny by a trick, but not if there were only larceny by a bailee, or possession obtained by false pretences."

A ATKIN, L.J., on the other hand, in *Lake v. Simmons* (2) ([1926] 2 K.B. 71) described it as a logical absurdity that at one and the same time a person could take the goods without the consent of the owner (i.e., by larceny by a trick) and be entrusted with the goods by the true owner (for example, under the Factors Act, 1889). Possession of goods may be obtained by a trick or deception in circumstances which amount to stealing, and the same facts may
B example, where the transferor (through the fraud) thinks he is dealing with someone other than the transferee, or thinks he is transferring different goods from those which the thief actually obtains. But in the, perhaps, more rare cases where the "logical absurdity" might be said to arise, it may be that the artificiality is on the side of the criminal law and not the common law.

C In the latest edition of RUSSELL ON CRIME (10th ed.), vol. 2, there is an historical and critical study of the law relating to larceny by trick. At pp. 1087 and 1089 it is stated:

"The argument on which the case of *R. v. Pear* (5) was decided [in 1779] was that the fraudulent intention of the transferee at the inception of the transaction in some way negatived in law the consent of the owner to do what he in fact did, namely, to put the horse in the hands of Pear so as to make him bailee of it. If this doctrine were sound there is no
D logical escape from the conclusion that the existence of the like fraudulent intention ought to have the same effect, so as to negative the consent of the owner, when the transaction is not one of purported bailment involving the transfer of possession merely, but when the transaction is, for example, one of the purported sale, involving the transfer of the ownership of the chattel. . . . The decision of the judges in *Pear's* case (5) that the deceit which eliminated the consent which the owner intended to give when he regarded himself as parting with merely the possession of his chattel would not have the same effect when he regarded himself as parting with something greater, namely, the ownership of it, was firmly maintained
E by subsequent courts in a multitude of cases . . . The doctrine of the *Pear* case (5) was anomalous, but it was highly important since it did much to expand the common law of larceny to meet a social need. It was widely applied, and the special offence which it covered came to be known as 'larceny by a trick', an inapt name which has caused a good deal of confusion in later law."

G This conclusion is expressed on p. 1102:

"By the decision in *Pear's* case (5) a new crime was created which was purely arbitrary and did not rest upon principle."

I accept and adopt these views, which have been so clearly expressed and so well supported by authority and argument. I see no reason to interpret
H "consent" in the Factors Act, 1889, s. 9, in an artificial way in order to bring it into harmony with the criminal law based on such foundations. In my judgment, therefore, the plaintiff has established a good title to the motor car claimed, and I make an order for its return to him.

Judgment for the plaintiff.

Solicitors: *S. Kalman* (for the plaintiff); *Seaton Taylor & Co.* (for the defendants).
[Reported by F. A. AMIES, Esq., Barrister-at-law.]

Re KEELE ESTATES. AVELING AND ANOTHER *v.* SNEYD
AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.),
May 20, 22, 23, 1952.]

Estate Duty—Incidence—Portions charged by will on property reversionary at date of testator's death—Duty exigible on death of life tenant—Liability of portioners to be charged with duty—Finance Act, 1894 (c. 30), s. 14 (1). A

By his will, dated May 30, 1865, R.S. senior devised real property to the use of W.S. for life and after his death to the use of R.S. junior for life, and after his death on limitations for the sons of R.S. junior in tail, and in default of such issue to the use of W.S. his heirs and assigns for ever. R.S. senior died on July 27, 1870, W.S. on July 2, 1888, and R.S. junior died without leaving issue on Dec. 25, 1949. R.S. junior was survived by his wife in whose favour a jointure was charged on the settled realty, and, therefore, the settlement under the will of R.S. senior remained in existence. By his will dated June 14, 1886, W.S., in case he should become entitled in fee simple to the said real property, devised the same (subject to subsisting prior limitations and to a jointure and certain portions charged by his own will) to the use of his trustees for a term of fifteen hundred years to raise a portion of £20,000 for each of his daughters. Each portion was then settled. On the question of the incidence of estate duty exigible in respect of the settled realty in connection with the death of R.S. junior, B

HELD: on the death of R.S. junior the settled realty passed to the special personal representatives, and not to the executors of R.S. junior as such; the special personal representatives were required to pay the estate duty thereon and were entitled within s. 14 (1) of the Finance Act, 1894, to recover the duty "from the person entitled to any sum charged on such property . . . under a disposition not containing any express provision to the contrary"; the persons entitled to the portions charged by the will of W.S. were such persons within the meaning of s. 14 (1); and, there being no express provision to the contrary in the will of W.S., they were liable to bear a rateable proportion of the duty. C

Decision of ROXBURGH, J. ([1952] 1 All E.R. 44), reversed. D

Estate Duty—Incidence—Property not passing to executor as such—Recovery of duty from persons entitled to sum charged on the property—"Provision to the contrary"—Finance Act, 1894 (c. 30), s. 14 (1). E F

Power of Appointment—Exercise—Excessive exercise—Power to appoint £25,000—Appointment of £15,000 clear of death duties—Total sum including duties exceeding £25,000.

By his will dated June 14, 1886, W.S. declared that it should be lawful for every person thereby made tenant for life of the settled estates, either before or after he should become entitled in possession by deed or will (but subject to prior limitations) to charge "all or any of the said premises [devised in settlement] with the payment of any sum or sums not exceeding . . . the sums hereinafter mentioned as and for the portion or portions of his or her child or children or any one or more exclusively of the other or others of his . . . children . . . that is to say . . . not exceeding for four or more such children . . . between them £25,000 . . ." By a deed dated June 5, 1931, H.S., being then tenant for life in remainder under the will of W.S., appointed that the settled estates should, subject to prior estates, powers and interest, "remain and be held upon trust for the trustees for the term of a thousand years upon the trusts following that is to say: (a) the trustees shall . . . by mortgage . . . or sale or demise of the premises . . . or by any other reasonable means raise the sum of G H

£15,000 clear of death duties (or such less sum as shall be the maximum principal sum chargeable by the appointor under the power now being exercised) . . . in trust for such of the daughters [of H.S.] as shall be objects of the power . . . in equal shares". There were five daughters of H.S. who were objects of the power. H.S. died on Aug. 12, 1950, after his life interest had fallen into possession.

A HELD: (i) the portioners under the deed of 1931 were also liable to bear a proportion of the estate duty payable on the death of R.S. junior, and in addition they were liable to bear a proportion of the estate duty payable in respect of the settled estates on the death of H.S.

B (ii) the deed of 1931 did not contain "an express provision to the contrary" within s. 14 (1) of the Act of 1894 so as to relieve the daughters of H.S. from their liability to bear a proportionate part of the estate duty chargeable in respect of the settled estates, and in so far as the deed purported to charge the settled estates with a sum (including death duties) exceeding £25,000, it was an excessive exercise of the power.

Re Smith-Bosanquet ([1940] 3 All E.R. 519), and *Re Sebright* ([1944] 2 All E.R. 547), distinguished.

C AS TO BY WHOM ESTATE DUTY IS PAYABLE, see HALSBURY, Hailsham Edn., Vol. 13, pp. 279-285, paras. 290-299; and FOR CASES, see DIGEST, Vol. 21, pp. 27, 28, Nos. 148-166.

Cases referred to:

D (1) *Berry v. Gaukroger*, [1903] 2 Ch. 116; 72 L.J.Ch. 435; 88 L.T. 521; 21 Digest 27, 155.

(2) *Re Fuchs*, [1944] 1 All E.R. 338; [1944] Ch. 200; 113 L.J.Ch. 97; 170 L.T. 191; 2nd Digest Supp.

(3) *Re Drake*, [1926] Ch. 559; 95 L.J.Ch. 386; 134 L.T. 362; Digest Supp.

(4) *Re Smith-Bosanquet*, [1940] 3 All E.R. 519; [1940] Ch. 954; 109 L.J.Ch. 440; 164 L.T. 267; 2nd Digest Supp.

E (5) *Re Sebright*, [1944] 2 All E.R. 547; [1944] Ch. 287; 113 L.J.Ch. 260; 171 L.T. 82; 2nd Digest Supp.

F APPEAL by the tenant in tail male in possession of real property under the will of the Reverend Walter Sneyd, deceased, who died on July 2, 1888, (i) against a decision of ROXBURGH, J., dated Nov. 29, 1951, reported [1952] 2 All E.R. 44, that no part of the estate duty exigible in respect of the said real property in connection with the death of Colonel Ralph Sneyd, deceased, who died on Dec. 25, 1949, was recoverable from persons entitled to portions charged by the said will on the said real property; and (ii) against an order of ROXBURGH, J., made on Nov. 29, 1951, in so far as it was thereby declared that the portions appointed to the daughters of Major Henry Ralph Mowbray Sneyd by a deed dated June 5, 1931, ought not to be charged with any part of the estate duty payable on the death of the said Colonel Ralph Sneyd in respect of the said real property; and (iii) against the said order in so far as it was thereby declared that the said portions appointed to the daughters of Major Henry Sneyd ought to be treated as being of an aggregate amount of £25,000 and for a declaration that the said portions ought to be treated as being of the aggregate amount of £15,000.

H CROSS-APPEAL by the portioners under the deed of 1931 asking that the said order of ROXBURGH, J., should be discharged in so far as it declared that the portions appointed to the daughters of Major Henry Sneyd by the deed of 1931 ought to be charged with a rateable part of the estate duty payable on the death of Major Henry Sneyd in respect of the said real property, and that in lieu thereof it might be declared that the said portions ought not to be charged with any part of the estate duty payable on the death of Major Henry Sneyd.

Salt, Q.C., and *H. E. Francis* for the fourteenth defendant, the infant tenant in tail male in possession.

J. A. Wolfe for the second to the fifth defendants and the fifteenth defendant, entitled to the portions under the will of the Reverend Walter Sneyd.

Wigglesworth for the sixth to the eighth defendants, interested in portions appointed under the will of the Reverend Walter Sneyd.

E. G. Wright for the ninth to the thirteenth defendants, portioners under the deed of June 5, 1931.

Wilfrid Hunt for the plaintiffs, the trustees of both the will of Ralph Sneyd, senior, and the will of Walter Sneyd.

SIR RAYMOND EVERSHED, M.R.: The question which arises for determination is now limited to one problem: What is the effect as regards the properties and dispositions with which this court is concerned of the Finance Act, 1894, s. 14 (1)? In saying that the matter is resolved to that single point, I am not to be taken to be suggesting that it is an easy one, and I have been conscious of considerable variation of view as the argument has proceeded, but, having reached a conclusion, rightly or wrongly, in the matter, I think there would be no advantage to be taken from postponing the delivery of my judgment.

The relevant facts, though complex, are so clearly set out in the judgment of *ROXBURGH, J.* ([1952] 1 All E.R. 44) that I take the liberty of citing his narrative and making it part of my judgment. He said (*ibid.*, 45):

“The property with which we are concerned is real property in strict settlement, which was originally settled by Ralph Sneyd senior, who died on July 27, 1870. By his will, dated May 30, 1865, Ralph Sneyd senior devised the said settled estates to the use of his brother Walter Sneyd for life, and after his death to the use of Colonel Sneyd for life, and after the decease of Colonel Sneyd on limitations for the sons of Colonel Sneyd in tail—he had none—and in default of such issue to the use of Walter Sneyd; his heirs and assigns for ever. Walter Sneyd died on July 2, 1888, i.e., before the passing of the Finance Act, 1894, but Colonel Sneyd survived until Christmas Day, 1949, and, therefore, when Walter Sneyd died he (Walter Sneyd) had a vested defeasible remainder in fee simple in the settled estates. Heavy estate duty became payable on the death of Colonel Sneyd. By his will, dated June 14, 1886, Walter Sneyd, in case he should become entitled in fee simple to the real estate being freeholds of inheritance devised by the will of Ralph Sneyd senior, devised the same (subject to any estates or interests prior to the ultimate limitation to himself and also subject to a certain jointure and portions charged by his own will) and all his own real estate to the use of his trustees for a term of fifteen hundred years to commence from his decease on the trusts thereafter declared and from and after the expiration or determination of the said term of years and in the meantime subject thereto to various uses. The trusts of the term were to raise as and for the portion of each of his daughters (other than the eldest or any other daughter or daughters entitled as tenant for life in possession) the sum of £20,000 together with certain interest. The portion of each daughter was settled.”

The daughters in whose favour was the term of fifteen hundred years for raising portions of £20,000 each were four in number.

The first question which is raised is whether those sums charged as I have described by Walter's will (for I will refer to the Reverend Walter Sneyd as “Walter”) have to bear some part of the large sum for estate duty which fell to be payable on the death of the person described by *ROXBURGH, J.*, as Colonel Sneyd, who was a nephew of the original settlor, Ralph Sneyd, and a son of Walter. If the portioners do not bear any part of the estate duty which then

became exigible, the effect will be that such duty must be borne by the persons entitled to the settled property under Walter's disposition, subject to the portions term. In effect the charge would fall on the present infant tenant in tail. The dispositions of Walter's will, after providing for the portions term, went on to limit these estates in the events which happened, first, in favour of one Henry Ralph Mowbray Howard for life. He subsequently changed his name to Howard Sneyd and he has been called in the course of the argument A Major Henry Sneyd. Colonel Sneyd, otherwise Ralph Sneyd the younger, died on Dec. 25, 1949, and it was therefore on that date that the limitation in favour of Major Henry Sneyd, subject always to the portions term, took effect. Unhappily Major Henry Sneyd only survived Colonel Ralph Sneyd, his uncle, by a very few months, and he died on Aug. 12, 1950. Again, a charge B for estate duty arose. Major Henry Sneyd had executed a deed in 1931, shortly after the dissolution of his first marriage, and by that deed, in exercise of a power given to him by the will of Walter, he charged the settled property with portions in favour of his, Major Henry Sneyd's, five daughters by his first marriage. The amount of the sums so charged is, as I understand it, a problem which will arise later in this appeal, but a similar question arises in C regard to those portions as in regard to the portions in favour of Walter's daughters, for again there is a conflict between the interests of those portioners and the tenant in tail, who is the only son of Major Henry Sneyd born of his second marriage. The second wife of Major Henry Sneyd survives. She is in fact the first defendant in these proceedings, and her interest is that of a jointure, not, however, under the deed that I have mentioned whereby Major D Henry Sneyd charged the settled property with portions for his daughters, but under Major Henry Sneyd's will. The portioners under the deed of 1931 join with the portioners under Walter's will in saying that the trustees, or the tenant in tail, cannot look to them for any part of the death duties which became exigible on the respective deaths of Colonel Ralph Sneyd and Major Henry Sneyd.

E From the facts as I have stated them, two matters arise which clearly add to the singular nature of the circumstances of this case. In the first place, though Walter's will took effect and came into operation on his, Walter's, death in July, 1888, the devises and other dispositions he made in regard to the property in question did not take effect until the passage of no less than sixty-one years from his, Walter's, death, for during that intervening period F Colonel Ralph Sneyd the younger was the tenant for life in possession under the terms of the original settlement made by Ralph Sneyd the elder. The second unusual feature which makes it perhaps unlikely that the facts presented to this court will find any close parallel hereafter is that at the death of Walter there was—it sounds a strange thing in these days—no such thing as estate duty, for Parliament had not then enacted the Finance Act, 1894. G Moreover, at that distant time the Land Transfer Act, 1897, had not been passed, so that real property did not pass to and vest in the personal representatives of a deceased proprietor. In the absence of testamentary disposition, the real estate would go to the heir at law, and if there was a will it would pass to the testamentary devisee.

H The problem is: What is the effect of s. 14 (1) in the circumstances that have occurred? The sub-section provides:

"In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorised or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise,) under a disposition not containing any express provision to the contrary."

Let me examine the situation that arose at the death on Christmas Day, 1949, of Colonel Ralph Sneyd the younger. I should have stated (because it was not comprehended in the narrative of ROXBURGH, J.) that Colonel Ralph Sneyd was survived by his third wife, Dorothy Charlotte Sneyd, who is the seventh defendant. She is interested in one of the sums charged for portions, but she was also entitled, by virtue of an exercise of a power conferred by the original settlement on Colonel Ralph Sneyd, to a jointure, and, on the death of Colonel Ralph Sneyd, that jointure sprang into being. To that extent, on any view of the matter, the settlement created by the first Ralph Sneyd's will remained in operation. According to the proper conveyancing practice and law, the effect of the continuance of the settlement was that the real estates in question, or their proceeds of sale, vested, on the death of Colonel Ralph Sneyd the younger, in what are called, under the property legislation of 1925, his "special personal representatives", as distinct from "general personal representatives", being persons who take only a vesting of the settled property. In other words, they are personal representatives for the limited purpose only of giving effect to the subsisting settlement and passing on the title of the settled property. That circumstance of the continued existence of the settlement after Colonel Ralph Sneyd's death has been called "fortuitous" by counsel for the portioners under Walter's will, and, of course, it was, but then any continuation of a settlement may be regarded as fortuitous in so far as it depends on the continued existence of some person who is entitled to a limited interest under the settlement. I will, however, say at once that it seems to me that the fact that the settlement continued and that it was true to say that, in the hands of the special personal representatives, the Keele estates, with which we are concerned, remain settled property is of the essence of the matter. Colonel Ralph Sneyd having had no issue, the effect of his death was to change the interest which Walter had had under the original settlement from an absolute fee simple in remainder defeasible on the coming into being of issue of Colonel Ralph Sneyd into a similar interest, indefeasible. In other words, on the death of Colonel Ralph Sneyd there sprang instantly into being and effect the devises and other limitations of Walter's will which I have read.

If I now turn back to s. 14 (1), the question is: Do its terms fit the circumstances as I have indicated them? The first requirement of the application of the section is contained in the first line in the words: "In the case of property which does not pass to the executor as such . . .". It is agreed that in the circumstances of this case the settled property which devolved on the special personal representatives of Colonel Ralph Sneyd is not to be described as property passing to the executors as such. Therefore, the first condition for the application of s. 14 (1) is satisfied. The sub-section proceeds

" . . . an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorised or required to pay the estate duty in respect of any property has paid such duty, from the person . . ."

lastly referred to. As regards the second part of that sub-section, again there is no question of its applicability. The special personal representatives became liable and answerable for this large sum of duty which was then exigible, and they have paid it or are in the course of so doing. Therefore, they are entitled, within the terms of the section, to recover that duty from the person who is last mentioned in this sub-section. The contest is: Who is that person, and does the description include the portioners in this case? The formula is:

" . . . from the person entitled to any sum charged on such property . . . under a disposition not containing any express provision to the contrary."

I confess that, on a first reading of the sub-section, it would appear tolerably plain, as a matter of language, that the portioners were persons aptly described

by these words, for, as a result of Walter's will (which, having been made before the Finance Act, 1894, naturally enough did not contain any express provision to the contrary) they were entitled to a sum of £20,000 each charged on such property, which means, of course, the settled property which passed on the death of Colonel Ralph Sneyd.

A The argument on behalf of the portioners, however, has been to the effect that, although the words are general—"a disposition"—there is necessarily some limitation to be imposed on them. To take the simplest case, illustrated in such authorities as *Berry v. Gaukroger* (1), if someone entitled under the limitations of the settlement to a sum of money charged on the settled estate has himself, by independent contract or by some derivative sub-settlement, proceeded to deal in some way with the sum charged, then the persons paying the duty described in this sub-section are not in any case concerned with the persons interested under the contract or the sub-settlement. They are too remote for this purpose, and the persons so entitled cannot properly, within the meaning of this sub-section, be described as persons entitled to a sum charged on the settled property. If, therefore (and, again, I take the simplest case) settled property comes to the hands of personal representatives on the cesser of the last limitation in the settlement (other than a limitation in favour of some person absolutely entitled) so that the settlement comes entirely to an end, and such personal representatives are accountable to the person absolutely entitled, it appears that an interest derivatively created by that person absolutely entitled would not be an interest to which s. 14 (1) had any application.

D It is said by counsel for the portioners, with great force, that the example I have given of a derivative settlement aptly describes the interest created by Walter's will, and that it is a mere matter of history, irrelevant to this action, that the will came into operation so long ago as 1888, sixty-one years before the tenant for life, Colonel Ralph Sneyd, died. If that were so, I think all the necessary conclusions would follow, but, on the whole, I have reached the other conclusion. It seems to me that at the relevant date to which I am directing my attention, Dec. 25, 1949, this property remained settled and that the settlement then consisted of the combined instruments, the original will of Ralph Sneyd the elder, the will of Walter and such other documents as had been executed pursuant to powers contained in one or other of those instruments. I venture to think that that is the inevitable common sense of the matter. If one were asked the question: "What was the settled property on Colonel Ralph Sneyd's death in the hands of his special personal representatives?"; the answer would be: "The Keele estates and the proceeds of their sale settled by the combined effect of the instruments I have mentioned". Further, if one were asked: "Were the sums settled by way of portions by the will of Walter charged on the settled estates? ", the answer would be in the affirmative. The proceedings are after all entitled

G "In the matter of the Keele estates in the county of Stafford settled by a compound settlement created by the will dated May 30, 1865, of Ralph Sneyd (the elder), deceased, and by the will dated June 14, 1886, of Walter Sneyd, deceased",

H and I cannot treat that description as being erroneous or irrelevant. It seems to me, therefore, that the terms of the sub-section in this case are satisfied, the circumstances of the case being, as I have indicated, special in many respects. I confine my conclusion to these facts, and I attempt no answers to other possible cases which were put forward by way of illustration, but my conclusion so far stated will cover the case of the portioners under Walter's will, viz., his four daughters.

The situation of the five daughters of Major Henry Sneyd is a little different and requires some further, though I think slight, explanation. I have said

that they are concerned as the result of a deed executed in 1931, and that circumstance, again, is, I think, important. The deed was executed by him long before the estate came into his possession, but the deed was an exercise of the power to appoint portions contained in his grandfather's will, the will of Walter Sneyd. That being so and the effect of the deed being equally, as I think, to charge the estates settled by the joint effect of all these instruments, no distinction in principle emerges between the case of those portioners and the case of the portioners taking directly under the will of Walter.

I have stated my conclusion, and it is contrary to that of ROXBURGH, J. On a matter of this kind, I differ from him with hesitation and diffidence, but the grounds which supported his contrary opinion have not, I think, formed any substantial part of the argument of the respondents in this appeal. He based himself on the fact that, when on Colonel Sneyd's death the interest of Walter became for the first time indefeasible, there emerged what he called "an equity of redemption", i.e., a freehold property subject to a charge for estate duty. In other words, he took the view that the interposition by Parliament in 1894 of the charge for estate duty had the effect, so to speak, of making the devises in Walter's will operate only on what the learned judge called the equity of redemption, i.e., on what was left after the charge for duty had been paid. With all respect, I do not accept that analysis. The duty, of course, was a first charge, but the incidence of it between the various interests created by the will or the settlement is something quite different, and to assume that Walter's will was, on its true construction, dealing only with the equity of redemption, with what was left after the estate duty had been paid, is, with all respect, to my mind begging the question. Secondly, the learned judge held that all that the persons interested in the real property passing under Walter's will were entitled to was to have Walter's estate properly administered. It may well be, since the Land Transfer Act, 1897, that such a statement is more strictly applicable, but, as I have said, when Walter died there was no Land Transfer Act, 1897, and the persons who became entitled to real estate, whether as heir at law or devisees, became entitled to it without having to call on the estate to be administered. Indeed, there were no executors in whom any interest in the real estate vested. I cannot, therefore, accept that argument as applicable or relevant to the problem that we have to consider.

I do, however, agree with the learned judge in rejecting, as he did, the theory which counsel for the portioners under Walter's will put again before us and which might, if it were well founded, support the theory of an equity of redemption. That argument was that one has to divide up by a minute process of temporal calibration the series of events which occurred, beginning with (for it was the first of them) the death of Colonel Ralph Sneyd. Counsel said that there must be a temporal difference between cause and effect, that you must therefore assume that the death of Colonel Ralph Sneyd preceded by a period of time, however short, the attachment to the property of the charge for estate duty. Though the theory is somewhat metaphysical and the period of time is of a spectral character, nevertheless, I am prepared (for the sake of argument) to accept the view that some interval of time must elapse, or be deemed to elapse, between the death and the imposition of the duty, but I cannot go further and assume that the duty attaches by some infinitesimal margin of time before there arises or springs into existence the next succeeding beneficial limitation. The property passed on the death of Colonel Ralph Sneyd, and, by virtue of that passing, death duty became exigible, but I think that the coming into existence of the next limitation in succession cannot on any doctrine or principle be postponed until after the attachment of duty. If it were so, I can see that it would help counsel to say that the next limitation, which was Walter's now indefeasible estate, would then attach not to the original estates in their full splendour, but to the estates after estate duty had taken its toll of them.

One other matter was presented to ROXBURGH, J., and that was based on the Finance Act, 1894, s. 8 (4). The learned judge rejected that argument, following and applying the reasoning of SIMONDS, J., in *Re Fuchs* (2). It has been no part of the appellant's argument in this court that s. 8 (4) applies, and it has, therefore, been unnecessary for us to consider that matter at all. I say, accordingly, nothing about it.

A For the reasons which I have endeavoured to state, I conclude that the sums of money to which the several portioners were entitled by virtue of the charges created, first, by Walter's will, and, secondly, by Major Henry Sneyd's deed in 1931 are within the ambit of the language of s. 14 (1), so as to entitle and require the trustees of the compound settlement, on behalf and in right of the tenant in tail (who are also the special personal representatives of Colonel Sneyd and I think fill every other relevant capacity that it is possible for them to do, including that of being the statutory owners for the tenant in tail himself), to look to the sums respectively charged "as and for portions" to bear a rateable part of the several sums of duty. I think, accordingly, that the appeal should be allowed on this point.

BIRKETT, L.J.: I agree.

C ROMER, L.J.: I agree with the judgment which the Master of the Rolls has just delivered, but I will add a word or two, not because the whole matter has not been fully dealt with by him, but because the arguments before us seem to have followed, as he has indicated, a somewhat different course from those which were presented to the learned judge in the court below.

D The whole question, as presented to us, has turned on the Finance Act, 1894, s. 14, and it was agreed (and, indeed, plainly it is so) that s. 8 (4), on which a good deal of argument seems to have turned before ROXBURGH, J., is out of the picture, because that only deals with cases where property passes on the death of the deceased and the executor is not accountable for the estate duty in respect of such property, whereas it was agreed before us on all hands that the special representatives of Colonel Sneyd were accountable by reason of the Law of Property Act, 1925, s. 16 (1). Therefore, all that we have to consider is whether the position is within the language of s. 14 (1). It appears to me that, if one just takes the language as one finds it and applies it to the position as it arose on the death of Colonel Sneyd, s. 14 (1) applies, because all the requisite elements are present. It was a case where property did not pass to the executor as such, but the executor was authorised or required to pay the estate duty leviable in respect of that property. The "property" in question was the settled estate, and the next subject for inquiry then is whether there was a person entitled to any sum charged on the settled estate under a disposition not containing any express provision to the contrary. It seems to me clear at first sight that there were persons here entitled to sums charged on the property, viz., the portioners through the trustees carrying into execution the trusts of the portions term which were set up by the will of the Reverend Walter Sneyd. Then were those charges in respect of sums charged "on such property", "such property", as I have indicated, being referable to the property referred to in the earlier part of the section—in this case, the settled estate? The answer to that, I should have thought, was: Yes. The portions were raisable out of the whole of the settled estate. Therefore, H it is not easy at first sight to see why that sub-section should not apply and why a contribution should not be levied on the trustees of the portions term, the result being to reduce the portions payable.

It was argued that the personal representatives, who were the Settled Land Act trustees of what was a compound settlement and, however fortuitously, continued to be a compound settlement after the death of Colonel Sneyd, were only concerned with charges which had been brought into being under or by virtue of that settlement. I suppose that it is clear that some limitation has

to be put on the very general language in which s. 14 (1) is couched, and it may be (it is not necessary to decide it) that they would not be concerned with a charge which had been brought into being by some instrument, or coming from some source, which was wholly unconnected with the settlement of which the personal representatives were the trustees. In this case, however, the charges were brought into being by one of the instruments which together constituted the compound settlement, viz., the will of the Reverend Walter Sneyd. Therefore, whatever restrictions one places on the generality of the language that one finds in the sub-section, it seems to me that this charge, on the facts of the present case, is within the language used. It is next suggested that in a sense the charge for the portions is to be regarded as a derivative charge, or as coming into being under a derivative settlement, but that is not so. It is quite true that, if one of the portioners had charged by way of mortgage her portion, then on Colonel Sneyd's death s. 14 (1) would not operate as against the mortgagee of that portion, and the reason, as is clearly stated by SARGANT, L.J., in *Re Drake* (3), is that the section is fully executed as against the original chargee and, having been fully executed, it is exhausted and there is nothing of the sub-section to survive so as to have any effective operation against derivative interests carved out by the original chargee. That, however, is not this case, because none of the portioners has mortgaged or in any other way alienated her share. One is only concerned with the original chargees as representing the respective portioners.

It is further suggested that the property on which the portions were charged was not the same property as that which did not pass to the executors as such, but in respect of which they were authorised or required to pay the duty. It was said that the property in respect of which they were authorised or required to pay the duty was the entirety of the settled estate, whereas all that the portions were charged on was something in the nature of an equity of redemption, which would differentiate that property from the property which as an entirety was subject to duty. The suggestion was that, by reason of the passing of the Finance Act, 1894, from that moment onwards there was a sort of inchoate charge fastened on this property and that, although until 1894 it was true to say that the portions were charged on the whole of the property if and when it fell into possession in Walter's estate, thereafter it was only a charge on the property subject to a prior charge for estate duty, and all that Walter's estate had from that moment onwards was an interest in property which was subject to an inchoate charge in favour of the Revenue, which charge would crystallise if and when the duty became exigible. I cannot take that view of the matter. There was not a charge. The passing of the Finance Act, 1894, gave rise to no charge. There was no charge of any sort or kind fastened on this property in respect of estate duty down to the time of the death of Colonel Sneyd. From 1894 onwards everybody knew that eventually, if on the death of Colonel Sneyd without issue the property reverted to the estate of Walter, duty would be payable and that duty would, by virtue of the provisions of the Finance Act, be a charge, but that is very far away from saying that, during the lifetime of Colonel Sneyd, there was a charge of any sort or kind, because there was not: there was nothing more than an expectation of a future charge. The result was that, in my opinion, on the death of Colonel Sneyd the portions were charged on the whole of the property and not merely on something which could be described as an equity of redemption.

Finally, there was the question of the sequence of events, with which my Lord has fully dealt, the suggestion being that, as the death of Colonel Sneyd gave rise to the claim and charge for duty, that operated at once, and everything else must be deemed to have taken place afterwards, and, therefore, in that alternative way one reaches the position that the portions were only raisable out of the property subject to the charge. That is a very metaphysical

conception, and it seems to me that all the relevant events were brought about solely by the death of Colonel Sneyd without issue, and that they all happened simultaneously—the falling into possession of the property into Walter's estate, the right of the portioners to their portions, and the right of the Revenue to the duty, and, although truly the right of the Revenue to the duty took priority in point of charge over the rights of the portioners or the trustees as representing them, it did not, in my opinion, take preference in point of time, because, as I say, these things all happened together and it is too much of a refinement to say that one happened before the other or to apportion out some kind of sequence of time to the various events respectively.

Accordingly, for these reasons and those which my Lord has given, I agree that this appeal should be allowed. I repeat that most of the arguments which were presented to this court were, apparently, not presented to ROXBURGH, J., or, at all events, he, apparently, decided the case on points on which no reliance has been placed in this court and did not deal with the difficult points which have been presented to us.

[THEIR LORDSHIPS heard argument on the points secondly and thirdly mentioned above and on the cross-appeal.]

SIR RAYMOND EVERSHERD, M.R.: The second point which has been raised is, in brief, whether the deed of 1931 executed by Major Henry Sneyd, to which I alluded in my earlier judgment, was an excessive exercise of the power conferred on him by Walter's will to appoint or to charge the settled estates with sums for portions, if and so far as the effect of it is to leave a clear sum for portions of £15,000 without any deduction from that sum having to be made in respect of the power of recoupment conferred by s. 14 (1).

Certain matters may be stated as being relatively plain. First, as regards the power of appointment, it is, in my judgment, clear enough that all that Major Henry Sneyd was empowered to do was in the circumstances of this case (that is, having regard to the number of his daughters) to charge the settled estates with a total figure for providing portions of £25,000 and no more. It has been argued that the power in Walter's will fairly can be and should be construed as permitting the appointor to charge a sum exceeding £25,000 by whatever is the necessary sum to produce the result that, when the sum charged has made whatever contribution towards estate duty it ought to make, there will be a figure left of £25,000 (net) for the enjoyment of the portioners. I agree with ROXBURGH, J., that such a result cannot be fairly attributed to the sense of the language used, and I agree with him also that some support for that view is to be derived from the formula: "to charge the estates with payments of sums as and for portions". If that is right, then next it is also quite clear, to my mind, that any exercise or purported exercise of the power which has the effect of charging the settled estates with a figure greater than £25,000 in respect of portions would be excessive. That, I think, as a proposition is conceded, but counsel for the portioners under the deed of 1931 has argued that, on its true construction, the document exercising the power did not have that effect, and he has further contended that the deed of appointment should be treated as a "provision to the contrary" within the terms of s. 14 (1), so that, without really raising the question of excessive exercise, the practical result is that the right of the trustees to go on the portioners for their rateable part of the estate duty in accordance with the section is thereby displaced.

I think that the proper approach in these cases must always be to look first at the document and to see what it means. I need not read the whole of it. The relevant words are found in cl. 4 of the deed, and are:

"The trustees shall [at the date specified] raise the sum of £15,000 clear of death duties (or such less sum as shall be the maximum principal sum chargeable by the appointor under the power now being exercised) . . ."

As a matter of plain terms, it seems to me that this appointor is saying: "I desire to charge the settled estates with either (i) a figure of £15,000 clear of death duties (meaning thereby a figure of such magnitude that there will remain £15,000 clear when all charges or contributions in respect of death duties are provided for) or (ii) if that is greater than the amount which the will of Walter tells me that I can charge, then the maximum sum that the will authorises".

I am unable to accept counsel's proposition that this deed of appointment can be regarded as being a disposition containing an express provision to the contrary within the meaning of s. 14 (1), so as to take the case altogether out of that sub-section and relieve the sums charged for portions of any liability to contribute and so also as to enable him to say that all that was charged was £15,000. Section 14 (1) (which has already been considered in our earlier judgments) provides that, in the case of property passing on the death otherwise than to executors as such, persons such as the special personal representatives of Colonel Ralph Sneyd in this case are entitled to recover a proper rateable part of the death duties, chargeable on the death, from persons entitled to sums charged on that property, unless the disposition—whatever for the moment that noun may cover—contains an express provision to the contrary. I think that language must mean an express provision making inapplicable the earlier part of the section and so freeing the persons entitled to sums charged on the property from liability to provide the rateable part of the death duty which otherwise the trustees would be entitled to recover. That seems to me to be something different from a provision which seeks to measure the sum to be charged by reference to the net figure that would be left after the liability for duty under this or any other section had been discharged. Treating the matter, therefore, as one entirely free from authority and governed by the language of the material instruments, I myself entirely agree with ROXBURGH, J., that the first alternative which Major Henry Sneyd put in his appointment is, on the facts of the case, excessive, but I cannot quite leave the matter there, for counsel for the portioners has very properly drawn our attention to two cases.

The first is *Re Smith-Bosanquet* (4), which was decided by BENNETT, J., in 1940. There power was given to a tenant for life under a settlement to appoint for the benefit of his widow any part of the income of the residuary trust income not exceeding £2,000 a year for the rest of her life. He purported to appoint and did appoint £2,000 a year "free of all deductions", and it was conceded that the amount expressed to be so appointed was a clear amount without liability to reduction as the result of a charge for estate duty and the way in which such a charge might be distributed among the persons entitled. In the argument for the widow, Mr. Vaisey put the case thus: The income of the residuary estate means the income of the estate after estate duty has been paid, and, therefore, the appointment was competent, because it only charged that income (i.e., the income of the estate after all duty had been paid) with the figure specified, viz., £2,000 per annum. In the course of his judgment, however, the learned judge may be said to have based himself on a different view of the matter, if his view is properly reported. He said ([1940] 3 All E.R. 522):

"It seems to me that, as long as the appointment made in exercise of the power does not charge the income of the residuary trust fund with a greater annual sum than £2,000, the appointment is within the terms of the power . . ."

So far he seems to have followed the argument presented by Mr. Vaisey, but then he used language which seems to indicate that in any case the use of the expression "free of all deductions" was (contrary to the view I have already indicated) a disposition "to the contrary" within the meaning of the Finance Act, 1894, s. 14 (1).

A In a later case, *Re Sebright* (5), a similar question arose in regard to a jointure. In that case, a tenant for life was empowered to charge the settled property with a jointure in favour of a widow not exceeding £600 a year. In exercise of that power, the tenant for life appointed the sum of £600 a year for the residue of the life of his wife "without any deduction". Much of the argument turned on the question of income tax and does not arise here, but in the course of the arguments it was contended by the widow that the matter was governed in principle by *Re Smith-Bosanquet* (4). Sir Norman Touche in answer put the matter thus: "In *Re Smith-Bosanquet* (4) the annuity was payable out of the income of a residuary trust fund the amount of which was only arrived at after payment of estate duty". That reflected Mr. Vaisey's argument in *Re Smith-Bosanquet* (4). "That does not apply here. The judgment in *Re Smith-Bosanquet* (4) does not make it clear on what ground it was decided, but if it is indistinguishable from the present case, it was not correctly decided".

B The learned judge, VAISEY, J., said ([1944] 2 All E.R. 551):

C "Did they [the appointors, for there was, I may say, another appointment of the same kind] by reason of the direction, go beyond the permitted limit of £600? The contention that they did so is supported by some authorities of great weight . . . I am, however, faced with a recent decision of BENNETT, J., namely, *Re Smith-Bosanquet* (4) which, after some hesitation, seems to me to cover the present case, and I shall follow it."

D We are here concerned with a charge on the corpus and with the language of the two instruments which I have already read. I do not think that the decisions in *Re Sebright* (5) or in *Re Smith-Bosanquet* (4) are of such a character as to be indistinguishable in any event from the present case, and I, therefore, feel at liberty to decide the present case, as did ROXBURGH, J., without regard to the decisions in those cases. But, if I comprehend the cases aright, I think Sir Norman Touche in his argument in *Re Sebright* (5) correctly justified the decision in *Re Smith-Bosanquet* (4) on the ground that the sum appointed was payable out of the income of a residuary trust fund, which would be arrived at after all relevant deductions for death duties. VAISEY, J., was obviously in a difficulty, and, in the circumstances, I am disposed to agree that he could do no other than follow the decision of BENNETT, J., in *Re Smith-Bosanquet* (4). I need not say more about those two cases, for I think that they do not cover a case such as the present, where in plain terms (as I think) authority was given to charge the settled estates with a capital sum of a limited amount and where the necessary effect of the language of the appointment or the first alternative in the deed of appointment would inevitably be to charge the settled estates with a larger figure than that figure. For those reasons, I think that on this point ROXBURGH, J., arrived at a correct decision and, on this aspect of the matter, I would dismiss the cross-appeal.

G BIRKETT, L.J.: I agree.

ROMER, L.J.: I also agree with the judgment of the Master of the Rolls, and, in particular, I should like to associate myself with the observations which he has made with regard to *Re Smith-Bosanquet* (4) and *Re Sebright* (5). I agree that the appeal on this point fails.

H *Appeal in respect of point (i) and point (ii) allowed, and appeal in respect of point (iii) and cross-appeal dismissed.*

Solicitors: *Hunters* (for the fourteenth defendant and for the ninth to the thirteenth defendants); *Nicholl, Manisty, Few & Co.* (for the second to the fifth defendants); *Royds, Rawstone & Co.* (for the sixth to the eighth defendants); *Cunliffe & Airy*, agents for *Knight & Sons*, Newcastle-under-Lyme (for the plaintiffs).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

HOENIG v. ISAACS.

[COURT OF APPEAL (Somervell, Denning and Romer, L.J.J.), January 18, 21, 22, 23, February 13, 1952.]

Work and Labour—Lump sum contract—Substantial compliance with contract—Defects and omissions—Right to repudiate—Waiver—Contract to furnish flat—“Net cash as work proceeds and balance on completion”—Use of furniture. A

The plaintiff, an interior decorator and designer of furniture, was employed by the defendant to decorate and furnish the defendant's flat for the sum of £750, the terms of payment being “net cash, as the work proceeds, and balance on completion”. The defendant paid £400 by instalments, occupied the flat, and used the furniture, but he refused to pay the balance of the contract price on the ground that certain work done and articles of furniture supplied were defective. On a claim by the plaintiff for the balance, the official referee found that, although there were certain defects in the furniture, there had been a substantial compliance with the contract. B

Held: (i) in an action on a contract for work and labour and articles supplied for a lump sum payable on completion the defendant cannot repudiate liability on the ground that the work, though substantially performed, is in some respects not in accordance with the contract, and, therefore, the defendant was liable for the balance sued for, less a deduction based on the cost of making good the defects or omissions proved. C

(ii) even if entire performance was a condition precedent to payment under the contract, in taking the benefit of the work by using the defective furniture the defendant had waived the condition and must pay the contract price subject to the appropriate deductions. D

Mondel v. Steel (1841) (8 M. & W. 858), and *H. Dakin & Co., Ltd. v. Lee* ([1916] 1 K.B. 566), applied.

AS TO REMUNERATION FOR WORK AND LABOUR, see HALSBURY, Hailsham Edn., Vol. 34, pp. 460-465, paras. 521-528; and FOR CASES, see DIGEST, Vol. 44, pp. 1296-1300, Nos. 16-55. E

Cases referred to:

- (1) *Cutter v. Powell*, (1795), 6 Term Rep. 320; 101 E.R. 573; 12 Digest, Replacement, 130, 810.
- (2) *Dakin (H.) & Co., Ltd. v. Lee*, [1916] 1 K.B. 566; 84 L.J.K.B. 2031; 113 L.T. 903; 7 Digest 367, 144.
- (3) *Eshelby v. Federated European Bank, Ltd.*, [1932] 1 K.B. 423; 101 L.J.K.B. 245; 146 L.T. 336; Digest Supp.
- (4) *Dakin v. Oxley*, (1864), 15 C.B.N.S. 646; 33 L.J.C.P. 115; 10 L.T. 268; 143 E.R. 938; 41 Digest 653, 4857.
- (5) *Sinclair v. Bowles*, (1829), 9 B. & C. 92; 7 L.J.O.S.K.B. 178; 109 E.R. 35; 7 Digest 367, 145.
- (6) *Boone v. Eyre*, (1779), 1 Hy. Bl. 273, n.; 126 E.R. 160; 12 Digest, Replacement, 472, 3526.
- (7) *Sumpter v. Hedges*, [1898] 1 Q.B. 673; 67 L.J.Q.B. 545; 78 L.T. 378; 7 Digest 368, 147.
- (8) *Appleby v. Myers*, (1867), L.R. 2 C.P. 651; 36 L.J.C.P. 331; 16 L.T. 669; 12 Digest, Replacement, 696, 5334.
- (9) *Broom v. Davis*, (1794), 7 East, 480, n.; 103 E.R. 186; 44 Digest 1298, 39.
- (10) *Mondel v. Steel*, (1841), 8 M. & W. 858; 10 L.J.Ex. 426; 151 E.R. 1288; 7 Digest 398, 262.

APPEAL by the defendant from an order of His Honour SIR LIONEL LEACH, Official Referee, dated July 20, 1951, on a claim by the plaintiff for the balance H

of money alleged to be due to him from the defendant for work and labour and materials supplied.

A The plaintiff was an interior decorator and furniture designer. The defendant, the owner of a one room flat, employed the plaintiff to decorate it and provide it with furniture, including bedstead and wardrobe and bookcase fittings, for a sum of £750, the terms of payment being "net cash, as the work proceeds; and balance on completion". On Apr. 12, 1950, the defendant paid £150, and on Apr. 19 he paid a further £150. On Aug. 28, the plaintiff said that he had carried out the work in compliance with the contract and requested payment of the balance of £450. The defendant replied complaining of faulty design and bad workmanship, but he sent the plaintiff a further £100, entered into occupation of the flat, and used the furniture. On a claim by the plaintiff for the balance of £350, the defendant alleged that the plaintiff had failed to perform his contract, and, alternatively, that the work was done negligently, unskilfully, and in an unworkmanlike manner. The official referee held that the door of a wardrobe required replacing, and that a bookshelf, which was too short, would have to be re-made, which would require alterations being made to a bookcase. The defendant contended that this was an entire contract which had not been performed, and, therefore, the plaintiff could not recover. The official referee held that there had been a substantial compliance with the contract and that the defendant was liable for £750 less the cost of remedying the defects which he assessed at £55 18s. 2d., and he gave judgment for £294 1s. 10d.

Platts-Mills and Belcourt for the defendant.

N. Lawson for the plaintiff.

Cur. adv. vult.

February 13. The following judgments were read.

SOMERVELL, L.J., stated the facts and continued. Counsel for the defendant submits that the decision of the official referee is wrong in law. He submits that this is an entire contract which, on the findings of fact, has not been performed. On the well-known principle applied to the facts of that case in *Cutter v. Powell* (1) he submitted that the plaintiff cannot, therefore, recover on his contract. He was not concerned to dispute that on this basis the plaintiff might on the facts of this case be entitled to recover on a quantum meruit. Such a claim has never been put forward. If it were, he submits that the amount recoverable would be the fair value of what was done and delivered. The learned official referee found that there had been a substantial compliance with the contract. Counsel submits that, if his first point is right, this does not enable the plaintiff to succeed. If necessary, he submits that on his findings of fact the learned official referee was wrong as a matter of law in holding that there had been substantial compliance. [HIS LORDSHIP referred to the official referee's findings as to the wardrobe door, the bookshelf, and the bookcase, and continued:] If any issue arises whether the breaches were substantial, I think it must be based on the items to which I have referred, bearing in mind, of course, that there were some additional minor defects.

The official referee regarded the principle laid down in *H. Dakin & Co., Ltd. v. Lee* (2) as applicable. The contract in that case was for repairs to a house. The official referee before whom the case came in the first instance found that the work as completed did not accord with the contract in certain respects. He proceeded to hold that the plaintiff could not recover any part of the contract price or any sum in respect of the contract work. This decision was reversed in the Divisional Court and their decision was affirmed by this court. In support of the official referee's decision it was argued that the plaintiff could not recover either on the contract or on a quantum meruit. No new contract on the latter basis could be implied from the fact that the defendant by continuing to live in her house had enjoyed the benefit of what had been done.

In *Eshelby v. Federated European Bank, Ltd.* (3) GREER, L.J. ([1932] 1 K.B. 431) clearly felt some difficulty about *H. Dakin & Co., Ltd. v. Lee* (2) as possibly inconsistent with *Cutter v. Powell* (1), and the cases following that decision and deciding that where work is to be done for a sum named neither that sum nor any part of it can be recovered while the work remains undone. We were referred to a number of these cases and I have considered those authorities and others. Each case turns on the construction of the contract. In *Cutter v. Powell* (1) the condition for the promissory note sued on was that the sailor should proceed to continue and do his duty as second mate in the ship from Jamaica to the port of Liverpool. The sailor died before the ship reached Liverpool and it was held his estate could not recover either on the contract or on a quantum meruit. It clearly decided that his continuing as mate during the whole voyage was a condition precedent to payment. It did not decide that if he had completed the main purpose of the contract, namely, serving as mate for the whole voyage, the defendant could have repudiated his liability by establishing that in the course of the voyage the sailor had, possibly through inadvertence, failed on some occasion in his duty as mate whereby some damage had been caused. In these circumstances, the court might have applied the principle applied to ordinary contracts for freight. The shipowner can normally recover nothing unless the goods are carried to their agreed destination. On the other hand, if this is done, his claim is not defeated by the fact that some damage has been done to the goods in transit which has resulted from a breach of the contract. The owner of the goods has his remedy by cross-action: *Dakin v. Oxley* (4). The damage might, of course, be so great as to raise the question whether what was agreed to be carried had substantially arrived (*ibid.*). *Sinclair v. Bowles* (5) is often cited as an illustration of the *Cutter v. Powell* (1) principle. The plaintiff had undertaken to repair chandeliers and make them "complete" or "perfect". This he, quite plainly on the evidence and findings of the jury, failed to do. It may, perhaps, be regarded as a case where, on the construction of the contract, having regard to the subject-matter, there was no scope for terms collateral to the main purpose.

The principle that fulfilment of every term is not necessarily a condition precedent in a contract for a lump sum is usually traced back to a short judgment of LORD MANSFIELD, C.J., in *Boone v. Eyre* (6)—the sale of the plantation with its slaves. LORD MANSFIELD said (1 Hy. Bl. 273):

" . . . where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent".

One is very familiar with the application of this principle in the law relating to the sale of goods. Quoad stipulations which are conditions, the *Cutter v. Powell* (1) principle is applicable. If they are not all performed the other party can repudiate, but there will not have been, as there was in *Cutter v. Powell* (1), a partial performance. But there may be other terms, collateral to the main purpose, the breach of which in English law gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated: see definition of warranty, Sale of Goods Act, 1893, s. 62 (1).

In a contract to erect buildings on the defendant's land for a lump sum, the builder can recover nothing on the contract if he stops before the work is completed in the ordinary sense—in other words, abandons the contract. He is also usually in a difficulty in recovering on a quantum meruit because no new contract can be inferred from the mere fact that the defendant remains in possession of his land: *Sumpter v. Hedges* (7). In *Appleby v. Myers* (8) while the work was in progress the premises and the work so far done on them were destroyed by fire and the court held both parties excused. At the end

of his judgment BLACKBURN, J., after referring to *Cutter v. Powell* (1), *Sinclair v. Bowles* (5), and that line of cases, said (L.R. 2 C.P. 661):

“ . . . the plaintiffs, having contracted to do an entire work for a specific sum, can recover nothing unless the work be done . . . ”

In *H. Dakin & Co., Ltd. v. Lee* (2) LORD COZENS-HARDY, M.R., I think, had this principle in mind when he said ([1916] 1 K.B. 578):

A “ The work was finished—and when I say this I do not wish to prejudice matters, but I cannot think of a better word to use at the moment.”

The question here is whether in a contract for work and labour for a lump sum payable on completion the defendant can repudiate liability under the contract on the ground that the work though “ finished ” or “ done ” is in some respects not in accordance with the contract. *H. Dakin & Co., Ltd. v. Lee* (2) is, of course, binding on us, but counsel for the defendant submitted that it was an exception to a general rule applying to contracts such as that in issue here and should be confined within as narrow limits as possible. I agree with the learned editor of the notes to *Cutter v. Powell* (1) in SMITH'S LEADING CASES, 13th ed., vol. 2, p. 21, that *H. Dakin & Co., Ltd. v. Lee* (2), so far from being an exception, re-affirmed the true position on the construction of this class of contract on which doubts had been thrown by taking certain observations out of their context.

D In *Broom v. Davis* (9) BULLER, J., decided that where a man had contracted to build a booth for a lump sum, and the booth was built but later fell down through faulty workmanship, the plaintiff could claim the agreed sum, but the defendant could have a cross-action for damages. So far as one can gather the facts from the report it might, I think, be held today that the defects were so substantial as to go to the root of the consideration, but it is an example, perhaps an extreme one, of the principle applied in *H. Dakin & Co., Ltd. v. Lee* (2).

E In *Mondel v. Steel* (10) the issue was procedural, but in a passage often cited PARKE, B., deals with contracts “ for an agreed price . . . of work which was to be performed according to contract.” After referring to the fact that a breach of warranty does not preclude the buyer from maintaining an action for the price he says of an agreement for work (8 M. & W. 870):

F “ . . . the law appears to have construed the contract as not importing that the performance of every portion of the work should be a condition precedent to the payment of the stipulated price, otherwise the least deviation would have deprived the plaintiff of the whole price; and therefore the defendant was obliged to pay it, and recover for any breach of contract on the other side.”

G The learned official referee regarded *H. Dakin & Co., Ltd. v. Lee* (2) as laying down that the price must be paid subject to set-off or counterclaim if there was a substantial compliance with the contract. I think on the facts of this case where the work was finished in the ordinary sense, though in part defective, this is right. It expresses in a convenient epithet what is put from another angle in the Sale of Goods Act, 1893. The buyer cannot reject if he proves only the breach of a term collateral to the main purpose. I have, therefore, come to the conclusion that the first point of counsel for the defendant fails.

H The learned official referee found that there was substantial compliance. Bearing in mind that there is no appeal on fact, was there evidence on which he could so find? The learned official referee having, as I hold, properly directed himself, this becomes, I think, a question of fact. The case on this point was, I think, near the border line, and if the finding had been the other way I do not think we could have interfered. Even if I had felt we could interfere, the defendant would be in a further difficulty. The contract included a number of chattels. If the defendant wished to repudiate his liability under the contract

he should not, I think, have used those articles, which he could have avoided using. On this view, though it is not necessary to decide it, I think he put himself in the same position as a buyer of goods who by accepting them elects to treat a breach of condition as a breach of warranty.

I now come to the final question, the measure of damages. It seems from the argument that the defendant regards the price of £750 as excessive irrespective of any relief by way of reduction of price or on his counterclaim. He was anxious to put the plaintiff in the position of having to sue on a quantum meruit for the value of the work done and he was anxious to tender evidence designed, no doubt, to show that the work done was worth much less than £750. The learned official referee excluded this evidence. The measure he applied was the cost of putting the work in accordance with the contract and on this basis such evidence was rightly excluded. The defendant is bound, he held, to pay for the furniture supplied less the cost of putting right the defects. This I think is, as the learned official referee thought, in accordance with *H. Dakin & Co., Ltd. v. Lee* (2). LORD COZENS-HARDY, M.R., there said ([1916] 1 K.B. 580):

" . . . the builders are entitled to recover the contract price, less so much as it is found ought to be allowed in respect of the items which the official referee has found to be defective ".

This seems to follow what was said by PARKE, B., in *Mondel v. Steel* (10). In dealing with the procedural point he said (8 M. & W. 872) that the defendant need not bring a cross-action but can diminish the price

" . . . by showing how much less the subject-matter of the contract was worth, by reason of the breach of contract ".

I therefore think the appeal must be dismissed.

DENNING, L.J.: This case raises the familiar question: Was entire performance a condition precedent to payment? That depends on the true construction of the contract. In this case the contract was made over a period of time and was partly oral and partly in writing, but I agree with the official referee that the essential terms were set down in the letter of Apr. 25, 1950. It describes the work which was to be done and concludes with these words:

" The foregoing, complete, for the sum of £750 net. Terms of payment are net cash, as the work proceeds; and balance on completion ".

The question of law that was debated before us was whether the plaintiff was entitled in this action to sue for the £350 balance of the contract price as he had done. The defendant said that he was only entitled to sue on a quantum meruit. The defendant was anxious to insist on a quantum meruit, because he said that the contract price was unreasonably high. He wished, therefore, to reject that price altogether and simply to pay a reasonable price for all the work that was done. This would obviously mean an inquiry into the value of every item, including all the many items which were in compliance with the contract as well as the three which fell short of it. That is what the defendant wanted. The plaintiff resisted this course and refused to claim on a quantum meruit. He said that he was entitled to the balance of £350 less a deduction for the defects.

In determining this issue the first question is whether, on the true construction of the contract, entire performance was a condition precedent to payment. It was a lump sum contract, but that does not mean that entire performance was a condition precedent to payment. When a contract provides for a specific sum to be paid on completion of specified work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions. The promise to complete the work is, therefore, construed as a term of the contract, but not

as a condition. It is not every breach of that term which absolves the employer from his promise to pay the price, but only a breach which goes to the root of the contract, such as an abandonment of the work when it is only half done. Unless the breach does go to the root of the matter, the employer cannot resist payment of the price. He must pay it and bring a cross-claim for the defects and omissions, or, alternatively, set them up in diminution of the price. The measure is the amount which the work is worth less by reason of the defects and omissions, and is usually calculated by the cost of making them good: see *Mondel v. Steel* (10); *H. Dakin & Co., Ltd. v. Lee* (2), and the notes to *Cutter v. Powell* (1) in SMITH'S LEADING CASES, 13th ed., vol. 2, pp. 19-21. It is, of course, always open to the parties by express words to make entire performance a condition precedent. A familiar instance is when the contract provides for progress payments to be made as the work proceeds, but for retention money to be held until completion. Then entire performance is usually a condition precedent to payment of the retention money, but not, of course, to the progress payments. The contractor is entitled to payment pro rata as the work proceeds, less a deduction for retention money. But he is not entitled to the retention money until the work is entirely finished, without defects or omissions. In the present case the contract provided for

C "net cash, as the work proceeds; and balance on completion." If the balance could be regarded as retention money, then it might well be that the contractor ought to have done all the work correctly, without defects or omissions, in order to be entitled to the balance. But I do not think the balance should be regarded as retention money. Retention money is usually only ten per cent., or fifteen per cent., whereas this balance was more than fifty per cent.

D I think this contract should be regarded as an ordinary lump sum contract. It was substantially performed. The contractor is entitled, therefore, to the contract price, less a deduction for the defects.

Even if entire performance was a condition precedent, nevertheless the result would be the same, because I think the condition was waived. It is always open to a party to waive a condition which is inserted for his benefit.

E What amounts to a waiver depends on the circumstances. If this was an entire contract, then, when the plaintiff tendered the work to the defendant as being a fulfilment of the contract, the defendant could have refused to accept it until the defects were made good, in which case he would not have been liable for the balance of the price until they were made good. But he did not refuse to accept the work. On the contrary, he entered into possession of the flat and

F used the furniture as his own, including the defective items. That was a clear waiver of the condition precedent. Just as in a sale of goods the buyer who accepts the goods can no longer treat a breach of condition as giving a right to reject but only a right to damages, so also in a contract for work and labour an employer who takes the benefit of the work can no longer treat entire performance as a condition precedent, but only as a term giving rise to damages.

G The case becomes then an ordinary lump sum contract governed by the principles laid down in *Mondel v. Steel* (10) and *H. Dakin & Co., Ltd. v. Lee* (2). The employer must, therefore, pay the contract price subject to a deduction for defects or omissions.

I would point out that in these cases the question of quantum meruit only arises when there is a breach or failure of performance which goes to the very

H root of the matter. On any lump sum contract, if the work is not substantially performed and there has been a failure of performance which goes to the root of it, as, for instance, when the work has only been half done, or is entirely different in kind from that contracted for, then no action will lie for the lump sum. The contractor can then only succeed in getting paid for what he has done if it was the employer's fault that the work was incomplete, or there is something to justify the conclusion that the parties have entered into a fresh contract, or the failure of performance is due to impossibility or frustration:

see *Appleby v. Myers* (8) (L.R. 2 C.P. 660); *Sumpter v. Hedges* (7); and s. 1 (3) of the Law Reform (Frustrated Contracts) Act, 1943. In such cases the contractor can recover in an action for restitution such sum as he deserves, or in the words of the Act, "such sum . . . as the court considers just." Those cases do not, however, apply in the present case, because in this case the work has been substantially performed. In my opinion, the official referee was right and this appeal should be dismissed.

ROMER, L.J.: I agree that this appeal fails. The defendant, by instalments, paid £400 of the agreed price and kept the furniture, but, when sued for the balance, refused to pay any more and said, indeed, and argued before us that he was not in law liable to pay anything under the contract at all because of certain defects in the furniture. The ground on which he based this claim was that the contract was an entire contract, that the plaintiff could not sue for any part of the purchase price unless and until he had wholly performed his obligations thereunder, and that this was a condition precedent which had never been fulfilled. Inasmuch as the learned official referee who tried the case found that, notwithstanding the most searching investigation by the defendant into every possible source of complaint, a sum of £55 18s. 2d. only was required to put right such defects in the work as he (the referee) found to have been established, the defendant's contention would appear on the face of it to be somewhat harsh, and it is to be observed that the contention could have been similarly used had the remedial expenditure amounted to no more than a £5 note.

The defendant's only attack on the plaintiff's performance of his obligations was in relation to certain articles of furniture which the plaintiff supplied and which the defendant says were faulty and defective in various important respects. The finding of the learned official referee on this was

"that the furniture supplied constituted a substantial compliance with the contract so far as the supply of furniture was concerned."

That is a finding of fact, and whether or not another mind might have taken a different view it appears to me impossible to say that there was no sufficient evidence on which the finding could be based. This, then, being a lump sum contract for the supply of furniture (and the carrying out of certain minor work) which was substantially complied with by the plaintiff, the question is whether the official referee was wrong in law in applying the principle of *H. Dakin & Co., Ltd. v. Lee* (2) and rejecting the defendant's submission that the plaintiff had failed to perform a condition on the fulfilment of which his right to sue depended. In my judgment, he was quite right in applying the *H. Dakin & Co., Ltd. v. Lee* (2) principle to the facts of the present case. I can see no reason why that principle should be approached with wariness and applied with caution. In certain cases it is right that the rigid rule for which the defendant contends should be applied, for example, if a man tells a contractor to build a ten foot wall for him in his garden and agrees to pay £x for it, it would not be right that he should be held liable for any part of the contract price if the contractor builds the wall to two feet and then renounces further performance of the contract, or builds the wall of a totally different material from that which was ordered, or builds it at the wrong end of the garden. The work contracted for has not been done and the corresponding obligation to pay consequently never arises. But when a man fully performs his contract in the sense that he supplies all that he agreed to supply but what he supplies is subject to defects of so minor a character that he can be said to have substantially performed his promise, it is, in my judgment, far more equitable to apply the *H. Dakin & Co., Ltd. v. Lee* (2) principle than to deprive him wholly of his contractual rights and relegate him to such remedy (if any) as he may have on a quantum meruit, nor, in my judgment, are we compelled to a

contrary view (having regard to the nature and terms of the agreement and the official referee's finding) by any of the cases in the books.

A The position is, I think, in some respects analogous to a case where a man agrees to sell land and, before completion, finds that he is unable to make title to a small part of it which is of no great significance in relation to the whole. In such a case the vendor can substantially perform what he has agreed to do but cannot perform it wholly, and the Court of Chancery has never hesitated to grant specific performance at his instance against the purchaser subject to a proper and reasonable deduction being made in the purchase price. It would not, however, make such an order if it resulted in the purchaser getting something substantially less than or different from what he had bargained for. The general principle is clearly stated in *FRY ON SPECIFIC PERFORMANCE*,
B 6th ed., p. 567, para. 1213, as follows:

C "The description by which a thing is contracted to be sold is a matter for which the vendor is *prima facie* responsible. Inasmuch, however, as equity looks to the substance rather than to the mere letter of a contract, if the vendor shows that he can substantially do what he contracted to do, he is entitled to enforce specific performance, although he may be unable to do it *modo et forma* according to the letter of the contract; the difference between what he contracted to do and what he can actually do becoming the subject of compensation."

D I am, accordingly, of the opinion, as already indicated, that the learned official referee fell into no error of law and that this appeal fails. If, however, I had come to a different conclusion on the point which I have been considering I should, nevertheless, be inclined to the view (for the reasons stated by *DENNING, L.J.*, in his judgment) that the appeal must fail on the ground of the defendant's waiver.

Appeal dismissed.

E Solicitors: *Beach & Beach* (for the defendant); *Herbert Oppenheimer, Nathan & Vandyk* (for the plaintiff).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

Re LILLINGSTON (deceased). PEMBERY *v.* PEMBERY AND ANOTHER.

[CHANCERY DIVISION (Wynn-Parry, J.), May 14, 15, 26, 1952.]

Gift—Donatio mortis causa—Reversion of subject-matter to donor in case of recovery—Certainty of imminence of death.

Gift—Donatio mortis causa—Delivery—Key to safe deposit containing jewellery—Safe deposit containing key to further safe deposit containing jewellery—Sufficiency of delivery of jewellery.

On Feb. 6, 1950, L., who had been in poor health for some months and was confined to her bed by illness, said to P. that she felt that she was "done for", that she was very near her end, and would die without leaving her room again. L. then said: "I am going to give you all my jewellery. I am giving you my key to the safe deposit at Harrods and when I am gone you can go and get the jewellery." She then handed to P. the keys of her trunk, and said: "Here is the key to the trunk over there. You will find the key to the Harrods safe deposit on the right hand side in the finger of a glove. I have shown you where it is before. The key to my city safe is at Harrods. I want you to have all my jewellery except the diamond necklace which is for my god-daughter. That is in my city safe." L. then took a packet from under her pillow and said: "This is also for you." P. opened it and saw that it contained jewellery. L. and P. and P.'s husband agreed that the packet should be kept in the trunk (which was in L.'s room), and P. opened the trunk with the key given her by L. and placed the packet inside. L. then said: "Keep the key; it is now yours." On Feb. 12, 1950, L. died. The safe deposits referred to by L. contained jewellery, and the safe deposit at Harrods, Ltd., also contained the key to the second safe deposit. P. claimed to be entitled to the jewellery in the packet and in the safe deposits.

HELD: on the evidence, it was not certain on Feb. 6, 1950, that L. would die within a few days although she thought that she was almost certain to die soon, and in those circumstances the essential condition of a donatio mortis causa that the donor must intend the subject-matter of the gift to revert to him should he recover was satisfied, and, there having been sufficient delivery of the jewellery in the packet and also of the jewellery in each of the safe deposits, a valid donatio mortis causa had been made thereof.

Gardner v. Parker (1818) (3 Madd. 184) and *Re Wasserberg* ([1915] 1 Ch. 195), applied.

Re Mustapha (1891) (8 T.L.R. 160), considered.

Lord Advocate v. M'Court (1893) (20 R. (Ct. of Sess.) 488), explained and distinguished.

AS TO DONATIONES MORTIS CAUSA, see HALSBURY, Hailsham Edn., Vol. 15, pp. 742-748, paras. 1283-1290; and FOR CASES, see DIGEST, Vol. 25, pp. 541-554, Nos. 286-390.

Cases referred to:

(1) *Treasury Solicitor v. Lewis*, [1900] 2 Ch. 812; 69 L.J.Ch. 833; 83 L.T. 139; 25 Digest 552, 371.

(2) *Re Harrison*, [1934] W.N. 25; 78 Sol. Jo. 135; Digest Supp.

(3) *Re Wasserberg*, [1915] 1 Ch. 195; 84 L.J.Ch. 214; 112 L.T. 242; 25 Digest 553, 378.

(4) *Re Craven's Estate*, [1937] 3 All E.R. 33; [1937] Ch. 423; 106 L.J.Ch. 308; 157 L.T. 283; Digest Supp.

(5) *Gardner v. Parker*, (1818), 3 Madd. 184; 56 E.R. 478; 25 Digest 544, 307.

(6) *Lawson v. Lawson*, (1718), 1 P. Wms. 441; 24 E.R. 463; 25 Digest 547, 324.

- (7) *Miller v. Miller*, (1735), 3 P. Wms. 356; 2 Eq. Cas. Abr. 575; 24 E.R. 1099; 25 Digest 556, 404.
- (8) *Jones v. Selby*, (1710), Prec. Ch. 300; 2 Eq. Cas. Abr. 573; 24 E.R. 143; 25 Digest 552, 374.
- (9) *Staniland v. Willott*, (1852), 3 Mac. & G. 664; 42 E.R. 416; *sub nom. Stainland v. Willott*, 18 L.T.O.S. 338; 25 Digest 550, 356.
- A (10) *Lord Advocate v. M'Court*, (1893), 20 R. (Ct. of Sess.) 488.
- (11) *Re Mustapha*, (1891), 8 T.L.R. 160; 25 Digest 553, 377.
- (12) *Re Johnson*, (1905), 92 L.T. 357; 25 Digest 553, 379.
- (13) *Delgoffe v. Fader*, [1939] 3 All E.R. 682; [1939] Ch. 922; 109 L.J.Ch. 6; 161 L.T. 166; Digest Supp.
- B (14) *Duffield v. Elwes*, (1827), 1 Bli. N.S. 497; 4 E.R. 959; *sub nom. Duffield v. Hicks*, 1 Dow & Cl. 1; 6 E.R. 425; 25 Digest 549, 351.

ADJOURNED SUMMONS with witnesses.

The plaintiff, Robert Ernest Gilbert Pembery, was the owner of a hotel which was managed by the first defendant, his wife, Edith Hilda Pembery. In November, 1949, Mrs. Elizabeth Lillingston, who was aged seventy-eight years and in failing health, took up permanent residence at the hotel, having obtained an assurance from Mrs. Pembery that she would not be sent to a hospital. Mrs. Pembery nursed her with the assistance of a trained nurse, who made two short visits each day. On Dec. 19, 1949, Mrs. Lillingston discussed with her bank manager a new will which she intended making. She said that she wished Mrs. Pembery to benefit by a monetary bequest and mentioned £4,000 or £5,000, but said that she might reduce the amount as she was giving D Mrs. Pembery all her jewellery except a necklace and a ring. On Jan. 7, 1950, Mrs. Lillingston sent for the plaintiff and said to him: "You are my executor." She then handed him a document and asked him to procure witnesses. The document merely appointed the plaintiff her sole executor and directed that all her personal property and effects were to be disposed of in accordance with her wishes of which Mrs. Pembery was already aware. Witnesses were obtained E and a will was executed. The plaintiff, however, subsequently persuaded Mrs. Lillingston to consult solicitors. On Jan. 9, 1950, a solicitor visited Mrs. Lillingston and took her instructions for a will. He had previously been informed by the plaintiff that there "might be some trouble about including the jewellery in the will", and as Mrs. Lillingston made no mention of the jewellery he suggested that she seemed to have overlooked it. Mrs. Lillingston replied: F "I shall have given that away before my death." On Jan. 14, 1950, the solicitor again visited Mrs. Lillingston and the engrossed will was executed. The question of the jewellery was again raised by the solicitor, but Mrs. Lillingston said she had "dealt with it". By her said will, Mrs. Lillingston gave Mrs. Pembery all her furniture, a screen, pictures, and candlesticks, and also £3,000. She bequeathed her trunks, suitcases and the whole of their contents to the plaintiff, requesting him (without creating a trust) to give effect G to the wishes which she had expressed with regard to their disposal. She gave other pecuniary legacies and bequeathed her residuary estate to the second defendant, Mrs. Alison Stirling Brooksbank.

On Feb. 6, 1950, a conversation took place between Mrs. Lillingston, Mrs. Pembery, and the plaintiff. In her affidavit relating to events on that day, H Mrs. Pembery said: "After she [Mrs. Lillingston] had recovered from a heart attack late in the evening on Feb. 6 she said that she felt low and depressed and asked me not to leave her. I sat by her bed and after a short time she said she felt she was 'done for', that she was very near her end, and would die without leaving her room again. She said: 'I want to be cremated. I do not want to go into the cold earth and I do not want any flowers'. There was a very long pause after this and I thought she had gone to sleep. She then said: 'I am going to give you all my jewellery. I am giving you my key to

the safe deposit at Harrods and when I am gone you can go and get the jewellery'. She then handed me the keys of her trunk. She said: 'Here is the key to the trunk over there'. I took the keys. She said: 'You will find the key to the Harrods safe deposit on the right hand side in the finger of a glove. I have shown you where it is before. The key to my city safe is at Harrods. I want you to have all my jewellery except the diamond necklace which is for my god-daughter. That is in my city safe'. I thanked her and reminded her that she wanted me to give a ring to Lillian [her former maid] and one to Muriel [Galsworthy]. She said: 'Yes, I leave it to you which one you give them'. She then took a packet from under her pillow and said: 'This is also for you'. I opened it and saw that it contained jewellery. I thanked her and suggested that we ought to tell my husband what she had done. She agreed and said: 'I am very tired, but it will not take long. Go and fetch him'. I fetched my husband, and Mrs. Lillingston told him what she had done, and we all three decided it was best to keep the jewellery which she had just handed to me in the trunk. I opened the trunk with the key she had just given me and put the parcel of jewellery in it. Mrs. Lillingston then said: 'Keep the key; it is now yours'. Mrs. Lillingston died on the following Sunday during one of her heart attacks."

In his affidavit Mr. Pembery said, referring to the events on Feb. 6, 1950: "I remember Mrs. Pembery calling me to the deceased's room on that day, and that Mrs. Pembery then showed me a parcel of jewellery which had just been given her. The deceased told me that she had given Mrs. Pembery all her jewellery, the remainder being in her two safe deposits. She then told me that she had given Mrs. Pembery the key of one of her trunks, that the key to Harrods safe deposit was in that trunk, and the key to the other safe deposit was in her Harrods safe deposit. She then told me that Mrs. Pembery was to give the diamond necklace, which she stated was in her city safe deposit to her god-daughter, a ring to her maid Lillian and a ring to Muriel Galsworthy. We (the deceased, Mrs. Pembery and myself) all agreed that the safest place for the time being to keep the jewellery that the deceased had just handed to Mrs. Pembery was in the trunk. Mrs. Pembery unlocked the trunk, placed the packet inside, and relocked the trunk. The deceased then said to Mrs. Pembery: 'Keep the key; it is now yours.' The deceased then said that she knew that she would never leave that room again, or words to that effect. By this time the deceased was very exhausted and said that she wanted to go to sleep. I said goodnight and left the room. Mrs. Pembery left shortly afterwards."

Mrs. Lillingston's former maid, Lillian Goodfellow, also filed evidence to the effect that (inter alia) on Feb. 5, 1950, she saw Mrs. Lillingston who left her in no doubt that she knew that she was very near death. The doctor who attended Mrs. Lillingston filed evidence that, during the last fortnight of her life, she seemed to make no effort to live and to be convinced that her life was very near its end. She died on Feb. 12, 1950.

Mrs. Lillingston had one trunk which contained jewellery, viz., the jewellery placed there by Mrs. Pembery on Feb. 6, 1950. The trunk was opened by the key produced by Mrs. Pembery, and also contained private papers and clothing, together with the key of the safe deposit at Harrods, Ltd. The safe deposit locker at Harrods, Ltd., contained jewellery and also the key to a safe deposit locker at the National Safe Deposit and Trustee Co., Ltd. The latter safe deposit contained jewellery. Mrs. Pembery claimed the jewellery in the trunk and in the two safe deposit lockers.

J. A. Brightman for the plaintiff, the executor.

Raymond Jennings, Q.C., and *F. B. Marsh* for the first defendant, Edith Hilda Pembery.

Milner Holland, Q.C., and *J. A. Wolfe* for the second defendant, the residuary legatee.

Curr. adv. vult.

May 26. WYNN-PARRY, J., read a judgment in which he stated the facts and continued: The first submission made by counsel for Mrs. Brooksbank, the second defendant and residuary legatee, was that on that evidence the true view is that Mrs. Lillingston had no intention of making either a gift inter vivos or a donatio mortis causa, but merely that of making a nuncupative will, her intentions being throughout testamentary, and her reason for excluding the jewellery from her will being due to her desire to attempt to hide from Mrs. Galsworthy and the second defendant the destination of her jewellery. This submission I reject. I agree that over the greater part of this material period, viz., from December, 1950, till her death, Mrs. Lillingston's intentions were testamentary, but they changed over the latter part of this period. In my view, the change occurred when she was persuaded to employ a solicitor to draft her will. She firmly refused to have the jewellery dealt with in the will which he was to prepare and did prepare for her. She said on the first occasion that her solicitor saw her: "That will have been dealt with before I die", and on the second occasion when the engrossment of the will was signed: "That has been dealt with". It is said that what she intended to do was, not to give the jewellery to Mrs. Pembery before her death, either conditionally or unconditionally, but merely to leave instructions as to how it should be dealt with after her death. I do not take this view of the evidence. In the first place, apart from Mr. Pembery, she was urged strongly by the solicitor on two occasions to allow the jewellery to be included in her testamentary dispositions. In the second place, whatever be its true effect, the evidence of what happened on Feb. 6, 1950, is, in my view, wholly inconsistent with any testamentary intention. *Treasury Solicitor v. Lewis* (1) and *Re Harrison* (2) were cited in support of this view. Each of those cases turned on the view of the facts arrived at by the court, and, on the view which I take of the evidence here, neither of those cases has any application to the present case.

In my view, the real question here is whether, as Mrs. Pembery contends, there was an effective donatio mortis causa, or, as the second defendant contends, there was an effort to make a gift inter vivos, in which event it is not disputed that the jewellery contained in the parcel which was put in the trunk was effectively given by Mrs. Lillingston to Mrs. Pembery. The constituent elements of a valid donatio mortis causa are well settled. They are accurately stated in JARMAN ON WILLS, 8th ed., p. 46, and they are stated by SARGANT, J., in *Re Wasserberg* (3) and by FARWELL, J., in *Re Craven's Estate* (4), and I do not intend to repeat them. It is sufficient to say that one of the elements is that the gift should be conditional, i.e., on the terms that, if the donor should not die, he should be entitled to resume complete dominion of the property, the subject-matter of the gift. On behalf of the second defendant it is said that on the true view of this evidence there is no room for any such condition.

In approaching the consideration of this matter it is necessary to have in mind what was said by SIR JOHN LEACH, V.-C., in *Gardner v. Parker* (5) (3 Madd. 185):

"The doubt here is, that the donor has not expressed that the bond was to be returned if he recovered. This bond was given in the extremity of sickness and in contemplation of death; and it is to be inferred that it was the intention of the donor that it should be held as a gift only in case of his death. If a gift is made in expectation of death, there is an implied condition that it is to be held only in the event of death. The cases of *Lawson v. Lawson* (6), *Miller v. Miller* (7) and *Jones v. Selby* (8) furnish this rule."

That decision was quoted with approval in *Staniland v. Willott* (9) (3 Mac. & G. 675), and is to be regarded as good law at the present time. But for the Scottish case, *Lord Advocate v. M'Court* (10), I should not myself have felt

any doubt but that the condition was fulfilled in this case. In the first place, there is the very considerable value of the jewellery and the number of pieces comprised in the gift. In the second place, there is the statement of Mrs. Lillingston to which I have already referred:

"I am going to give you all my jewellery. I am giving you my key to the safe deposit at Harrods and when I am gone you can go and get the jewellery."

Those words, to my mind, are (i) words of gift, but (ii) words which import the condition that if Mrs. Lillingston were to survive she would expect to resume complete dominion.

Counsel for the second defendant, however, referred me to *Lord Advocate v. M'Court* (10). The facts are as follows:

"In August 1892 the Lord Advocate, on behalf of the Board of Inland Revenue, brought an action against Mrs. Ann Finnigan or M'Court and Mary Finnigan, as two of the next of kin of their deceased brother Hugh Finnigan, pawnbroker in Glasgow, who died unmarried on May 28, 1886, and as the executors-dative qua next of kin of their deceased brother Arthur Finnigan, pawnbroker in Glasgow, who died on Apr. 6, 1890, concluding for decree against the defenders, ordaining them to exhibit a true and full inventory of the moveable estate of Hugh Finnigan, duly stamped with inventory-duty, or otherwise a true and full account, duly stamped, of the moveable property belonging to Hugh Finnigan, 'and taken from him as a donation mortis causa by the said deceased Arthur Finnigan', and further, for payment of legacy-duty on the said estate."

In the result, the court held that the transaction in question was not a donatio mortis causa and the members gave reasons why in their view the transaction could not be treated as a donatio mortis causa. The Lord President (Right Hon. J. P. B. ROBERTSON) said (20 R. (Ct. of Sess.) 497):

"It is one of the commonplaces in argument in such cases that it is very improbable that a man would denude himself of all he has, and leave himself at the mercy even of a brother. But then, when we turn to the facts about this unfortunate man, it appears that he was in such a state of health that practically the door of hope of recovery was closed. There is a most painful account given of his condition about the time of this transaction—there is no use being particular about dates, because he was dying of mortification in his leg, which had gone on for years. He had been worn to a skeleton by the month of May, and he died towards the end of May, and that state of matters, although it had of course got worse, had been substantially the same for months and years, and I cannot doubt that Hugh, like everybody who saw him, was aware that it was merely a question of time, probably a very short time, how soon his lease of life would be over . . . The lord ordinary has taken a view which, I confess, I cannot very well appreciate, at all events so far as its logic is concerned; because his lordship finds that shortly before his death Hugh Finnigan transferred his estate and effects to Arthur Finnigan, but he adds 'as a donation mortis causa'. Now, the facts of the case, for the painful reason I have mentioned, make it not highly probable that there should be need to make such a provision as is implied in the words donation mortis causa, because I think, as it was put from the Bar, that this was a doomed man who recognised the very short span of life he had alone to count on. But I cannot discover anything at all in the evidence to support the view that there was a condition in this case of the kind which is implied in the expression donation mortis causa."

LORD ADAM said (*ibid.*, 499):

"As your Lordship said, the conclusion that a person during his life has divested himself of almost his whole estate is in certain circumstances

one which the court would have extreme difficulty in reaching. Suppose that a person in the prime of life is said to have made over his estate to somebody else thereby making himself a beggar, it would be very difficult to accept the statement. But it is entirely a question of circumstances, and the presumption arising from the state of a man's health may lead to a very opposite conclusion. If a man, as in this case, is on deathbed, ill of a disease from which there is no hope of recovery, in that case there ceases to be a presumption against his divesting himself, and there arises a presumption that he would do so absolutely, if he transferred his property at all. Therefore, in the particular circumstances of this case, I do not think the presumption is at all against the view that Hugh made an absolute donation of his estate, and I think that there is but little to favour the view that the transaction was a donation mortis causa."

Finally, LORD M'LAREN said (ibid., 500):

"Now, it seems to me that we must consider this case exactly as we should do if we had an action by a donor who had recovered, or who thought he was going to recover, and desired to get back his estate. And while it must be taken as part of our law that a donation mortis causa remains to the end subject to the condition that, in the event of the donor's recovery, the property shall be given back, yet I agree with an observation which was made in argument, and with LORD ADAM, that such a condition in the general case would be very easily presumed. If a man who is very ill, it may be, of some disease which has not undermined the constitution, but has a tendency to cut off life, such as a fever, makes over his estate in the form of a donation, the law will very easily presume that he meant that donation to be conditional on his death, and that it was merely a substitute for what our law does not allow in express terms, a nuncupative will. In such a case where the circumstances were such as to lead irresistibly to the conclusion that the donation must have been conditional on the donor dying of the disease, then of course the Crown would be entitled to legacy-duty. But the reason why, in common with your Lordships, I think there is no such right in the present case is the peculiar nature of this man's condition, which rendered it impossible that he could recover. The nature of the disease was such that he could not possibly recover, and he was doubtless apprised of that, and knew that he had only a few weeks or months to live. That being so, there was no occasion for any implied condition about recovery, and I am not going to read such a condition where the circumstances were not such as would give rise to it, and it is not expressed on the face of the written document purporting to make over the property."

It appears from those passages that that must be regarded as a case turning on its peculiar facts. The imminence of death was certain and knowledge thereof was imputed to the deceased. Further, it appears to me that the form of the transaction in that case, involving the payment of £100, militated against the presence of the essential condition. In the present case the evidence does not lead me to the conclusion that on Feb. 6, 1950, it was certain that death would overtake Mrs. Lillingston within a matter of days. No doubt, she felt that she was almost certain to die soon, but that does not appear to me to be sufficient. In *Gardner v. Parker* (5) the facts were:

"Richard Crossley being on terms of intimacy with the plaintiff (who had rendered the deceased various services), and being seriously ill and confined to his bed, two days before his death, in the presence of a servant, gave the plaintiff a bond for £1,800; saying, at the same time, 'There, take that and keep it'."

In the course of his judgment SIR JOHN LEACH, V.-C., said (3 Madd. 185):

“This bond was given in the extremity of sickness and in contemplation of death.”

It appears to me that, substituting the word “jewellery” for “bond”, those words apply to this case. It is not shown by the evidence that on Feb. 6, 1950, Mrs. Lillingston's death was inevitable within the immediate future, and, in my judgment, that must be shown before the reasoning of the Court of Session in *Lord Advocate v. M'Court* (10) can apply. A

In *Re Mustapha* (11) the gift in question was made in these circumstances:

“In January, 1890, Mr. Mustapha, who was suffering from heart disease, was suddenly taken ill. He was put to bed, and a doctor was sent for. At the time the doctor arrived Mr. Mustapha was partly undressed and lying upon the bed. Having partially recovered, the doctor left to fetch some medicine, and in his absence the alleged gift was made. Mr. Mustapha sent for the plaintiff, and in the presence of a Miss Deacon, his house-keeper, said, ‘Lulu, dear, take my purse and keys.’ The plaintiff did so, taking the keys out of his trousers pocket. Her father then said, ‘That is right; put them in your pocket; take the bonds; all is yours. Take care of your brother and sister.’ When the doctor returned Mr. Mustapha was in a dying state, and shortly afterwards expired.” B C

If the principle which counsel for the second defendant seeks to deduce from *Lord Advocate v. M'Court* (10) is correct and not limited as I have suggested, I cannot help feeling that the decision in *Re Mustapha* (11) ought to have gone the other way. I should have thought—and this, I think, must have been the view of MATHEW, J., who decided the case—that the gift was made because the deceased was convinced that he was dying. He was suffering from heart disease. He said “Take the bonds; all is yours. Take care of your brother and sister.” Those are not the words of a man who thinks he has any chance of recovery. Finally, as the report says, when the doctor returned he was in a dying condition. That case was decided in 1891 and has stood as good law ever since. On my view of that case, the decision in which binds me, the correct conclusion from the evidence in the present case is, in my judgment, that the implied condition was that the gift of the jewellery was only to be held in the event of the death of Mrs. Lillingston, and that this case is distinguishable from *Lord Advocate v. M'Court* (10). D E

There remains the question whether sufficient delivery was made of all or any part of the jewellery. So far as the jewellery in the trunk in the bedroom is concerned, delivery of the key of that trunk to Mrs. Pembury was sufficient delivery. So far as the jewellery in Harrods, Ltd., safe deposit is concerned, I am of opinion that delivery of the key to that safe deposit, the key being in the finger of the glove in the trunk, was sufficient delivery on the authority of the judgment of SARGANT, J., in *Re Wasserberg* (3). It was argued that delivery of the key was not sufficient because the terms of the contract between Mrs. Lillingston and Harrods, Ltd., required that a person other than herself could only be given the contents of the safe deposit on producing, in addition to the key, an authority signed by her and giving a password. In the course of his judgment SARGANT, J., observed ([1915] 1 Ch. 202): F G

“... the delivery of the key did not in itself enable the recipient to get at the bonds, since the bank would not (as the testator must have known at any rate after his conversation with Mr. Watson) have allowed Mrs. Wasserberg to have access to the box without some further authority from the testator... But on the other hand the handing over of the key later in the day went much further than this. On that occasion there was a transfer to Mrs. Wasserberg of part of the means of getting at the bonds, of a partial dominion over them, and there was of course a corres- H

ponding deprivation of the testator's facilities for dealing with them. Was this partial or inchoate delivery or transfer a sufficient delivery to effectuate a donatio mortis causa? In my judgment that question must be answered in the affirmative both on principle and (what is perhaps more important in so anomalous a branch of law as this) on actual authority . . . When it is once admitted that any property is a possible subject-matter for a donatio mortis causa—and in fact chattels of all kinds are much more obviously and readily within this category than choses in action—I can see no more reason for declining to give effect to an incomplete or inchoate gift in the case of the one class of property than in the case of the other.”

At the end of his judgment he said (*ibid.*, 205):

“*Re Johnson* (12) again was a case where there was a retention of the key and the learned judge held that there was an intention on the part of the testatrix not to part with dominion over the box. In the present case I think that when the testator handed the key to his wife he intended to part with dominion over the box which I have called the locked box; and it may be incidentally remarked that in both *Re Mustapha* (11) and *Re Johnson* (12), and indeed in all the cases above referred to, extreme importance has always been attached to the possession of the key of any receptacle in which the articles claimed by way of donatio mortis causa may have been placed—a possession which in the present case passed to the widow.”

The death of the donor can occasion no difference where the gift is inchoate as is shown from a passage in the judgment of LUXMOORE, L.J., in *Delgoffe v. Fader* (13) where he said ([1939] 3 All E.R. 685):

“If the subject-matter of the gift is not completely vested, the question arises whether or not the donee can call upon the legal personal representative of the donor to complete the title. Where there is a donatio mortis causa of a subject-matter which is not completely vested, I think that the true legal aspect is that a trust has been raised under which the donee can call on the legal personal representative of the donor to complete the gift. I think that that aspect of the case was settled in *Duffield v. Elwes* (14), and has been recognised for years.”

It remains to consider the jewellery in the safe deposit at the National Safe Deposit and Trustee Co., Ltd. There is no direct authority on the point, but I do not see how any different principle can be applied in this case. Mrs. Lillingston included the jewellery in this safe deposit within the scope of her gift. She referred to the key to this safe deposit as being in the safe deposit at Harrods, and she made clear that she intended Mrs. Pembury, on opening the Harrods, Ltd., safe deposit, to take that key for the purpose of opening the city safe deposit. In my view, it does not matter in how many boxes the subject of a gift may be contained or that each, except the last, contains a key which opens the next, so long as the scope of the gift is made clear. In saying this, which is sufficient to decide this case, I do not intend to prejudge a case where there is doubt as to the scope of the gift. That case had better remain to be decided if and when it arises. In the result I propose to answer question 1 of the originating summons by declaring that the jewellery mentioned was the subject of a donatio mortis causa in favour of Mrs. Pembury and ought to be delivered by the plaintiff to her subject to the payment of estate duty and the debts of the deceased.

Order accordingly.

Solicitors: *F. Shirley Turner & Harrison* (for the plaintiff and the first defendant); *Speechly, Mumford & Craig*, agents for *Lamport, Bassitt & Hiscock*, Southampton (for the second defendant).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

EBBS v. JAMES WHITSON & CO., LTD.

[COURT OF APPEAL (Singleton, Denning and Hodson, L.J.J.), May 1, 2, 5, 1952.]

Factory—Dust—No failure to ventilate—Dust not of character or extent likely to be injurious—Duty of occupier—Factories Act, 1937 (c. 67), s. 4 (1), s. 47 (1).

The plaintiff was employed by the defendants on work which involved scraping and sand-papering monsonia wood. No special precautions in the way of protective clothing or otherwise were taken by the defendants to safeguard the health of the plaintiff, as they were unaware that any danger was involved in working on monsonia wood which was a Nigerian hardwood, little used in this country until 1946. The plaintiff contracted dermatitis through the monsonia wood dust, and claimed damages for breach of statutory duty under s. 4 (1) and s. 47 (1) of the Factories Act, 1937, and for negligence at common law.

HELD: (i) the requirements of s. 4 (1) of the Factories Act, 1937, for rendering dust harmless could not be called in aid by the plaintiff as that section related only to ventilation, as to which the plaintiffs were not at fault, and not to other methods of rendering dust harmless.

(ii) there was evidence to support the judge's finding of fact that the dust was not of such a character and given off to such extent or in such a substantial quantity as to be likely to be injurious or offensive, and, accordingly, the defendants had not infringed s. 47 (1) of the Factories Act, 1937.

(iii) on the state of knowledge then existing of the danger of exposure to monsonia wood dust, there was no such probability that exposure would result in injury as to lead a reasonable man placed in the defendants' position to anticipate it, and, accordingly, the defendants had not been negligent at common law.

FOR THE FACTORIES ACT, 1937, s. 4 (1), and s. 47 (1) see HALSBURY'S STATUTES, Second Edn., Vol. 9, pp. 1004, 1038.

APPEAL by the plaintiff from an order of McNAIR, J., dated Jan. 30, 1952, dismissing the plaintiff's claim for damages for breach of statutory duty and negligence.

Edgedale, Q.C., and *R. T. Monier-Williams* for the plaintiff.

Marven Everett, Q.C., for the defendants.

SINGLETON, L.J.: Early in 1950 the plaintiff was employed by the defendants as a coach-builder at their factory at Harlington, Middlesex. Immediately before Apr. 4 he had been working in the hand-finishing factory on a wood called monsonia, a species of West African walnut. The process on which he had been engaged was scraping with a hand-plane or spokeshave timber which had been prepared from the rough log elsewhere, and, finally, polishing the fillets of timber by hand with sand-paper. In the course of the operation a fine powder is given off which settles on the workman's hands, face, and parts of his clothing. The plaintiff had started that work on or about Mar. 13. He had never before experienced any skin trouble, though he had been in the wood-working industry for twenty years. On Apr. 4 or 5 he found red blodges and pimples on his hands and face and with them was intense irritation. He consulted his doctor, and eventually he was certified as unfit for work and he never returned to the defendants' factory. On the medical evidence there is no doubt that the trouble was due to dust from monsonia wood while the plaintiff was working in the defendants' works. On Feb. 16, 1951, the plaintiff commenced this action in which he claimed damages for breach of statutory duty and for negligence. McNAIR, J., held that he was not entitled to recover against his employers on either ground, and he gave judgment for the defendants. Against that judgment the plaintiff appeals to this court.

A The claim of the plaintiff for breach of statutory duty was based on s. 4 (1), s. 42 (1), and s. 47 (1) of the Factories Act, 1937. His claim for breach of the duty which the defendants owe at common law is based on allegations that they had provided no safe system of work and had failed and neglected to make any inquiries or investigation with a view to ascertaining whether or not the dust was injurious to health and liable to cause dermatitis. Monsonia wood was little used in this country before the war, and was, apparently, little known. Substantial imports into this country really began in 1946. Though the wood has been used in large quantities in coach-building works throughout the country, the evidence given recorded only one case of dermatitis arising from monsonia wood dust. Dr. Ray Bettley, a skin specialist, who gave evidence, considered that the plaintiff's case was a personal idiosyncrasy to monsonia dust, an idiosyncrasy which might exist in one in a hundred or one in a thousand cases.

Section 4 of the Factories Act, 1937, reads:

C “(1) Effective and suitable provision shall be made for securing and maintaining by the circulation of fresh air in each workroom the adequate ventilation of the room, and for rendering harmless, so far as practicable, all fumes, dust and other impurities that may be injurious to health generated in the course of any process or work carried on in the factory. (2) The Secretary of State may, by regulations prescribe a standard of adequate ventilation for factories or for any class or description of factory or parts thereof.”

D That section takes the place of s. 1 (1) of the Factory and Workshop Act, 1901, which provided:

E “The following provisions shall apply to every factory as defined by this Act, except a domestic factory . . . (d) It must be ventilated in such a manner as to render harmless, so far as is practicable, all the gases, vapours, dust or other impurities generated in the course of the manufacturing process or handicraft carried on therein, that may be injurious to health.”

F It seems to me that s. 4 (1) of the Act of 1937 is directed to ventilation. It is true to say that the position of the words, “by the circulation of fresh air in each workroom” gives force to the contention made on behalf of the plaintiff that s. 4 (1) states two requirements: (a) provision for ventilation, and (b) provision for rendering harmless, so far as practicable, all fumes, dust, etc., that may be injurious to health. If this submission was adopted, the plaintiff would be in a strong position, for it seems to me that the dust produced might be injurious to health, and on the wording of the section it is immaterial whether the occupiers knew or ought to have known of the risk. I am impressed by the fact that, apart from ventilation, there is no known way of rendering the dust harmless, at least none has been suggested. Section 4 (1) must be contrasted with s. 47 (1), which specifies measures to be taken in certain circumstances to prevent inhalation of dust and fumes. Section 47 (1) requires, in cases to which it applies, the provision of exhaust appliances where the nature of the process makes it practicable. In the present case exhaust appliances, even if practicable (and I do not think they would be) would not be of any help, for the dust comes largely from the sand-papering of the wood and from the rubbing of the sand-paper. The only suggestion made by counsel for the plaintiff was that the workpeople could be provided with gloves and ointment. Though that might be a good argument on the question of common law liability, I do not regard it as coming within s. 4 (1), nor would it be “rendering harmless” the dust within the meaning of that section. You do not render dust harmless by giving to your men ointment which they can put on their hands or covers of various kinds. You may be giving the men protection,

but you are not rendering the dust harmless. The judge found that effective and suitable provision was made for securing and maintaining adequate ventilation. He also found there had not been any complaint whatever in regard to ventilation. In my view, his finding disposes of the claim under s. 4 (1). Furthermore, as there is no other known way of rendering harmless the dust, I would say that the words, "so far as practicable" excuse the defendants. No regulations have been made by the Secretary of State calling for the provision of ointment or gloves for this work, and I cannot think that s. 4 (1) contains any such requirement. If employers do not take reasonable care to protect their employees against unnecessary risks, they are, of course, responsible in negligence for breach of their common law duty.

Section 47 (1) of the Act, which deals with the removal of dust or fumes, provides:

"In every factory in which, in connection with any process carried on, there is given off any dust or fume or other impurity of such a character and to such extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, all practicable measures shall be taken to protect the persons employed against inhalation of the dust or fume or other impurity and to prevent its accumulating in any workroom, and in particular, where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained, as near as possible to the point of origin of the dust or fume or other impurity, so as to prevent it entering the air of any workroom."

It is to be noticed that the section is chiefly directed towards protecting persons employed against inhalation of dust or fumes or other impurities of such a character and to such an extent as to be likely to be injurious. The provision of exhaust appliances, as I said when dealing with s. 4, is to take the dust away and out of the room in which people are working. On this part of the case the learned judge said:

"It seems to me to be fully arguable that this section is primarily, if not wholly, directed to measures of preventing the inhalation of dust, and further, that the measures are only required to be taken when in connection with any process carried on in the factory there is given off either (i) a dust which is likely to be injurious or offensive to the persons employed in the factory in the sense of likely to be injurious according to the estimation of a reasonably well-informed factory occupier or which the actual occupier knew, or ought to have known, to be likely to be injurious, or (ii) dust present, of any kind, in substantial quantities. On the facts proved before me I do not find that dust from monsonia wood was at the material time in either of the senses indicated likely to be injurious or offensive to the persons employed, or that it was present in substantial quantities. It only was created at all by the operation of sand-papering these pieces of wood with sand-paper, and it seems to me that it is an abuse of language to say that that simple process would produce substantial quantities of dust within the meaning of this section. The only time at which any real quantities of dust would be produced seems to me to be on the occasions, as demonstrated by one of the witnesses, when the pieces or sheets of sand-paper were beaten together to clean them . . . The evidence was conclusive that practical mechanical exhaust appliances are never used in hand-finishing shops, and I was satisfied on the evidence . . . that the operation in question, which sometimes involves the sand-papering of fillets of substantial length, could not, as a practical matter, be carried on under a dust extractor."

It seems to me that, apart from anything else, the judge's finding that there was no dust of such a character and to such extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of

any kind, disposes of the claim under s. 47 (1), and I am inclined to think that counsel for the plaintiff assented to that view, though he submitted that on the evidence the judge ought not to have found that there was no substantial accumulation of dust. The claim under s. 42 was not pursued in this court.

[His LORDSHIP dealt with the evidence relating to the claim based on the common law duty which an employer owes to his workmen, and said that he was unable to find that on the state of knowledge, as existing in 1950, there was any such reasonable probability that exposure to monsonia wood dust would result in injury so as to lead a reasonable man placed in the defendants' position to anticipate it, and, therefore, the plaintiff had not made out any case of failure by the defendants to render to him the duty which they owed him at common law, and his claim failed].

DENNING, L.J.: I agree, and I only wish to add a word on s. 4 (1). The case in this respect involves the usual contest between a literal interpretation of an Act of Parliament and a liberal or reasonable interpretation. The evidence shows that dust from monsonia wood may be injurious to health, and that no provision was made by the defendants for rendering it harmless. It was practicable for the defendants to do so by providing barrier cream and protective clothing, but they made no such provision. In my opinion, however, s. 4 (1) cannot be taken literally. It is directed to ventilation, and the important words are "by the circulation of fresh air" which must be read as governing both the first and second parts of the section. This view is supported by sub-s. (2), and also by the fact that any other view would render s. 4 inconsistent with s. 47 (1) which deals with dust that is "likely to be injurious to health". It would be very strange if a person who could not succeed under s. 47 (1) because the dust was not likely to be injurious, could nevertheless recover under s. 4 (1) on the ground that it might be injurious. In my opinion, therefore, s. 4 must be read as confined to defects of ventilation and as not extending to protection in other respects. In these circumstances I need say nothing about whether the provisions of s. 4 and of the other sections in Part I of the Act give rise to a civil action for damages. The enforcement of these sections is expressly provided for by ss. 8 and 9, and it may be that from the nature of them they were intended to be enforced by means of a prosecution and not by a civil action. The question, however, does not arise in this case, and I say no more about it.

HODSON, L.J.: Section 1 (1) (d) of the Act of 1901 clearly deals entirely with ventilation. The construction of s. 4 of the Act of 1937 is by no means easy. There is force in the plaintiff's contention that, by altering the language of the Act of 1901, the legislature, by the use of the words "and for rendering harmless" in the position which they now occupy, has imposed a duty separate from and additional to a duty to ventilate. I am, however, of the opinion that on its true construction there is, in spite of the position of the words, no duty imposed by this sub-section apart from the duty of ventilation. This construction is, I think, supported by the consideration that the Act is divided into Parts of which the first four deal with Health (General Provisions), Safety (General Provisions), Welfare (General Provisions), and Health, Safety and Welfare (Special Provisions and Regulations), and that s. 4 is included under Health (General Provisions). A comparison with the preceding section in the Act of 1901, notwithstanding the change of wording, leads me to the same conclusion. The provisions contained in s. 4 (2) of the Act of 1937 for the making of regulations prescribing a standard of adequate ventilation also points in the same direction, since there is here no provision for regulations designed to render dust harmless by means other than ventilation. Moreover, it is exceedingly difficult to see how the subject-matter of the section could be rendered harmless by means other than ventilation, and I doubt whether any means such as those suggested by the plaintiff could be said to

render it harmless. I, accordingly, read s. 4 (1) as applying to ventilation only, and read the words "and for rendering harmless" as meaning "and for rendering harmless by the adequate ventilation which has been mentioned." I agree with my Lord that the construction of s. 47 in contrast with s. 4 points very strongly in the same direction.

Section 47 (1) was also relied on by the plaintiff. It deals with the provision of exhaust appliances for the purpose of throwing off dust, fumes or other impurities. In my opinion, there are several reasons why this sub-section does not apply. It is directed to the protection of persons employed against inhalation. In accordance with the learned judge's finding, with which I agree, the evidence did not justify the conclusion that the dust in question was likely to be injurious, or, in the alternative, substantial in quantity. It is not likely to be injurious to anyone except one with a particular idiosyncrasy of the kind mentioned by Dr. Ray Bettley, and the process of sand-papering pieces of wood would not, according to the ordinary use of language, produce substantial quantities of dust.

Appeal dismissed.

Solicitors: *Shaen, Roscoe & Co.* (for the plaintiff); *A. D. Vandamm & Co.* (for the defendants).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

SNELLING v. SNELLING.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Wallington, J.), June 10, 1952.]

Divorce—Maintenance of wife—Re-marriage of wife—Application after re-marriage—Matrimonial Causes Act, 1950 (c. 25), s. 19 (2) (3).

The wife obtained a decree nisi of divorce which was made absolute on Nov. 21, 1951. On Nov. 26, 1951, the wife re-married, but two days later the husband by that marriage died. On Dec. 18, 1951, the wife applied for an order for permanent maintenance against her former husband, and on Apr. 4, 1952, the registrar made an order for 1s. a year. On appeal by the husband,

HELD: the fact of re-marriage, though relevant in considering quantum, was no bar to the wife's application for maintenance.

Bellenden (formerly Satterthwaite) v. Satterthwaite ([1948] 1 All E.R. 343), applied.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 19 (2) (3), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 407.

Cases referred to:

(1) *Fisher v. Fisher*, (1861), 2 Sw. & Tr. 410; 31 L.J.P.M. & A. 1; 5 L.T. 364; 164 E.R. 1055; 27 Digest 501, 5362.

(2) *Sidney v. Sidney*, (1865), 4 Sw. & Tr. 178; 34 L.J.P.M. & A. 122; 12 L.T. 826; 164 E.R. 1485; *on appeal*, (1866), L.R. 1 P. & D. 78; (1867), 36 L.J.P. & M. 73; 27 Digest 503, 5383.

(3) *March v. March & Palumbo*, (1867), L.R. 1 P. & D. 440; 36 L.J.P. & M. 64; 16 L.T. 366; 27 Digest 517, 5576.

(4) *Bellenden (formerly Satterthwaite) v. Satterthwaite*, [1948] 1 All E.R. 343; 2nd Digest Supp.

APPEAL by the husband against an order of Mr. Registrar TOWNLEY MILLERS, dated Apr. 4, 1952, whereby he was ordered to pay maintenance to the wife.

Friend for the husband.

Chope for the wife.

WALLINGTON, J.: This is an appeal from an order made by Mr. Registrar TOWNLEY MILLERS on Apr. 4, 1952, requiring the husband to pay or

cause to be paid to the wife maintenance at the rate of 1s. per annum. The husband asks that that order may be set aside. The ground on which the appeal is based is that the court has no jurisdiction to entertain an application by a wife for maintenance where she has re-married after a decree of divorce, or to make any order, either nominal or otherwise, on such an application.

A On Nov. 19, 1951, the wife obtained a decree of divorce on the ground of her husband's adultery. On Nov. 21, 1951, that decree was made absolute. On Nov. 26, 1951, the wife re-married and is now Mrs. Hammond. On Nov. 28, 1951, Mr. Hammond died. On Dec. 18, 1951, the wife applied by summons for an order for permanent maintenance against her first husband, and on Apr. 4, 1952, the registrar made an order for 1s. a year—obviously a nominal order, which was all the wife then asked for. It appeared that Mr. Hammond's B financial circumstances were such that she was left so well provided for as to obviate the necessity of her getting any substantial order for her maintenance.

C Counsel for the husband relied on two points, both of them, he says, points of principle. The first is that in consequence of the wife's re-marriage it was not open to the court to entertain an application for maintenance against him because the effect of the statute dealing with this matter and of decisions of the court—in particular, three to which I will refer—is that there is an absolute bar to the jurisdiction of the court to grant maintenance to a wife who has re-married. That was put on a variety of grounds by counsel in his able argument, but the main ground was, that, inasmuch as before the divorce the wife had all her common law rights in respect of her husband's liability to maintain her, as a result of the divorce she lost those rights because he ceased to be her D husband, and when she married a second time she confirmed the giving up of her common law rights against her husband and acquired and accepted in lieu thereof similar rights against her new husband. On this ground counsel based his first submission that the jurisdiction of the court in this matter disappeared on her re-marrying. Another, but incidental, though not unimportant, part of his argument was that, if the court has jurisdiction to deal with an application E of this kind, it is under an obligation to decide whether any order for maintenance made should be subject to a *dum sola* clause or should be for the life of the wife. Counsel's argument on this point was that, as the court is obliged to decide as a matter of discretion whether any order which is made is to be a limited one or is to run for the whole term of the wife's life, it follows that, if the wife has re-married, she has thereby put it out of the power of the F court to exercise the discretion as to what shall be the duration of any order it would make, and he argued that this point, if not conclusive, is at least support for his argument that the court is without jurisdiction after a wife has re-married. On the other hand, counsel for the wife relied on the provisions of the Matrimonial Causes Act, 1950, s. 19, and submitted that the whole matter rests on the interpretation of that section and that the court must G look only at that section and the authority conferred by it to ascertain whether in any case it will or will not make any, and what, order in respect of maintenance. Both sides relied on a number of authorities and both sides agree that this precise point has not been hitherto before the court, and, therefore, there is no decision on it.

H By s. 19 of the Matrimonial Causes Act, 1950, provisions are made similar in all material respects to those dealing with the same or similar matters in the Matrimonial Causes Act, 1866, s. 1, the Matrimonial Causes Act, 1907, s. 1, and the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190. I do not propose to go into those various sections; it will suffice if I say that for all practical purposes the effect of those sections is the same as the provisions of the Matrimonial Causes Act, 1950, s. 19, which is as follows:

"(1) On any petition for divorce or nullity of marriage, the court may make such interim orders for the payment of alimony to the wife as the

court thinks just. (2) On any decree for divorce or nullity of marriage, the court may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable . . . (3) On any decree for divorce or nullity of marriage, the court may, if it thinks fit, by order direct the husband to pay to the wife, during their joint lives, such monthly or weekly sum for the maintenance and support of the wife as the court may think reasonable, and any such order may either be in addition to or be instead of an order made under the last foregoing sub-section."

That means that under sub-ss. (2) and (3) the court has a discretion to make such an order, either wholly or partly secured or wholly unsecured, for the maintenance and support of the wife as the court may think reasonable, and the basis on which the court has jurisdiction to deal with that matter is that it may "secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable". I have no doubt that the provision in sub-s. (3) for unsecured maintenance must be governed as to the exercise of discretion by the matters set out in the second sub-section.

Counsel for the husband's argument was very largely based on three cases. Referring to *Fisher v. Fisher* (1) (with special reference to the passage at 2 Sw. & Tr. 414) and *Sidney v. Sidney* (2), he submitted that the first of those cases decided that, even though a petitioning wife may have been the guilty party, she is not to be left destitute, and that the second decided that it would be unjust for a wife to purchase a divorce by a surrender of her rights to maintenance (4 Sw. & Tr. 180), and he argued that it follows that those are the matters which the court ought to look at in order to decide whether there should be an order, and, if so, for how much. I am bound to say that I am unable to follow him in that argument. All those considerations were matters which affected the minds of the judges, but, in my opinion, they did so, not as the basis on which maintenance should be ordered, but as matters affecting the reasonableness of the application for maintenance, i.e., as part of the circumstances of the case, part of what is referred to or included in the section as the conduct of the parties. They were not fundamental in the sense that they were decisive as to the existence of the right to order maintenance. Then he argued that the effect of those cases and also of *March v. March & Palumbo* (3) (with special reference to the passage at L.R. I.P. & D. 442) is that the wife, having by proceedings deprived herself of her rights of necessity, by re-marriage acquired a substituted set of rights, namely, those against her second husband. In his final submission he contended that by the judgments in those three cases the court has authoritatively established the principle that the jurisdiction of the court is restricted to cases in which an application for maintenance is made before re-marriage. That proposition I am unable to accept. In my clear opinion, none of those cases has, nor have all of them together had, the effect of establishing any such principle as he suggests to restrict the jurisdiction conferred on the court by the statute under which the court has acted.

Counsel for the wife cited to me *Bellenden (formerly Satterthwaite) v. Satterthwaite* (4). That was a case in which a wife, having been granted a decree of divorce against her husband, obtained a maintenance order providing for the payment to her of £400 a year, less tax, during the joint lives of herself and her husband or until further order. Later, both parties re-married and the order was varied by the registrar, the payment under it being reduced to the nominal sum of 1s. a year. This order was affirmed by the judge. The

wife appealed on the grounds (a) that the registrar and the judge had applied a wrong principle of law, and (b) that, having regard to the evidence, the low figure of ls. must be wrong and the result of the order was manifestly unjust. The matter came before WILLMER, J., on appeal from the registrar and he affirmed the registrar's order. The case went to the Court of Appeal, and, in the course of his judgment ASQUITH, L.J., made these observations ([1948] 1 All E.R. 344):

"To revert to the wife's contentions. The first was that the registrar—whose order the judge affirmed without giving reasons—misdirected himself, or applied a wrong principle of law, or adopted a wrong approach to the question—all different ways of expressing the same thing. The only indication of the principles of approach of the registrar is contained in the first two or three lines of a judgment which can hardly have exceeded six. According to counsel's note, he said: 'I have to look at all the circumstances including the financial position of all the parties'. So far, this direction seems unimpeachable, reproducing, as it does, the substance of s. 14 (2) [of the Administration of Justice (Miscellaneous Provisions) Act, 1938]. Then follow the words complained of: 'The wife chose to marry again,' and then follows the decision. It is conceded that if the registrar had said: 'She has, in fact, married again,' his language would have been wholly free from objection. I am not satisfied that the registrar meant any more than this. Most certainly he did not mean that the re-marriage of a woman, as such, and without more, is a ground for reducing her maintenance to nothing or its equivalent. All he meant, in my judgment, was that it was a relevant factor in so far as it increased her means in money or money's worth. The case was elaborately argued before WILLMER, J., who confirmed the decision of the registrar, though, as I have stated, without giving any reasoned judgment of his own. In the circumstances, and having heard the arguments before the court, which I understand were put also to the learned judge, I am satisfied that there is no ground for saying that WILLMER, J., any more than the registrar, misdirected himself or exercised his discretion on any wrong principle. There is, accordingly, no substance in the suggestion that the learned judge or registrar applied a wrong principle of law, but the application of a wrong principle of law is not the only ground on which the exercise of this judicial discretion may be challenged."

EVERSHED, L.J., made these observations in the course of his judgment (ibid., 345):

"No formal judgments were given either by the registrar or by the judge, but save in one respect it has not been suggested to us that either registrar or judge paid regard to matters which should have been disregarded or disregarded matters which should have been taken into account, or, indeed, otherwise misdirected himself in fact or law. The one alleged exception is that, according to a brief contemporary note, the registrar used the phrase 'The wife chose to marry Dr. Bellenden.' It was urged by counsel for the wife that by this language the registrar must be taken to have inferred that by the mere act of re-marriage the wife forfeited the rights which she had to the receipt of any maintenance from her former husband, and that this error on the part of the registrar must be taken to have infected also the decision of WILLMER, J. I do not agree, nor do I accept counsel's interpretation of the phrase of which the registrar made use. I, therefore, find no grounds sufficient to entitle, still less to compel, this court to say that the registrar did not, or that the judge did not, in accordance with sub-s. (2) of s. 14 of [Administration of Justice (Miscellaneous Provisions) Act], properly and to the best of his ability consider and weigh all the circumstances of the case including the changes

in the resources and prospects of the wife and the husband as a result of their respective re-marriages."

Before I leave that case I had better refer to the provisions of s. 14 of the Administration of Justice (Miscellaneous Provisions) Act, 1938:

"(1) Where under the Supreme Court of Judicature (Consolidation) Act, 1925, the court has made . . . (b) an order under s. 190 (2) of that Act . . . the court shall have power to . . . vary the order . . . (2) In exercising the powers conferred by this section, the court shall have regard to all the circumstances of the case, including any increase or decrease in the means of either of the parties to the marriage."

I need not devote any further attention to that provision. It means merely that after the court has made an order under s. 190 of the Act of 1925 (which, as I have said, is similar in all respects to the Matrimonial Causes Act, 1950, s. 19), then, on an application properly made, variations may be made in the order and the court must consider such an application to vary an existing order "having regard to all the circumstances of the case".

In my opinion, it is plain from the judgments to which I have referred, and, in particular, the passages I have read in *Bellenden's* case (4), that the learned lords justices were firmly laying it down that the re-marriage of a wife is not enough to put an end to her right to apply for, and in a proper case to obtain, a maintenance order against her first husband. In the report of *Bellenden's* case (4) there is no suggestion that the learned lords justices based their opinion on the mere fact that the wife had already obtained an order. They expressed it in terms which, in my view, they intended to mean, and which must mean, that re-marriage may have an effect on quantum, either increasing or decreasing the amount of the original order according to the circumstances of the case, but that it can have no further effect on the matter than that—in other words, that the fact of re-marriage can in no circumstances nullify an order which has been made or preclude the making of an order which is applied for on a proper application to the court. It is true that up to now there has been no decision on the question whether the re-marriage of a wife has the effect of depriving her of any right to apply successfully for an order for maintenance, but, for the reasons I have given, I entertain no doubt that her re-marriage had no effect at all on her right so to apply. In the present case the circumstances of the wife's second marriage made it unnecessary for her to press for a substantial order for her maintenance because her second husband had left her so placed financially that she could get along without any resort to the first husband. It is plain that these orders are made "until further order", and are subject to variation. It is not impossible that some tragedy may befall this lady so that within weeks or months, or, perhaps, years, her fortune may disappear and she may have to resort to the court for an increase in the present nominal order for maintenance.

The second, and rather subsidiary, point made by counsel for the husband was that the provisions of s. 19 cannot be operated by the court if the wife re-marries before she applies for maintenance because it is impossible for the court then to consider whether the order it is about to make is to be a limited one or a permanent one. It seems to me that that is merely incidental. It may be that there are cases, quite apart from those in which a wife has re-married, in which the court must consider whether to make a limited order or an order for the life of the wife, and I can see no limit to what the court may do in the exercise of its judicial discretion, for the words of s. 19 (2) are: "such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable." This provision is so wide in its terms that, in my opinion, there can be no question that in operating it the court must regard a re-marriage as one of the incidents coming within

"the conduct of the parties" and within all the circumstances of the case—a circumstance which may be to the advantage of the wife or may be to the advantage of the husband. In this case the second marriage has led to the better financial position of the wife. This appeal must, accordingly, be dismissed.

Appeal dismissed.

Solicitors: *Champion & Co.* (for the husband); *Bentley Taylor & Stevens* (for the wife).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

Re LAMBTON'S MARRIAGE SETTLEMENT.

B MAY AND ANOTHER v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.), May 23, 26, 27, 28, 1952.]

Estate Duty—Passing—Cesser of wife's annuity on husband's death—Wife becoming entitled to whole income of trust fund—Allowance for annuity—Finance Act, 1894 (c. 30), s. 5 (3) (as amended by Finance Act, 1938 (c. 46), s. 48).

By an ante-nuptial settlement made on July 20, 1912, certain funds, the property of the husband, were settled on trust during the joint lives of the husband and the wife to pay out of the income an annuity of £400 to the wife and to pay the rest of the income to the husband. Subject thereto, the income of the settled fund was payable to the survivor of the husband and wife during his or her life (or widowhood in the case of the wife) with remainder after the death of the survivor to the children of the marriage absolutely, with an ultimate limitation, in default of issue, to the husband. After the solemnisation of the marriage, certain further investments were transferred to the trustees on the trusts of the settlement. In 1949 the husband died, leaving him surviving his wife and two children of full age, and the Crown claimed estate duty on the entire funds without any allowance in respect of the wife's annuity.

HELD: on the true construction of the settlement the husband during his life was entitled to the whole of the income of the settled fund subject to the payment thereof of £400 per annum to the wife, and, therefore, the whole of the settled funds passed on the death of the husband within the Finance Act, 1894, s. 1, and it followed that s. 5 (3) of that Act, as amended by the Finance Act, 1938, s. 48 (which provides that where the interest of any person under a settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations continue to subsist, the property shall not be deemed to pass on his death by reason only of such failure or determination), did not operate to exempt the "slice" necessary to produce the wife's annuity.

Earl Cowley v. Inland Revenue Comrs. ([1899] A.C. 198) as interpreted in *De Trafford v. A.-G.* ([1935] A.C. 280), applied.

A.-G. v. Glossop ([1907] 1 K.B. 163), no longer good law.

Decision of HARMAN, J. ([1952] 1 All E.R. 162), affirmed.

Per SIR RAYMOND EVERSLED, M.R.: The exemption under the Finance Act, 1894, s. 5 (3) (as amended by the Finance Act, 1938, s. 48), is limited to cases where the fact that the deceased had an interest ceasing on his death is the only element which might have given rise to a claim for estate duty—i.e., where the only potential charge for estate duty would have been under s. 2 (1) (b) of the Act of 1894.

AS TO SETTLED PROPERTY IN WHICH THE INTEREST FAILED BEFORE POSSESSION, see HALSBURY, Hailsham Edn., Vol. 13, p. 249, para. 240; and FOR CASES, see DIGEST, Vol. 21, pp. 14, 15, Nos. 68-71.

Cases referred to:

- (1) *A.-G. v. Glossop*, [1906] 1 K.B. 284; *affd.* C.A., [1907] 1 K.B. 163; 76 L.J.K.B. 199; 95 L.T. 823; 21 Digest 14, 69.
- (2) *Cowley (Earl) v. Inland Revenue Comrs.*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; *varying S.C. sub nom. Re Cowley's (Earl) Estate*, [1898] 1 Q.B. 355; 21 Digest 7, 27.
- (3) *De Trafford v. A.-G.*, [1935] A.C. 280; 104 L.J.K.B. 396; 153 L.T. 17; Digest Supp.
- (4) *R. v. Northumberland Compensation Appeal Tribunal. Ex p. Shaw*, [1952] 1 All E.R. 122; [1952] 1 K.B. 338; 116 J.P. 54.
- (5) *Braybooke (Lord) v. A.-G.*, (1861), 9 H.L. Cas. 150; 31 L.J.Ex. 177; 4 L.T. 218; 25 J.P. 531; 11 E.R. 685; 21 Digest 94, 694.
- (6) *Inland Revenue Comrs. v. Harrison*, (1874), L.R. 7 H.L. 1; 43 L.J.Ex. 138; 30 L.T. 274; 21 Digest 110, 828.
- (7) *A.-G. v. Wood*, [1897] 2 Q.B. 102; 66 L.J.Q.B. 522; 76 L.T. 654; 21 Digest 14, 68.
- (8) *A.-G. v. Beech*, [1899] A.C. 53; 68 L.J.Q.B. 130; 79 L.T. 565; 63 J.P. 116; 21 Digest 7, 26.
- (9) *Re Norfolk (Duke)*, [1950] 1 All E.R. 664; [1950] Ch. 467; 2nd Digest Supp.
- (10) *Re Cassel*, [1927] 2 Ch. 275; 96 L.J.Ch. 483; 137 L.T. 785; Digest Supp.

APPEAL by the taxpayers from a decision of HARMAN, J., on Dec. 19, 1951, and reported [1952] 1 All E.R. 162.

The taxpayers issued an originating summons to determine whether, on the true construction of a marriage settlement, dated July 20, 1912, and of the Finance Act, 1894, and amending Acts, and in the events which had happened, estate duty became payable on the death of the Hon. Charles Lambton on Dec. 5, 1949, (a) on the principal value of the property comprised in the said settlement at the date of his death, or (b) on that value less the value of so much of the capital of the said property as was attributable at that date to the production of the yearly sum of £400 made payable by the said settlement to his wife, Marion Lavinia Lambton, during their joint lives, or (c) on that value less some other, and, if so, what, deduction in respect of the said yearly sum. HARMAN, J., made a declaration in the terms of para. (a) of the summons.

Sir Lynn Ungood-Thomas, Q.C., and *J. A. Armstrong* for the taxpayers, the trustees of the settlement.

Pennyquick, Q.C., and *J. H. Stamp* for the Inland Revenue Commissioners.

SIR RAYMOND EVERSLED, M.R.: I agree with the order made in this case by HARMAN, J., and I think, therefore, that the appeal should be dismissed.

By an indenture of settlement dated July 20, 1912, made on the marriage of the Hon. Charles Lambton and Miss Marion Lavinia Garforth, certain funds were settled on trusts in favour of the two parties to the marriage, and (in the events which have happened) their children. The clauses in the settlement relevant to the present matter are those which relate to the income of the trust property. By cl. 2 the trust fund is to be held in trust during the joint lives of the husband and the wife

"to pay out of the income of the trust fund to the wife the yearly sum of £400 by equal quarterly payments . . . and to pay the rest of such income to the husband."

By cl. 3 on the death of either of them the trust fund is to be held in trust to pay the settled income, if the husband shall survive, to him for his life, or, if the wife shall survive, to her, for her life or until she shall re-marry, and on her marriage other provisions take effect. The husband, Brigadier Charles Lambton, died on Dec. 5, 1949. There were two children of the marriage, both

of whom are of full age, and they are entitled to the corpus of the marriage settlement fund, subject to the life interests to which I have referred. The question which was raised by the summons relates to the estate duty payable in respect of the marriage settlement property and the several interests therein on the death of Brigadier Lambton. The two alternative views which have been presented are, first, that duty is payable on the whole value of the settled property on the footing that the whole property passed under the Finance Act, 1894, s. 1, on the death of the brigadier. The other view, for which the appellants in this court have argued, rests on the authority of *A.-G. v. Glossop* (1), to which I shall hereafter make full reference, and is to the effect that duty is exigible only in respect of that part of the property representing the excess of the income of the trust funds over the £400 a year which, by cl. 2 of the deed, was payable to the wife during the joint lives, and that no duty is payable in respect of that £400 per annum, or in respect of what is now sometimes called the "slice" or that portion of the trust funds which may be said to have produced or represented it.

It will be convenient here to state one or two figures. Immediately before the death of the brigadier, the income of the trust property amounted in all to approximately £627 per annum. The total value of the investments at his death was approximately £17,500, and the total value of that part of the property which produced the £400 a year was £11,169 approximately. From the figures it will be noticed that, if the taxpayers are right, the amount of duty exigible will be in respect of roughly one-third of the trust property instead of the whole of it. It is proper first to construe the relevant terms of the settlement so far as it is necessary for the purposes of this judgment. I have referred to cl. 2, and to the circumstance that, according to its terms, £400 a year was to be paid out of the income to the wife, and that the trustees were then to pay "the rest of such income" to her husband. As a matter of construction, I have no doubt that the effect of that provision is the same as though the clause had read (as these clauses not uncommonly do) "subject to payment" of the £400 a year, the income was payable to the husband. In other words, the effect of the provision is to give the husband the right to the income of the trust funds subject to the payment thereof of £400 a year to the wife.

As I have indicated already, the substantial question is whether *A.-G. v. Glossop* (1) should now be regarded as having been rightly decided by this court, or whether it is (right or wrong) binding on this court. I shall, therefore, have to analyse that decision somewhat closely, and two decisions of the House of Lords, one preceding *A.-G. v. Glossop* (1), and one subsequent to it. At this stage, however, it will be convenient to state briefly the facts and the effect of the decision in *A.-G. v. Glossop* (1). It was a case like the present in that it related to a marriage settlement whereby, during the joint lives of the spouses, the wife was entitled to £400 a year as a first payment out of the income. So far the parallel is indeed close, and it remains close in that, subject to that interest of the wife, the husband was entitled during the joint lives to the residue of the income. The settlement further provided that after the death of either spouse, the survivor should thereafter, for the rest of his or her life, be entitled to the whole income of the settled property. There was, however, this complication, that in *A.-G. v. Glossop* (1) there were two separate funds or fortunes. Part of the funds were contributed by or on behalf of the wife, and part by the husband, and each of the two funds or fortunes had to be regarded as contributing rateably to the provision of the £400 per annum payable to the wife. I further add that in *A.-G. v. Glossop* (1) there was in fact no issue of the marriage, and the ultimate remainders, after the death of the spouses, were different accordingly as regards the two funds—in the case of the husband's fund, the final limitation was in the circumstances absolutely to the husband, and in the case of the wife's fund the final limitation

was to her personal representatives. I should further add that the problem arose in *A.-G. v. Glossop* (1) (as it has arisen here) as to what was the proper estate duty payable on the death of the husband, he being the first spouse to die. But it is necessary to bear in mind that in *A.-G. v. Glossop* (1) no question was even raised in the case but that estate duty was payable on the death of the husband in respect of the whole of the husband's fund. Whether that concession was made having regard to the previous decision in *Earl Cowley v. Inland Revenue Comrs.* (2), does not, I think, matter, but it is the fact that no question was raised in the case in regard to the husband's fund, the whole contest being what was the estate duty exigible on the death of the husband in respect of the wife's fund.

As I must refer a good deal to *A.-G. v. Glossop* (1), it will, I think, make for simplicity, and will be permissible, to assume that the wife's fund and the husband's fund were exactly equivalent in value or amount. That being so, I can proceed as though the relevant trusts in relation to the wife's fund were, immediately before the husband's death, out of income the first £200 per annum to be paid to the wife; subject thereto, during the joint lives the husband was entitled to the whole income; and on the death of the husband the whole income of the wife's fund went to the wife for the rest of her life, passing thereafter to her personal representatives. If the husband had survived his wife, he would have been entitled to the entire income of the wife's fund for the rest of his life. The decision of this court, in the circumstances I have mentioned, was that duty was payable in respect of the wife's fund to the extent that it was referable to the excess of the income of that fund over £200 a year, but that no duty was leviable in respect of that part of the fund which was attributable to the production of the £200 a year payable to the wife, that part (or the claim for duty in respect thereof) being exempted by the effect of the Finance Act, 1894, s. 5 (3). It is, therefore, I think, so far made clear that there are involved in the present case two points, and though the arguments in regard to them are necessarily, to some extent, intertwined, they are distinct points. The first question is: Was the exemption which the Court of Appeal held in *A.-G. v. Glossop* (1) to be applicable to the claim for duty quoad the £200 a year removed by the amendment made to s. 5 (3) of the Finance Act, 1894, by s. 48 of the Finance Act, 1938? Secondly, and apart from that first question: Is the distinction which the Court of Appeal drew between the circumstances in the *Glossop* case (1) and the circumstances in the *Cowley* case (2) invalidated by the interpretation which has been given to the *Cowley* case (2) by the later decision in the House of Lords of *De Trafford v. A.-G.* (3), so that, on the principle stated in *R. v. Northumberland Compensation Appeal Tribunal. Ex p. Shaw* (4), this court should now regard the decision in *A.-G. v. Glossop* (1) as no longer correct and binding on us?

I propose to deal with those two questions in the order in which I have stated them, but I shall, I hope, be forgiven if first I read such part of the relevant sections of the Finance Act, 1894 (familiar though they be) which are material to the present question. Section 1 of that Act, as is known, provided that duty

"shall . . . be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of . . ."

a person dying after the commencement of that Part of the Act. Section 2 (1) goes on to provide:

"Property passing on the death of the deceased shall be deemed to include the property following, that is to say . . . (b) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest . . ."

I need not, I think, make any further references to s. 2, only pausing to recall the fact (now so well established since the *Cowley* case (2)) that s. 1 and s. 2, as regards the impact of estate duty, must be regarded as mutually exclusive. Section 5 (3) is in these terms:

A "In the case of settled property, where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death."

B It was to that sub-section that by s. 48 of the Finance Act, 1938, was added the phrase "by reason only of the failure or determination of that interest". I shall pass over s. 7 of the Act of 1894, which provides for the evaluation of interests and property passing, and confine myself to one reference to the definition section, s. 22. By that section, sub-s. (1) (f), it is provided that:

"The expression 'property' includes real property and personal property and the proceeds of sale thereof respectively and any money or investment for the time being representing the proceeds of sale";

C and there is now no doubt that the widest interpretation has always been given, and must be given, to the word "property" as used in the Finance Act, 1894. There is also no doubt, as will more clearly appear when I come to make my references to it, that in *A.-G. v. Glossop* (1) the Court of Appeal thought that the question for decision depended, and depended primarily, on the effect that s. 5 (3) had on it. What then is the effect of that sub-section, D first, before the amendment? A simple case may be taken to illustrate the answer. Suppose that under a continuing settlement A, immediately before his death, is entitled to some limited or other interest contingently on his surviving B, and then that A has died in B's lifetime. There is no doubt that at the date of his death, A had an interest, a right of property, viz., a right which he would have enjoyed in possession had he survived B, but that right E or interest ceased or was destroyed on his death during B's life, but since he had a property or interest which had ceased, then *prima facie* (and apart for the moment from s. 5) it would appear that the circumstances would bring the case within the language of s. 2 (1) (b), which I have read, as being property in which the deceased had an interest ceasing on the death of the deceased. I will assume that the circumstances that I give in my illustrations are such F that there was "a benefit accruing or arising" to some other person because the chance of A succeeding was destroyed. Section 5 (3) then applies, in the simple case I have stated, to exempt the estate of A from liability for the duty on the ground that the interest of A will have failed or determined by reason of his death before it had become an interest in possession.

G It is to be observed that in the *Glossop* case (1), the deceased (the husband) had an interest of the character I have mentioned. Had he survived his wife, he would then have enjoyed the whole income of the trust premises, including that part which produced the £200 a year payable to the wife during her life, but that was not his sole interest. He was at his death (or immediately before his death) in actual possession or enjoyment of the balance or excess of the trust income over £200 a year, and that right, that enjoyment, ceased or passed H on his death, altogether apart from and in addition to the cesser of his contingent interest which never did come into his possession. It was said in argument by junior counsel for the Crown (and it was held by HARMAN, J.), that the effect of the amendment which was made by the Finance Act, 1938, s. 48, to s. 5 (3) renders that sub-section altogether inapplicable in any event to such a case as *A.-G. v. Glossop* (1), and, therefore, to this case, because, as I have said, they are not simply cases where the deceased had a future interest in the settled property which ceased before it came into possession, and no more: and, if

that is right, it follows that *A.-G. v. Glossop* (1), which was decided before the amendment, can no longer be applicable after the amendment. I do not say that I think the learned judge in this matter was wrong. It is not necessary for me in the circumstances to express any final view on it, but I am bound to say that there seem to me to be difficulties in the way of resting the decision in this case solely on this view of the effect of the amendment. For myself, I prefer to base my decision on the second ground above indicated, viz., that apart from any question of the effect of the amendment to s. 5 (3), the basis and validity of the decision in *A.-G. v. Glossop* (1) has been displaced or destroyed by the later interpretation given to *Earl Cowley v. Inland Revenue Comrs.* (2) by the House of Lords. As regards the amendment, however, and so that I may complete what I have to say on this part of the case, it has, I think, been accepted by both parties before us that its effect is correctly stated in *DYMOND'S DEATH DUTIES*, 11th ed., p. 414. The paragraph reads:

"The words 'by reason only of the failure or determination of that interest' were added to s. 5 (3) by s. 48 of the Finance Act, 1938. These words, although their meaning is perhaps not altogether beyond doubt, are considered to confirm the interpretation previously adopted and to make it clear that the exemption is limited to cases where the fact that the deceased had an interest ceasing on his death is the only element which might have given rise to a claim for estate duty, i.e., where the only potential charge for estate duty would have been under s. 2 (1) (b) of the Finance Act, 1894. On this basis, s. 5 (3) does not afford exemption from duty chargeable under either s. 1 of that Act or any other sub-clause of s. 2 (1)."

Junior counsel for the taxpayers, in the course of his address to us, gave further cogent reasons for the view that s. 5 (3) is applicable, and applicable only, in cases in which the tax (if exigible at all) would be exigible by virtue of s. 2 (1) (b).

As will appear, one of the difficulties (and they are not few in this matter) has been to detect with any sense of certainty under what section or sub-section of the Act of 1894 the Court of Appeal in *A.-G. v. Glossop* (1) treated the estate duty as chargeable. If the view of the court was that the £200 a year, or the part of the trust funds which produced the £200 a year, were treated as passing under s. 1, then I agree that the effect of the amendment is now to show that s. 5 (3) would be inapplicable to a case of that character. I am, however, not myself clear that the Court of Appeal did treat the duty in *A.-G. v. Glossop* (1) as exigible (if exigible at all) under s. 1. Nevertheless, I am clear (and this will appear from my references hereafter to the judgments) that the Court of Appeal regarded the wife's fund or fortune in *A.-G. v. Glossop* (1) as being properly divisible or severable for the purposes in hand into shares or "slices", as they have since sometimes come to be called in estate duty cases, but that as regards the "slice" attributable to the £200 a year payable to the wife, the interest of the husband was a future interest contingent on his surviving his wife, so that if that interest is taxable, it would be taxable, and taxable only, under s. 2 (1) (b). If that be the right view, then s. 5 (3) presumably would be applicable both before the amendment, and not less afterwards. It appears, however, from what counsel for the Crown told us during the argument that a rather wider effect was at one time alleged to be attributable to s. 5 (3). It was suggested that if, in fact, a deceased person had at the time of his death an interest in settled property which ceased on his death before it had fallen into his possession, then no estate duty was exigible at all on his death in respect of the settled property, notwithstanding that the deceased might have had or had some other interest, including an interest in possession which did pass or cease on his death in the ordinary sense. Counsel said that, acting on that view, certain devices had been invented whereby a settlor shortly before his death settled his property, say, on his son for life, then on himself for life after the son's

death, and then finally to the son's children. Then, if the settlor died shortly thereafter, and the view which I have indicated was right, there would be no duty payable at all under the appropriate paragraph of s. 2 (not being s. 2 (1) (b)) because on this view the effect of s. 5 (3), having regard to this reversionary life interest which was never enjoyed, would be to exempt the property from duty altogether. For that reason, it is said, the amendment was introduced confining the exempting operation of s. 5 (3) to the type of case which I have illustrated by my simple example, and that type of case only. That may or may not be the explanation of it, and if the Court of Appeal in *A.-G. v. Glossop* (1) treated s. 5 (3) as having so wide an import, then again I would agree that the amendment altered the law. My difficulty in thinking that the Court of Appeal did act on such a view is that, if they did, it seems to me that logically they should then have gone on to say that on the death of the husband in *A.-G. v. Glossop* (1), no estate duty would have been payable at all in respect of the wife's fund—not only in respect of the reversionary life interest which did not fall into possession, but equally no estate duty in respect of that part of the income which the husband had enjoyed, and on which the court did clearly decide that duty was exigible.

I now come to the second, and, as I think, the more important point in the case, and, if I may state my conclusion at once, it is that *De Trafford v. A.-G.* (3) in the House of Lords in 1935 gave a significance to the decision, or that part of the decision in *Earl Cowley v. Inland Revenue Comrs.* (2) that is relevant to this case, which was not apprehended when *A.-G. v. Glossop* (1) was decided, and makes *A.-G. v. Glossop* (1) now no longer good law. It, therefore, prevents this court from relying on the authority of *A.-G. v. Glossop* (1), or saying that *A.-G. v. Glossop* (1) or this case is properly distinguishable from *Earl Cowley v. Inland Revenue Comrs.* (2). I must, therefore, decide what, in my judgment, *De Trafford* (3) held to be the principle which *Cowley* (2) must be treated as having established. In the circumstances it is clear that I must make some close analysis of the three cases that I have mentioned, and I hope I shall be excused if I necessarily take a little time in doing so.

It will be convenient to take the three cases in their chronological order, and, accordingly, I start with *Earl Cowley v. Inland Revenue Comrs.* (2). The facts I read from the headnote of the report in the House of Lords:

"Father and son, tenant for life and tenant in tail respectively, executed a disentailing deed by which they granted the estates to a trustee to hold freed from the estate tail to such uses as they should jointly appoint. In exercise of that power father and son mortgaged the estate in fee simple to [the Prudential Insurance Co.] as security for a loan, part of which was advanced for the benefit of the father and part for the benefit of the son . . . Father and son then executed a deed of re-settlement by which the estates were charged with an annuity to the son payable during the father's life, and subject thereto were declared to be held in trust for the father for life and after his death for the son for life with remainders over."

To that short statement I must add that the annuity payable to the son, which was £3,000 a year, was in fact payable to him, his executors, administrators and assigns, during the whole period of the life of the father, that is the second earl. The importance of that fact is that in the circumstances, the father, by surviving the son, would not have enjoyed the £3,000 a year which the son enjoyed under the provision that I have mentioned; the £3,000 a year went on being payable to the son's estate even though the father survived him. Section 5 (3), therefore, was not applicable in any circumstances as regards the amount of this annuity of £3,000 a year. The father never had any future or contingent interest in that sum, which ceased or determined before it came into possession. The point in *Earl Cowley v. Inland Revenue Comrs.* (2) may

be accurately stated thus. It was conceded that on the death of the father, the second earl, there was a passing of the property. Until LORD MACNAGHTEN had delivered his speech, the true significance of the distinction between s. 1 and s. 2 had not been observed, and indeed finds no part in the argument. That is the circumstance which makes *Earl Cowley v. Inland Revenue Comrs.* (2) in that respect, as in others, one of the most remarkable cases which has influenced our law. But the argument for the taxpayer suggested that the subject-matter which passed was but an equity of redemption, first because there was a prior charge in favour of the Prudential of £230,000, so that the settled property was only in the equity remaining subject to that mortgage; secondly because, according to the argument, the property passing should also be properly treated as reduced or assessed after deduction of the capital value of the £3,000 a year which, as I have said, had been payable until the death of the father, but had then ceased. The capital value of the annuity was, I think, agreed at £65,000. The question then was whether either or both those sums—£230,000 or £65,000—were properly to be deducted from the value of the estate for the purpose of the tax? The Court of Appeal held that neither could be deducted. The House of Lords held that the Prudential mortgage could, but that the capitalised value of the £3,000 annuity could not.

We have been taken with great care through the reports of the case in the Court of Appeal and the House of Lords, and there is, I think, no doubt at all that the argument, so far as it related to the sum of £65,200—which in all conscience was a large sum, but very small compared with the Prudential mortgage—was very much, if I may use the phrase, tied on the tail of the argument as regards the Prudential mortgage. The sort of point which we have debated in this case does not appear ever to have been clearly put or worked out in the debate in *Earl Cowley v. Inland Revenue Comrs.* (2). Let me illustrate that by a brief reference to the judgments in the Court of Appeal. I have said that the court decided against the subject both as regards the mortgage and as regards the annuity. The leading judgment was delivered by A. L. SMITH, L.J., and he considers at great length the question of the mortgage. The learned lord justice said ([1898] 1 Q.B. 367):

“In my judgment, for the above reasons, the value of the benefit accruing upon the death of the second earl must be ascertained under s. 7 (7) (b) without making any allowance for the £230,000 mortgage. As regards the annuity of £3,000 a year charged upon the life estate of the second earl, and payable thereout during his life to his son, for the reasons I have given above, I think that no deduction for this can be made.”

That is all. The learned lord justice thought that the annuity was in all respects *in pari materia* with the mortgage. The matter is stated particularly clearly, if briefly, by RIGBY, L.J. (*ibid.*, 380):

“The annuities, amounting to £3,000, affected only the enjoyment by the second earl of the property which passed, not the extent of the property passing, and cannot therefore be deducted.”

I will only add that the third member of the court, who dealt with it no more fully, was COLLINS, L.J., who sat as Master of the Rolls in the *Glossop* case (1).

I now turn to the report of the case in the House of Lords. It will be taking up undue time if I refer to the arguments, but it may be taken that the burden of the case plainly was all the time concentrated on the Prudential mortgage, and the report deals with the argument as regards the annuity in a single short sentence ([1899] A.C. 203). With equal brevity and dispatch, the House of Lords—and they took a different view from the Court of Appeal on the mortgage, which they regarded as being a prior charge anterior to (and therefore properly to be taken into account in reduction of) what passed under the

settlement—nevertheless as to the £3,000 annuity rejected the appeal from the Court of Appeal. The EARL OF HALSBURY, L.C., said (*ibid.*, 207):

“As to the claim by the appellant to a deduction in respect of the cesser of the rent-charge of £3,000 a year, it is enough to say that the argument in respect of it is hardly intelligible, and certainly the appellant has made out no case to establish it.”

A LORD WATSON said (*ibid.*, 208):

“With regard to the second deduction claimed by the appellant, I have had no difficulty in coming to the conclusion that the decisions of both courts below were right. Very little was said about the point in the argument of the learned counsel for the appellant, and, so far as I can see, their reticence was not injudicious.”

B I venture to insert that for succeeding generations I think it was not so much injudicious as somewhat unfortunate. LORD WATSON continued (*ibid.*):

“The annuity, the capitalised value of which forms the subject of the claim, was regularly paid to the appellant during his father's lifetime, and ceased to be payable on his death. No part of it formed a charge upon the equitable estate to which the appellant has succeeded, under the deed of re-settlement, not in fee but in life-rent.”

C I read that language as meaning that by contrast with the Prudential mortgage, the estate itself, which was the subject of the settlement, was not liable to a charge in respect of this annuity, taking effect anterior and in priority to the settlement and to the interests under the settlement, as was the case with the Prudential mortgage. LORD WATSON continued (*ibid.*):

“In these circumstances I do not think it can, with any degree of plausibility, be maintained that the estate which passed to the appellant upon his father's death has been thereby diminished or affected.”

D The next speech is that of LORD MACNAGHTEN, and on this matter he said tersely (*ibid.*, 216):

“As regards the minor point urged by Mr. Haldane, I think the claim to deduct the value of the £3,000 annuity must fail. There is no foundation for it; the property passed free from the annuity, and the Act makes no provision for any such allowance. There was a provision to that effect in the Succession Duty Act. At any rate, s. 38 of that Act was so construed in this House: *Lord Braybrooke v. A.-G.* (5); *Inland Revenue Comrs. v. Harrison* (6). But there is no analogous provision in the Finance Act, 1894.”

E LORD MORRIS said that he failed to see any sound argument in the contention. LORD SHAND dealt with it no less summarily; and finally LORD DAVEY devoted a few lines to the matter thus (*ibid.*, 221):

G “As to the other point—whether the appellant is entitled to any deduction in respect of the cesser of the rent-charge of £3,000 a year to which he was entitled during the second earl's lifetime—I agree with your Lordships that he is not entitled to that deduction, and I need not repeat the reasons which have been given.”

H The student of the law who read *Earl Cowley v. Inland Revenue Comrs.* (2) in relation to this point might, I think, be excused for failing to discern that it had (as, in my judgment, was the case) decided a most significant and far-reaching question of principle. When I come to *De Trafford* (3), I think it is impossible to resist the view that what I have said is correct, for putting it for the moment very briefly, the *Cowley* case (2) must now, in my view, be taken to have decided that where the income of settled estate is held on trusts not to pay it in aliquot shares to two or more persons, but to apply the income

first in making an annual payment of a fixed sum or an annuity, whether that annuity is or is not charged on any part of the estate, and subject thereto to pay the income to another person, then the entire property passes on the death of the latter person under s. 1 of the Finance Act, 1894, and s. 2 (1) (b) has no application whatever to it. How far-reaching that is may be seen if examples are taken (and the present is indeed not a bad one) in which the annuity or fixed annual payment takes up by far the largest part of the income of the whole estate. So far, indeed, does the principle go that it is irrelevant that the person who succeeds to the whole income is the same person who has in fact enjoyed the annuity or annual payment. The result seems indeed a hard one, but though the point appeared most casually taken and briefly dealt with in the House of Lords as a minor point of little significance, it is my view that *De Trafford* (3) beyond any question lays it down that that is what, as a matter of principle, *Earl Cowley v. Inland Revenue Comrs.* (2) in the House of Lords did decide. If that is right, I have come to the conclusion (which I think is inevitable) that *A.-G. v. Glossop* (1) proceeded on a failure to appreciate the significance of the decision in *Earl Cowley v. Inland Revenue Comrs.* (2), and is inconsistent with the principle which *De Trafford* (3) states that *Cowley* (2) laid down and established. It is not merely that *Cowley* (2), quite understandably perhaps, was not fully appreciated, or that its significance was not fully appreciated, but when *A.-G. v. Glossop* (1) came before the court there were two matters in respect of which an obvious distinction appeared between *Cowley* (2) and *A.-G. v. Glossop* (1). In the first place, as I have indicated, in *Earl Cowley v. Inland Revenue Comrs.* (2) the £3,000 annuity was in fact charged on the corpus of the settled estates. In the second case, for reasons which I have already intimated, s. 5 (3) had, and could have had, no application in *Earl Cowley v. Inland Revenue Comrs.* (2); and therefore one finds beyond any doubt that in *A.-G. v. Glossop* (1) the members of the court thought that the question turned essentially on the applicability of s. 5 (3), which had not been a material consideration in *Earl Cowley v. Inland Revenue Comrs.* (2).

I, therefore, come to the *Glossop* case (1). Except for one sentence in the judgment of WALTON, J., to which junior counsel for the taxpayers alluded (and to which I will, in deference to his very careful argument, also refer presently) I do not find it necessary to go to the report in the court of first instance. I turn to the report in the Court of Appeal, and I hope that I have already sufficiently stated the facts of the case. The Master of the Rolls, as I have already said, was SIR RICHARD COLLINS, who had taken part in the decision in *Cowley's* case (2) in the Court of Appeal, and there is no doubt that *Cowley* (2) was referred to in the course of the argument. Other points were before the court in *A.-G. v. Glossop* (1), but the relevant part of the case was the cross-appeal before the Court of Appeal, and it is dealt with in these terms by the Master of the Rolls ([1907] 1 K.B. 174):

"I come now to the cross-appeal in respect of that portion of the wife's fortune which WALTON, J., held not to be subject to estate duty. The learned judge has decided that 'the Crown is entitled to succeed except as to so much of the "wife's fortune" as is her share of the capitalised value of the fund which produced the income of £400 a year'. This part of the case turns on other considerations. The question is whether the case comes within s. 5 (3) of the Finance Act, 1894, [which he reads]. The learned judge said: 'As to so much of the corpus producing the £400 a year as was part of the wife's fortune the case is different. If he had survived his wife, he would have been entitled to a life interest in this, and this interest failed on his death before it became an interest in possession. The question remains whether as to this any subsequent limitations continued to subsist after the death of the husband. I have already held

in effect that upon the death of the husband the wife became entitled to this property absolutely. But it appears to me that, if this be so, it has been decided in *A.-G. v. Wood* (7) that in such a case a limitation under the settlement does continue to subsist within the meaning of s. 5 (3). In my judgment, therefore, so much of the wife's fortune as formed part of the capital which produced the income of £400 a year must not be deemed to have passed on the husband's death'."

A It is at that point that the quotation from the judgment of WALTON, J., stops, but I will add the further sentence to which junior counsel for the taxpayers very properly alluded: "In order to arrive at the amount an apportionment will be necessary". Then the end of this part of the judgment of SIR RICHARD COLLINS, M.R., is (*ibid.*):

B "In my opinion it is clear that there was an interest of the husband in this part of the wife's fortune which failed or determined by reason of his death before it became an interest in possession. The question is whether, when the husband's interest failed, the subsequent limitation in favour of the wife could be said to continue to subsist."

C The learned Master of the Rolls proceeded to deal with that point.

Before I turn to the other two judgments, I make three observations. First, as I have stated more than once already, the Master of the Rolls plainly treated the question as turning on the applicability of the Finance Act, 1894, s. 5 (3), and (if I may say so) rightly and naturally, if for no other reason that that thereby the case was clearly distinguishable from the decision in *Earl Cowley v. Inland Revenue Comrs.* (2). The second observation is that in *A.-G. v. Glossop* (1) much turned on whether one of the conditions of s. 5 (3) was satisfied, viz., that there were continuing limitations under the settlement. The court held that there were, and that point may be disregarded for present purposes, since in this case it is irrelevant. But the third observation, which in this case I think to be the most significant, is this. Quite plainly, I think, from the judgment that I have read, the learned Master of the Rolls regarded the wife's portion as severable for the purposes in hand. I need not repeat anything I have read except, just by way of reminder, to refer to the passage quoted from the judgment of WALTON, J.:

F "The learned judge has decided that 'the Crown is entitled to succeed except as to so much of the "wife's fortune" as is her share of the capitalised value of the fund which produced the income of £400 a year'";

and, in the sentence which junior counsel for the taxpayers has caused me to add to the citation, "an apportionment will be necessary". In other words, I think it is fundamental to this decision that the Master of the Rolls treated this part of the wife's fund which produced the £400 a year as distinct and severable from the rest. It was as to that part of the fund that the husband had and only had a reversionary interest contingent on surviving his wife.

G I pass to the judgments of the other two members of the court. So far as COZENS-HARDY, L.J., was concerned, he seemed more doubtful, but I think his doubts were much more directed to the question of the continuation of the settlement. On the main point he added little, if anything, to the Master of the Rolls' judgment. The learned lord justice said (*ibid.*, 177):

H "With reference to the cross-appeal, I confess that I have felt more difficulty, but I am not prepared to differ from the other members of the court."

Then, after referring to a section of the Finance Act, 1896, which is not relevant here, he went on (*ibid.*):

"... as regards s. 5 (3) of the Finance Act, 1894, I feel that the question is one of more difficulty, and I am not, as I have said, prepared

to dissent from the view taken by VAUGHAN WILLIAMS, J., and WRIGHT, J., in *A.-G. v. Wood* (7) and by my colleagues in the present case, to the effect that one must look at the moment of time when the husband died to see whether there was any subsequent limitation subsisting."

So that COZENS-HARDY, L.J., is really adopting in its entirety, so far as is relevant to this case, what the learned Master of the Rolls said. Finally, there is the passage in the judgment of FARWELL, L.J., to which much attention has been directed, because I think he may have gone somewhat further than either of his colleagues. The learned lord justice said (*ibid.*, 180):

"Then, with regard to the second question, I also think that the learned judge was right. That question turns on s. 5 (3) of the Finance Act, 1894, which provides . . . [he reads it]. In this case there was in the first place a trust, during the joint lives of the husband and wife, to pay out of the entire income an annuity of £400 to the wife and to pay the residue of the income to the husband, and, then, after the death of either of them, there was a trust to pay the whole income to the survivor. It seems to me clear that the husband failed to take any interest in possession in such part of the wife's fortune as is property attributable to the production of the £400 annuity. To my mind it is a perversion of language to say that, in the events that happened, the husband ever had an interest in possession in the whole income, subject only to a charge of £400. He never had anything but a right to receive the residue remaining after payment of the annuity of £400 to the wife; and the trustees would have been guilty of a breach of trust if they had let him into possession of the whole income on his undertaking to keep down the annuity. Counsel for the Crown likened the case to that of a charge, but, if there could be said to be any charge in favour of the wife, it would only be a continuing charge on income so that there would be a right to make up deficiency of income in one year by having recourse to the income of another year; but there is no charge on corpus, and no right in the husband to be let into possession."

As regards the charge, what the learned lord justice was saying served at any rate to distinguish the case from *Earl Cowley v. Inland Revenue Comrs.* (2), which the Crown had cited in support of their argument, because in the latter case the annuity was, as I have said, charged on corpus. FARWELL, L.J., perhaps, states less precisely the view which I think beyond doubt WALTON, J., the Master of the Rolls and COZENS-HARDY, L.J., entertained—that the portion of the trust fund which produced the £400 a year was severable and distinct for the purposes in hand, but I do not think that he dissented from that view because of the phrase in the passage that I have read (*ibid.*):

"It seems to me clear that the husband failed to take any interest in possession in such part of the wife's fortune as is property attributable to the production of the £400 annuity";

but he did go on to say that he thought it "a perversion of language" to say that a husband who was entitled to income subject to the £400 a year charge could possibly be said to have an interest in possession, subject only to a charge of £400, and, in so far as he meant thereby that, for that reason, there could be no passing of the whole fund, it will be seen, as I think beyond a peradventure, that that statement is inconsistent with what LORD RUSSELL OF KILLOWEN said in the *De Trafford* case (3).

So much for *A.-G. v. Glossop* (1), and I think, as I have said, that the decision rests on the circumstance that the court was able to regard that part of the fund as produced the £400 as being separate or severable, what is now called a "slice", and that in respect of it, s. 5 (3) applied to provide exemption, as it had not been available in *Earl Cowley v. Inland Revenue Comrs.* (2). I think the court also thought (or at least FARWELL, L.J., did) that there was a further

distinction insomuch as in *A.-G. v. Glosop* (1) the annuitant had no charge on the corpus. So I come to the third of these cases, *De Trafford v. A.-G.* (3). Of the several misfortunes which, I think, have befallen the court in the present appeal—including the circumstance that in the case I have just read there is certainly no clear statement by any of the learned judges whether they regarded the case as falling within s. 1 or s. 2 (1) (b)—one is the fact that the *De Trafford* case (3) contains for our purposes a somewhat obscure and incomplete statement of the facts, and although the law reporter states that the argument sufficiently appears from the speech of LORD RUSSELL OF KILLOWEN, I venture to doubt whether that observation does justice to what may have fallen from the very learned counsel who appeared for the appellant. But the facts in *De Trafford* (3), as stated in the reports, have been amplified for us by counsel for the Crown, who has supplied us with the record in the House of Lords on the occasion of the appeal. The settlement in question of the *de Trafford* estates was, undoubtedly, very complicated, the settlement consisting not merely of certain deeds, but also of two private Acts of Parliament. I will read the first part of the headnote, and then I will make some addition for which I am indebted to counsel and the House of Lords record, because it will, I think, help to make clearer the true significance of this case. The headnote reads:

“At the date of the order of the Chancery Division hereinafter mentioned an estate of great value consisting of real property, invested funds, and policies of insurance was by a deed of re-settlement and two private Acts of Parliament vested in trustees for the life of Sir H. F. de T., the late baronet, to uses for raising £250,000 for portions for the late baronet's younger children and subject thereto to the use of Sir H. E. de T., the present baronet, for life with remainder to his first and other sons in tail male; and it was provided that the annual income of the estate should during the life of the late baronet be held and applied by the trustees in making certain payments and among them a payment of an annual sum of £8,000 to the present baronet during the joint lives of the late baronet and the present baronet.”

There is a reference to a further power to charge further sums. The significant addition to those facts which counsel enables me to make is that under the second Act—the private Act of 1914—the exact terms of the trusts during the joint lives were that the trustees were to make divers payments, and among them was this annual sum which happened to be at the rate of £8,000 at the date when Sir Humphrey Francis de Trafford died, but which was in fact a rising sum, and would, if Sir Humphrey Francis de Trafford had lived long enough, have risen to £10,000 a year. There were other payments to be made, and then the net surplus income, after payment or provision for these various other sums, was payable and distributable in the hands of the trustees on discretionary trusts, one of the objects of discretion being the late baronet. The phrase “the net surplus income” is, at any rate, closely comparable to the phrase which we have in the present settlement (the Lambton settlement), “the rest of the income”. It is clear from the speeches in the House of Lords in *De Trafford* (3) that the direction to apply the net surplus income was treated as being entirely equivalent to a direction “subject to the payment of” such-and-such prior payments “the whole income goes to A B”, and it is that which has led me to construe the Lambton settlement in this respect in the way I have done.

The question which was raised in *De Trafford* (3) was whether, on the death of the late baronet, Sir Humphrey Francis de Trafford, the estate duty which became payable was on the footing of a passing of the entire estates, notwithstanding that the then present baronet, Sir Humphrey Edmund de Trafford (who came into possession and enjoyment of the income of the settled estates

had, immediately before the death of his father, been the recipient of the £8,000 a year annuity. It will be seen from those facts alone how close they are to the facts of the present case, and how difficult it would be, on a matter of principle to distinguish the two cases. Unfortunately, in *De Trafford* (3), so far as can be discovered, *A.-G. v. Glossop* (1) was never referred to at all, but the speech of LORD RUSSELL OF KILLOWEN has made clear, I think beyond a doubt, as I have said more than once, how significant and far-reaching were those parts of the speeches in *Earl Cowley v. Inland Revenue Comrs.* (2) which, at first sight, might appear casual and insignificant. LORD RUSSELL (and the other noble and learned Lords were content to accept and agree with his speech) said ([1935] A.C. 288):

"It is in regard to the estate duty payable in consequence of his death [i.e., Sir Humphrey Francis de Trafford's death] that two disputed points have come before your Lordships' House for determination. The first one is concerned with the annual sum of £8,000 of which the present baronet was in receipt and had been in receipt since he had attained the age of thirty-five years on Nov. 29, 1925. That annual sum, since it was only payable out of the annual income arising during his father's life, came to an end with his father's death; but on the happening of that event he became tenant for life in possession of the estates, and as such entitled, during his life, to the whole income arising therefrom subsequently to his father's death. In these circumstances it is argued by the appellants (who are the trustees and have accepted liability for the duty payable) that a notional portion of the estates (namely, so much as was required to produce £8,000 per annum) neither passed on the death of the late baronet within the meaning of s. 1 of the Finance Act, 1894, nor should be deemed to be included in property so passing by reason of s. 2 of that Act. Alternatively it is contended that no benefit accrued or arose to the present baronet by reason of the cesser of his right to receive the £8,000 a year.

"My Lords, these are contentions which in my opinion we are precluded by authority from adopting. I am unable to distinguish this case from *Earl Cowley v. Inland Revenue Comrs.* (2). In that case two points arose for decision. The first related to a sum secured by a mortgage, which had been created on the fee simple of the Mornington estates before the execution of a settlement of those estates upon trust that the third Earl Cowley should receive during the life of his father the second earl a sum of £3,000 a year, and, subject to and charged as aforesaid, for the second earl for life and after his death for the third earl for life with remainders over.

"The second point arose in regard to the annual sum of £3,000. On the death of the second earl the Crown sought to recover estate duty on the footing of the estates being valued as unincumbered by the mortgage. It was held by your Lordships' House that the case fell under s. 1 of the Finance Act, 1894, and not under s. 2 (1) (b) of that Act; and further that the property which passed on the death of the second earl was only the property which was settled—namely, the equity of redemption and not the unincumbered fee.

"The third earl, however, claimed that no duty should be paid in respect of the annuity of £3,000 since no benefit had accrued to him by the cesser of the second earl's interest, and he claimed to deduct the capitalised value thereof. It was decided that there was no foundation for such a claim.

"It was urged before us here that the second point in the *Cowley* case (2) had only been argued as a question of deduction from the value of the property which passed; but that the present contention was a question

of reduction of the quantum of the property which passed on the death; and it was said that the reasoning which decided the first point in the *Cowley* case (2) was applicable here to establish that the quantum of the property which passed on the death should be reduced by excluding the notional portion of the estates which I have indicated above. It was further said that the *Cowley* case (2) was distinguishable on the facts.

- A "For myself I see no distinction of substance on the facts; for the fact that the life estate had been divested from the tenant for life and vested in trustees during his life, can of itself cause no different answer to be given to the question what property passed on his death. The mortgage in the *Cowley* case (2) was outside and anterior to the settlement, and independent of it. The annual sum of £8,000 in the present case was payable out of income arising under the settlement. The reasoning which decided the first point in the *Cowley* case (2) cannot therefore apply. Nor can I see any justification for the exclusion of any portion of the estates from the property passing on the death. The present baronet's right to an annual sum of £8,000 gave him no right to the receipt of any particular items of the annual income, or to the income of any particular portion of the estates. His right to receive an annual sum of £8,000 ceased on the death of the late baronet; his right, which then arose, to receive all the rents was a new and a different right. There was never either in fact or in law anything resembling a surrender of the life estate to the immediate remainderman, as was the case in *A.-G. v. Beech* (8). In my opinion it is impossible to distinguish this case from the *Cowley* case (2). The property as a whole passed to the present baronet freed from the trust or liability to pay the annual sum, which trust or liability automatically came to an end with the death of his father."
- B
- C
- D

Then LORD RUSSELL cites from LORD WATSON's speech in *Earl Cowley v. Inland Revenue Comrs.* (2) the part of it which I have already quoted.

- E I venture to think that it is not surprising that, as LORD RUSSELL states, the contention was that in *Cowley* (2) all that was argued was a question of deduction from the value of the property; but quite clearly LORD RUSSELL was not deterred by that circumstance from setting out in characteristically clear and unambiguous phraseology what *Cowley* (2) decided. LORD RUSSELL quite plainly negatived and rejected the view which formed the basis of the argument in *De Trafford* (3)

- F "that a notional portion of the estate (namely, so much as was required to produce £8,000 per annum) neither passed on the death of the late baronet within the meaning of s. 1 of the Finance Act, 1894, nor should be deemed to be included in property so passing by reason of s. 2 of that Act."

- G LORD RUSSELL said (*ibid.*, 289):

" . . . these are contentions which in my opinion we are precluded by authority from adopting "

- yet those were the very contentions, as I interpret the case, which formed the basis of the decision in *A.-G. v. Glossop* (1). The passage which I have read at the end of LORD RUSSELL's opinion makes quite clear, I think, that,
- H in the view of the House of Lords, where a person is entitled to an annuity or annual sum payable out of income, then on the death of the person entitled to the rest of the income there is a passing of the whole estate under s. 1, and in that respect the case differs from the case where the income is payable in aliquot shares to two or more persons. That distinction between aliquot shares and an annuity or annual fixed sum may, no doubt to many, seem a narrow and fine one. Perhaps it is, but that it exists and is clearly established is, I think, not now open to any doubt, and, if any citation were necessary for

this purpose, I cite the recent case decided in this court of *Re Duke of Norfolk* (9), and in particular the passages which were cited from the judgment of JENKINS, L.J. ([1950] 1 All E.R. 673 et seq.). I am unable to read *De Trafford's* case (3) as doing other than deciding and establishing that *Earl Cowley v. Inland Revenue Comrs.* (2), whatever may have been thought at the time or subsequently before 1935, covers as a matter of principle all cases where income under a settlement is held on trust to pay an annuity or other fixed sum and subject thereto to pay the balance to A B, and then A B dies—in all those cases, as I have said, there is a passing of the whole property and it is irrelevant that the person who succeeds to the whole income is the same person who enjoyed the annuity or fixed annual sum.

Junior counsel for the taxpayers attempted to persuade us that, even so, we could and should hold ourselves bound by the decision in *A.-G. v. Glossop* (1) on the basis that there were between *A.-G. v. Glossop* (1) and the present case, on the one hand, and *Cowley* (2) and *De Trafford* (3), on the other, sufficient distinctions, however artificial—however one might be inclined to reject them on the grounds of logic or good sense—to justify, and indeed compel, us to say that this case is within the four corners of *A.-G. v. Glossop* (1), and, therefore, we are bound to follow it, and it will be for the House of Lords to say that it is wrong. That might be so if the distinctions were such that we could, consistently with loyalty to the decision in *De Trafford* (3), accept them, but I think they are not. The first distinction rested on the existence in the *Cowley* case (2) of a charge on corpus, whereas in the present case there is no charge at all, or at most only a continuing charge on income. That distinction is surely quite untenable in view of the general language of LORD RUSSELL OF KILLOWEN in *De Trafford* (3) (where equally there was no charge) which I have already read, and do not repeat. Secondly, it was argued that there was a distinction, at once perceptible and intelligible, between a case where the settled property consists of realty or the proceeds of the sale of realty held as capital money, on the one hand, and pure personalty, on the other, and counsel drew attention to the fact that possession of real estate involved a certain degree of physical enjoyment of the actual property in a sense which is inapplicable to investments. Again, I am quite unable to attach any such significance to that distinction as to justify our departing from the principle so plainly enunciated by LORD RUSSELL, more particularly when regard is had to the width of the definition I have read from s. 22 (1) (f) of the Finance Act, 1894, and to the fact that for estate duty purposes no distinction has ever been drawn between realty and personalty in any sense in circumstances relevant to the present case.

I confess that the conclusion at which I have arrived may be thought somewhat regrettable partly because (as is stated and frankly conceded) for forty-five years the decision in *A.-G. v. Glossop* (1) has, I believe, been followed as a matter of practice as governing cases of this character, and it may be that many persons have acted in reliance on it. The distinction is in any case a fine one between aliquot shares and provisions for payment of a fixed annual sum and subject thereto to pay the residue of the income. I ventured to suggest to counsel for the Crown that conveyancing ingenuity of no very extravagant or remarkable order could very easily frame trusts of a settlement so as to produce by fluctuating fractions the substantial equivalent of the present case, and, although I do not decide it, I should imagine that, if success crowned those efforts, the result would be to give rise to a much smaller liability for duty. These, however, are matters for Parliament and not for the court. LORD RUSSELL himself in *Re Cassel* (10) ([1927] 2 Ch. 279, 280), I think, has joined those who have somewhat regretted the sharp distinction between s. 1 and s. 2 which the *Cowley* case (2) must be taken to have drawn, and its decision that in cases such as this it is s. 1, and not s. 2 (1) (b), which applies. But the duty of this court is to decide the case as best it can according to the

law as it interprets it, and, giving my best attention to this matter, I have been unable to avoid the conclusion that the basis on which *A.-G. v. Glossop* (1) is quite clearly shown to have rested was cut away and destroyed in quite unmistakable language by LORD RUSSELL OF KILLOWEN in the *De Trafford* case (3), and I, therefore, think that the appeal must be dismissed.

BIRKETT, L.J.: I am in complete agreement with the judgment of the Master of the Rolls which has just been delivered, and have nothing that I wish to add.

ROMER, L.J.: I also agree. It seems to me that the first subject to inquire into in this case is as to the nature and quality of the £400 a year to which the wife was entitled under cl. 2 of the settlement. In my opinion, the wife's right to prior payment out of the annual income of this sum was an annuity, and cannot be regarded as a mere share of income or an income interest in a separate and aliquot part of the settled fund. Had the wife surrendered her right to the £400, it is, in my judgment, impossible to say that there would have been a resulting trust as to this income, for, on the construction of cl. 2 of the settlement, it is clear that it would have accrued to the residuary income which was payable to the husband. This residuary income is described in much the same way as the balance of income was described in the *De Trafford* case (3). In that case the ultimate income was described as "any surplus income remaining after" certain payments had been made, including the £8,000 per annum which was under discussion in that case. The recipient of that sum was regarded by the House of Lords as an annuitant, and not as a person entitled to the income of such portion of the settled estate as would produce that sum.

It appears to me that in *A.-G. v. Glossop* (1) the Court of Appeal undoubtedly treated the wife in that case as a person to whom the income of an appropriate part of the corpus of her fund had to be paid, that is to say, as a person who was in possession of that income. The result of this was to exempt from duty the husband's prospective interest in such income on his death by virtue of s. 5 (3) of the Finance Act, 1894, leaving only the rest of the fund exigible to the duty. In the light of the decision in *Earl Cowley v. Inland Revenue Comrs.* (2), as explained by the House of Lords in the *De Trafford* case (3)—because, as my Lord has pointed out, the full significance of the relevant point in that case did not apparently emerge very clearly—it seems to me that the approach by the court to the position as it existed in *A.-G. v. Glossop* (1) was erroneous. On the footing that an income interest, such as that of the wife, could and should be treated on what has been described as the "slice" principle, then the decision at which the court arrived would necessarily follow. It is, however, now clear that the recipient of such an income interest has no right to any specific income, for his position is no more and no less than that of an ordinary annuitant. That was clearly stated, I think for the first time, by LORD RUSSELL OF KILLOWEN in his speech in the *De Trafford* case (3), where he said ([1935] A.C. 290):

"The annual sum of £8,000 in the present case was payable out of income arising under the settlement. The reasoning which decided the first point in the *Cowley* case (2) cannot therefore apply. Nor can I see any justification for the exclusion of any portion of the estates from the property passing on the death. The present baronet's right to an annual sum of £8,000 gave him no right to the receipt of any particular items of the annual income, or to the income of any particular portion of the estates. His right to receive an annual sum of £8,000 ceased on the death of the late baronet; his right, which then arose, to receive all the rents was a new and a different right."

If this principle had been present to the minds of the members of the court in the *Glossop* case (1), it must, I think, have resulted in a conception different from that which formed the basis of their decision. It must necessarily have led to the conclusion that the wife had no beneficial interest in any individual particles of income arising from the trust fund, but an interest in the income as a whole, and that during her lifetime, as no particles of income were dedicated to her exclusive benefit, the husband was entitled in possession to the whole income, subject only to the payment out of that income generally of the wife's annuity. From this it must follow that on the husband's death in the present case there was a passing of the settled fund as a whole, and not merely the passing of a segregated part thereof; and for the reasons which my Lord stated more elaborately (and of which I have given the merest summary) it seems to me there is no escape from the conclusion which the Master of the Rolls has expressed. For my part I share his regret that we should be compelled to this conclusion.

The general scope of the Finance Act, 1894, was described in the well-known passage in LORD MACNAGHTEN's speech in the *Cowley* case (2) as follows ([1899] A.C. 210):

"My Lords, the principle on which the Finance Act 1894 was founded is that whenever property changes hands on death the State is entitled to step in and take toll of the property as it passes without regard to its destination or to the degree of relationship, if any, that may have subsisted between the deceased and the person or persons succeeding."

It has been pointed out by HARMAN, J., in his judgment in this case (and it is plainly true) that by reason of her husband's death, the widow here has only become richer by the difference between the £400 a year, which she had been receiving in her husband's lifetime, and the total income of the fund, and nevertheless estate duty will be leviable on the entire fund as the result of this decision. It appears to me that that result is difficult to reconcile with the statement of principle which LORD MACNAGHTEN expressed in the passage from his speech that I have cited. But there it is. In my view, the conclusion is inevitable, and, if any change be thought desirable in such a case as this to meet what to my mind is an undoubted hardship, then it would be for the legislature to make such change as it thinks proper, for it is outside the powers of this court so to do. I agree, therefore, with the result that my Lord has stated.

Appeal dismissed.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Cooper & Jackson*, Newcastle-upon-Tyne (for the taxpayers); *Solicitor of Inland Revenue*.

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

FIRESTONE TIRE AND RUBBER CO. (S.S.) LTD. v. SINGAPORE HARBOUR BOARD.

[PRIVY COUNCIL (Lord Normand, Lord Tucker, Lord Asquith of Bishopstone and Lord Cohen), April 29, 30, May 1, 5, June 10, 1952.]

A *Public Authority—Limitation of action—Harbour board—Action under power to carry on trade of wharfingers and warehousemen—Trade not subsidiary to main purpose of managing and controlling harbour—Straits Settlements Public Authorities Protection Ordinance (Revised Laws, 1936 (c. 14)), s. 2 (2), as amended by Public Authorities Protection (Amendment) Ordinance, 1939, s. 2—Limitation Act, 1939 (c. 21), s. 21 (1).*

B It is essential to the protection afforded by enactments prescribing limitation of action for the protection of public authorities that the act or default in question should be in the discharge of a *public* duty or the exercise of a *public* authority. In deciding whether the duty or authority has this public quality it is sometimes relevant to consider whether it arises out of or is imposed by a contract voluntarily entered into by the public authority with an individual with whom it is under no obligation to contract.

C The mere fact, however, that in the discharge of its duty or the exercise of its authority the public authority may have made a contract does not of itself deprive the duty or authority of its public quality. The existence or absence of a contract is not a decisive test. Effect must be given to the word “authority”. This excludes the test of obligatory as opposed to permissive powers.

D The respondent board, a public authority constituted under a local ordinance, were authorised to construct, maintain and repair docks and wharves and to carry on, inter alia, the business of wharfingers and warehousemen at the port of Singapore, and to levy rates for the wharfrage and storage of goods. In an action by the appellants against the board for damages for the loss of goods, the property of the appellants, which had been received by the board in one of their warehouses, but not delivered to the appellants, the board claimed that the action, not having been commenced within the prescribed period of limitation after the acts complained of, was barred by s. 2 (2) of the Public Authorities Protection Ordinance of the Straits Settlements, which was in substantially the same terms as the Limitation Act, 1939, s. 21 (1).

F HELD: the board having exercised their power to carry on the trade of wharfingers and warehousemen did not thereby cease to function as a harbour board and undertake some trading activity of a non-public and purely subsidiary nature; they were supplying facilities essential to the shipping community in one of the ways authorised by the ordinance by which they had been created a harbour board charged with the management and control of the port, and were thus fulfilling one of the main purposes for which they had been given statutory powers; and, therefore, they were entitled to the protection of the ordinance.

G *Bradford Corpn. v. Myers* ([1916] 1 A.C. 242), and dictum of VISCOUNT MAUGHAM in *Griffiths v. Smith* ([1941] 1 All E.R. 76), applied.

H Decision of COURT OF APPEAL OF SINGAPORE ([1950] 1 M.L.R. 91), affirmed.

AS TO THE PUBLIC AUTHORITIES PROTECTION ACT, 1893, see HALSBURY, Hailsham Edn., Vol. 26, pp. 290-304, paras. 609-630; and FOR CASES, see DIGEST, Vol. 38, pp. 101-136, Nos. 725-998.

Cases referred to:

(1) *Bradford Corpn. v. Myers*, [1916] 1 A.C. 242; 85 L.J.K.B. 146; 114 L.T. 83; 80 J.P. 121; 38 Digest 110, 784.

- (2) *Griffiths v. St. Clement's School, Liverpool (Managers) & Liverpool Church of England Schools Society*, [1939] 2 All E.R. 76; *sub nom. Griffiths v. Smith*, 103 J.P. 163; *affd. sub nom. Griffiths v. Smith*, [1941] 1 All E.R. 66; [1941] A.C. 170; 110 L.J.K.B. 156; 164 L.T. 386; 105 J.P. 63; 2nd Digest Supp.

APPEAL by the plaintiffs from an order of the Court of Appeal of Singapore (MURRAY-AYNSLEY, C.J., and GORDON-SMITH, J., EVANS, J., dissenting), dated Mar. 28, 1950, and reported [1950] 1 M.L.R. 91, allowing an appeal of the harbour board against an order of BROWN, J., dated Dec. 9, 1949, whereby he gave judgment for the appellants in a claim for damages for breach of a contract of bailment. A

The appellants were the consignees of a cargo of rubber tyres from Bombay which arrived at Singapore on July 4, 1946, and were discharged into the board's warehouse. Between July 11 and 14 the cargo was delivered out of the warehouse to the appellants with the exception of seventeen tyres. On Aug. 1, 1946, the appellants notified the board of the loss and on June 19, 1948, they issued the writ in the action. The board, who were a body incorporated under the Ports Ordinance of the Straits Settlements with certain powers to manage the Singapore harbour and to carry on the business of warehousemen, contended that the action against them was for an act done in pursuance of the Ports Ordinance and that it was not maintainable because it was not commenced within six months after the alleged act, default or neglect complained of as required by s. 2 (2) of the Public Authorities Protection Ordinance of the Straits Settlements. BROWN, J., held that the board had failed to discharge the burden of proving that the loss of the tyres was not due to their negligence, and that, in dealing with the appellants, they were doing so, not as members of the public, but as individuals in the course of an implied contract which was an incident in carrying on their business as warehousemen, and, therefore, that the action was not statute-barred. The Court of Appeal held that the board were directly performing their duties as dock owners under the Ports Ordinance and were entitled to protection. B C D E

Raeburn, Q.C., and *C. H. Withers Payne* (of the Singapore Bar) for the appellants.

Diplock, Q.C., and *J. F. Donaldson* for the harbour board.

June 10. LORD TUCKER: On Dec. 9, 1949, BROWN, J., sitting in the High Court of the colony of Singapore gave judgment for \$2,053.10 in favour of the appellants who were the plaintiffs in an action brought by them against the respondent board claiming damages for the loss of seventeen tyres, the property of the plaintiffs, which had been received by the board in one of their godowns in the harbour of Singapore but never delivered to the plaintiffs. On appeal by the respondent board to the Court of Appeal for the colony the judgment of the trial judge was (by a majority) reversed and judgment entered for the respondent board on the ground that the action was barred by s. 2 (2) of the Public Authorities Protection Ordinance of the Straits Settlements, not having been commenced within six months next after the act, neglect or default complained of. This plea had been rejected by the trial judge. The appellants appealed to Her Majesty in Council by leave of the Court of Appeal. It was common ground that if the Court of Appeal decision with regard to the Public Authorities Protection Ordinance was correct, the appeal must fail, but counsel for the respondent board was desirous of arguing, should it become necessary so to do, that the board were in certain events entitled to succeed on other grounds. The only issue, however, debated before their Lordships was the applicability of the ordinance. F G H

The parties are hereinafter referred to as "the appellants" and "the board". The material facts which are not now in dispute are as follows: (i) On or about

June 25, 1946, the Firestone Tire Co. of India, Ltd. (hereinafter referred to as "the consignors"), consigned a cargo of 3,960 rubber tyres and thirty-three cases of rubber tubes to the appellants in Singapore from Bombay per s.s. Samokla on the terms of a bill of lading dated in Bombay June 18, 1946, between the consignors and the P. and O. Steam Navigation Co. A copy of the bill of lading was sent on June 25, 1946, to the appellants by the consignors. By the bill of lading the goods were shipped to consignors' order with an option

A to the shipping company (the P. and O.) to deliver

"either over the ship's side or from lighter or store ship or hulk or custom house or warehouse or dock or wharf or quay at consignees' risk."

It also provided that the bill should be surrendered duly indorsed at port of destination in exchange for delivery order. (ii) On or about June 28, 1946, Islay Kerr & Co., Ltd. of Singapore, as agents for the shipping company (P. and O.), supplied to the appellants a delivery order dated June 28, 1946, addressed to the board requesting them to deliver the cargo to the appellants. (iii) On or about July 4, 1946, the delivery order was sent by the appellants to the board. (iv) On July 4, 1946, the s.s. Samokla arrived in Singapore and berthed at godowns Nos. 1 and 2. (v) On July 11, 12, 13 and 14, 1946, the cargo was

C discharged from the s.s. Samokla by the servants of the board and was received by the board in one of their godowns. (vi) On or about the dates aforesaid the cargo was delivered out of the board's godown to the appellants or to their order with the exception of the seventeen tyres in respect of which the action was brought which were never delivered. Loss of the goods was reported to the board's clerk on duty at the godown at the time and formal notification

D in writing given on Aug. 1, 1946. (vii) The writ in the present action was issued on June 19, 1948. These being the facts, the board failed to discharge the onus that lay on them as bailees to prove that the goods were lost without negligence on their part, and, apart from the Public Authorities Protection Ordinance, were, accordingly, liable to the appellants unless they could rely on some contractual protection, and it was on this aspect of the case that counsel for

E the board desired to reserve his right of further argument. For present purposes it is assumed that, but for the ordinance, the appellants would be entitled to hold the judgment of the trial judge in their favour.

The material provisions of s. 2 of the Public Authorities Protection Ordinance (c. 14 of the Straits Settlements Revised Laws, 1936, as amended by Ordinance No. 19 of 1939), are as follows:

F " (1) Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution, or intended execution of any ordinance or rules made thereunder or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such ordinance, rules, duty, or authority the following

G sub-sections shall have effect. (2) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or in case of a continuance of injury or damage, within six months next after the ceasing thereof. . . . "

This language is for all practical purposes identical with the English Public

H Authorities Protection Act, 1893, s. 1.*

Although the words "public authority" do not appear in the section it has long been settled law that the words "any person" must be limited so as to apply only to public authorities or persons acting on behalf of public authorities. In the present case it has been admitted throughout that the board is a "public authority" within the meaning of the ordinance so interpreted.

* See now the Limitation Act, 1939, s. 21 (1), which increases the period of limitation under the Act of 1893 from six months to one year, except in criminal proceedings,

The sole issue, accordingly, is whether in taking the appellants' goods into their custody for delivery to them they were doing an act "in pursuance of any public duty or authority". In this connection it is also well settled that this question cannot be resolved merely by ascertaining whether the act or activity in question was intra vires the authority. The protection of the ordinance does not cover all the lawful and authorised acts of a public authority. Some acts are excluded. The difficulty is to define what acts or classes of act are excluded. In *Bradford Corpn. v. Myers* (1) LORD BUCKMASTER, L.C., [referring to the Public Authorities Protection Act, 1893, s. 1] said ([1916] 1 A.C. 250):

"The difficulty is to draw a line between the class of cases that are within and those that are without the statute, and I am conscious that this opinion does not establish as clear and distinct a line as I should like to see. But the statute itself is so framed that such distinction is not easy, and there may well be cases about which greater doubt may arise and more uncertainty be felt than about the present, which to my mind lies clearly outside the area of statutory protection."

In the same case VISCOUNT HALDANE said (*ibid.*, 251):

"What causes of action fall within these categories it may be very difficult to say abstractly or exhaustively. It is hardly easier to define a priori the meaning of being done directly than it is to define the number of grains that will make a heap. But just as it is not difficult to tell a heap when it is seen, so it may be easy at least to say of certain acts that they are not the immediate and necessary outcome of duty or authority in a particular case."

LORD DUNEDIN expressed his entire agreement with the speech of LORD BUCKMASTER, and neither LORD ATKINSON nor LORD SHAW OF DUNFERMLINE attempted to enunciate a principle for the construction of the statutory words although LORD SHAW (*ibid.*, 261) expressed his disapproval of the process of attempting to find an answer by first putting the question: "What is it that this statute did not mean?"

When the construction of these words [in the Act of 1893] again came before the House of Lords in 1941 in *Griffiths v. Smith* (2) the noble Lords who took part in that case again emphasised the difficulty of giving any precise or exhaustive definition and none of them attempted so to do, LORD PORTER saying ([1941] 1 All E.R. 92):

"... I doubt whether it ever will be possible to lay down some general principle by which all cases can be tested."

In this state of affairs it will not, perhaps, cause surprise if their Lordships do not attempt to accomplish what the noble Lords referred to above found well-nigh impossible, but content themselves with examining the two cases cited with a view to extracting therefrom certain matters and considerations that are relevant to, though not necessarily always decisive of, this issue:

(i) It is essential to the protection afforded by the statute that the act or default in question should be in the discharge of a *public* duty or the exercise of a *public* authority. This assumes that there are duties and authorities which are not public: see per LORD BUCKMASTER, L.C., in the *Bradford Corpn.* case (1) ([1916] 1 A.C. 247). (ii) In deciding whether the duty or authority has this public quality it is sometimes relevant to consider whether it arises out of or is imposed by a contract voluntarily entered into by the public authority with an individual with whom it is under no obligation to contract. (iii) The mere fact, however, that in the discharge of its duty or the exercise of its authority the public authority may have made a contract does not of itself deprive the duty or authority of its public quality. The existence or absence of a contract is not a decisive test: see per LORD SHAW OF DUNFERMLINE in the *Bradford Corpn.* case (1) (*ibid.*, 263). (iv) Effect must be given to the word

“authority”. This excludes the test of obligatory as opposed to permissive powers: see per VISCOUNT MAUGHAM in *Griffiths*’ case (2) ([1941] 1 All E.R. 76).

Their Lordships consider that this passage in the speech of VISCOUNT MAUGHAM (which speech was expressly approved by VISCOUNT SIMON, L.C. (ibid., 70)) affords them most assistance in the determination of the present case. He there says (ibid., 76):

A “It is sufficient to establish that the act was in substance done in the course of exercising for the benefit of the public an authority or a power conferred on the public authority not being a mere incidental power, such as a power to carry on a trade.”

B The word “incidental” is here used in the sense of “subsidiary”. It has in these cases sometimes been used as equivalent to “necessarily incidental to” and was so used by SIR WILFRID GREENE, M.R., in *Griffiths*’ case (2) in the Court of Appeal. It will, therefore, avoid any possible confusion if “subsidiary” is substituted for “incidental” in the passage quoted above. Applying this test to the facts in *Griffiths*’ case (2), the noble Lords held that the finding of the trial judge that the school premises where the accident occurred was on the occasion in question being used as a public elementary school, and not for some extraneous purpose, was almost conclusive.

C In the present case, accordingly, their Lordships proceed to consider the Ports Ordinance (c. 149) of the Straits Settlements Revised Laws, 1936, by which the respondent board was created with a view to determining whether in the light of its provisions and on the facts set out above the board, in taking the appellants’ goods into their care and custody in one of their godowns within the precincts of the port of Singapore, were in substance acting in the course of exercising for the benefit of the public an authority or power conferred on them by the Ports Ordinance not being a mere subsidiary power. The heading of the ordinance reads:

E “To constitute boards for the management and control of the ports of Singapore and Penang.”

Section 2 provides for the transfer of obligations and the benefit of debts due. Section 4 (4) provides:

F “The duty of carrying out this ordinance within such limits in the ports and settlements of Singapore and Penang respectively as are duly prescribed shall, subject to such conditions and limitations as are in this ordinance hereinafter contained, be vested in bodies of commissioners to be called respectively ‘The Singapore Harbour Board’ and ‘The Penang Harbour Board’.”

G Section 29 (3) limits the board’s power of leasing to three years unless the written sanction of the governor is obtained. Section 46 imposes an obligation on the board to frame a scale of rates for, inter alia, “the landing, shipping, wharfage, crannage, storage or demurrage of goods at . . . any wharf, dock, pier, building or other place in the possession of the board” and gives power to the board to levy any such rates. It is to be observed that with regard to the matters specifically dealt with in this section the board are given no power to enter into special agreements instead of charging in accordance with the scale of rates framed by them. This is in contrast with s. 47 (2) which confers such a power with regard to charges for the use of docks and the other matters there referred to. Section 60 (1) enacts that provision shall be made for the due fulfilment of the board’s liabilities “and for the efficient administration of the property vested in it under this ordinance”. Section 62 provides for the recovery of leviable rates and gives a right to seize and detain goods until the rates due in respect thereof are paid. Section 73 is headed: “Works and Duties”. It enacts that “The board may” do the various things enumerated

in paragraphs lettered (a) to (g). The section is clearly designed to give wide powers to the board so as to cover every activity which could be foreseen and avoid any question of some act being held to be ultra vires. It includes some matters such as the construction, maintenance and repair of docks and wharves which are of the very essence of the undertaking and other matters some of which might be considered purely subsidiary and others to be on the border line. The paragraph which is most relevant for present purposes is (c) which reads as follows:

“ Carry on the business of builders and repairers of ships and machinery, of wharfingers and warehousemen, of dealers in coal and other kinds of fuel, and dealers in stores connected with or required in the above-named business.”

Paragraph (p) permits them to “ be insurers of goods in the custody of the board ”. This, however, does not mean, as seems to have been thought by some, that it gives power to take out a policy of insurance in respect of goods in their custody, but that they may take on themselves the liability of insurers of such goods. Sections 74 and 75 deal with the regulation of the use of wharves and read as follows:

“ 74. (1) The governor may, notwithstanding anything in this ordinance, appoint any part of the wharves or premises vested in the board as a place for the collection of import or other revenue duties payable to the government. (2) Whenever any wharf or part of the premises of the board has been so appointed as a place for the collection of import or other revenue duties, the board shall set apart and maintain such place, in such manner as the governor requires, for the use of the persons entitled to collect such duties. (3) All rates payable in respect of any such wharf or part of the premises so set apart, or for the landing, shipping or storage of goods thereon, therefrom or therein, shall be paid to the board. 75. The board shall provide such number of public landing-places as are, in the opinion of the governor, sufficient, from and at which the public shall be permitted to embark and land, free of charge, and may, with the sanction of the governor, vary the same.”

Section 75 is, apart from the section which imposes a duty to frame a scale of rates, the only section which is in express terms obligatory, but when read in conjunction with the previous section it is clear that the emphasis is on the duty to make available a sufficient number of free landing-places from the number of existing landing-places rather than to construct special landing-places for this purpose. Section 76 gives the board power to make bye-laws for, *inter alia*:

“ (c) the safe and convenient use of the docks, wharves, piers, landing-places, warehouses, sheds and premises vested in the board or under its control and of any ferry service maintained by the board and (d) regulating the reception, storage and removal of goods within and from the premises of the board. . . .”

Section 78 imposes penalties for the infringement of bye-laws.

The board having constructed or become possessed of warehouses which must be regarded as a normal and necessary adjunct to a port such as Singapore, could elect whether to let them out to others for periods of less than three years (or with consent of the governor for longer periods) or themselves to operate them as wharfingers and warehousemen and levy rates for the wharfage or storage of goods therein. Having chosen the latter alternative they did not thereby cease to function as a harbour board and undertake some purely subsidiary activity of a non-public nature. They were supplying facilities essential to the shipping community in one of the ways authorised by the

ordinance by which they were created a harbour board charged with the management and control of the port, and were thus fulfilling one of the main purposes for which they had been given statutory powers.

Counsel for the appellants stressed the fact that in so doing they were, in the words of VISCOUNT MAUGHAM, acting under "a power to carry on a trade", and he further argued that in so doing they entered into a contractual relationship both with the appellants and the shipping company, or alternatively only with the shipping company, and that the existence of this contractual relationship which gave rise to the liability of the board arose out of a private trading transaction. It would, however, be putting much too narrow a construction on VISCOUNT MAUGHAM's language to interpret it as meaning that every act done under a power to trade must always be a mere subsidiary power. He was doing no more than give an instance of a subsidiary power having in mind, no doubt, the facts in the *Bradford Corpn.* case (1). Furthermore, as previously stated, the existence or non-existence of a contract is not a decisive test, and on the facts in the present case their Lordships are clearly of opinion that the question of contract is immaterial to their decision since, on any view, the board were exercising their permissive powers to perform a normal function of a harbour board, and in so doing were providing a service essential to the shipping and commercial community of Singapore, and, accordingly, were entitled to the protection of the Public Authorities Protection Ordinance.

In the result, their Lordships feel no difficulty in deciding on which side of the line this case lies and are in agreement with the conclusion reached by the majority of the Court of Appeal. EVANS, J., in his dissenting judgment held that there was no public duty on the board to run a warehousing business. He says the public had not been consulted and might have preferred to deal with private traders, and after quoting VISCOUNT MAUGHAM he finds that the board is carrying on a trade and there was no evidence that it was acting for the public benefit. From what has been already stated it will be seen that this view does not give sufficient weight to the word "authority" as distinct from "duty" and would appear to lay more emphasis on the words "such as a power to carry on a trade" than was intended in the context in which they were used. In agreeing, however, with the conclusion reached by the majority their Lordships think it right to observe that they are not able to accept the test laid down by the Chief Justice in that portion of his judgment where in dealing with the interpretation of the decision in the *Bradford Corpn.* case (1) he says:

"The corporation was obliged to supply gas and authorised to sell coke. This distinction was stressed in the judgments of the House and this stress caused the actual decision to be misunderstood. In view of later cases it must be taken to be limited to cases in which there is a contract and either a breach of contract or a tort arising out of the performance of that contract. When there is no contract there is no distinction between activities which are obligatory and those which are merely permissive."

For the reasons stated their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs of the appeal.

Appeal dismissed.

Solicitors: *Smith & Hudson* (for the appellants); *Parker, Garrett & Co.* (for the harbour board).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

WOODWARD v. WOODWARD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), June 10, 1952.]

Husband and Wife—Maintenance—Application to High Court—Jurisdiction—Matrimonial Causes Act, 1950 (c. 25), s. 23 (1).

By s. 23 (1) of the Matrimonial Causes Act, 1950: "Where a husband has been guilty of wilful neglect to provide reasonable maintenance for his wife or the infant children of the marriage, the court, if it would have jurisdiction to entertain proceedings by the wife for judicial separation", may order the husband to make to her periodical payments. The wife applied to the court for maintenance, and in her affidavit she stated that the husband had deserted her, but for a period of less than three years. On a preliminary objection that the court had no jurisdiction,

HELD: the "jurisdiction to entertain proceedings" in s. 23 (1) depended on the domicile and residence of the parties and not on the merits of the case.

Dictum of LORD MERRIMAN, P., in *Rusby v. Rusby* ([1950] W.N. 349) applied.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 23 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 410.

Case referred to:

(1) *Rusby v. Rusby*, [1950] W.N. 349; 94 Sol. Jo. 489; 2nd Digest Supp.

SUMMONS by the wife for maintenance.

The preliminary objection was taken that the court had no jurisdiction to entertain the proceedings, and the case is reported on that point.

Joseph Jackson (Victor Williams with him) for the wife.
Comyn for the husband.

WILLMER, J.: Counsel for the husband has taken a preliminary objection to the jurisdiction of the court. He informs me that the affidavit put in by the wife discloses that her husband has deserted her, but for a period of less than three years. In those circumstances he contends that the court has no jurisdiction to entertain proceedings under s. 23 (1) of the Matrimonial Causes Act, 1950, which provides:

"Where a husband has been guilty of wilful neglect to provide reasonable maintenance for his wife or the infant children of the marriage, the court, if it would have jurisdiction to entertain proceedings by the wife for judicial separation, may, on the application of the wife, order the husband to make to her such periodical payments as may be just . . ."

Counsel contends that it appears on the face of the wife's affidavit that the court would not have jurisdiction to entertain proceedings by the wife for judicial separation based on desertion because the necessary three years have not yet elapsed, and that in those circumstances the court has no jurisdiction to entertain proceedings under s. 23 (1).

In my judgment, the argument, attractive as it is, is entirely fallacious, because it confuses the question whether there is jurisdiction to entertain proceedings with the question whether there are in fact good grounds for proceedings. Merely because, in a particular case, the wife would necessarily have failed had she instituted proceedings for judicial separation, it does not in the least follow that the court would have no jurisdiction to entertain the proceedings. The jurisdiction to entertain proceedings depends on domicile and residence of the parties. That is quite a separate matter from the merits of the claim that is put forward. It seems to me that any other view would involve that this new enactment added nothing to the remedies already open to the

wife. Yet, quite clearly, I should have thought, s. 23 (1) was intended to confer a new remedy.

A That is the view of the matter at which, without assistance, I should have arrived, but I am happy to be able to say that it is entirely in accordance with the view expressed by LORD MERRIMAN, P., in *Rusby v. Rusby* (1). That was, I believe, the first application which came before the court under s. 5 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949, which is now re-enacted by s. 23 (1) of the Act of 1950. The learned President there took the opportunity of making certain remarks as to the scope of the new remedy which had been made available to wives. What he said, of course, was obiter, and without the learned President having had the benefit of argument before him. On the other hand, coming from such a source, that pronouncement is one to which I should in any case feel bound to pay a great deal of respect. The learned President said ([1950] W.N. 349):

C “Before the court entertains an application of this sort, it is first of all necessary for it to satisfy itself that it would have jurisdiction to entertain proceedings by the wife for judicial separation. [Counsel for the husband] has rightly refrained, in my opinion, from suggesting that that means that one has to inquire whether the circumstances are such that a decree of judicial separation should be pronounced. What is meant is that the status of the parties as regards domicile, residence, or the like, is such that the court would have jurisdiction as between those parties to pronounce a decree of judicial separation. If that condition is satisfied, then it has jurisdiction to entertain an application of this kind.”

D Counsel for the husband concedes that if what the learned President there says is right, it is completely destructive of the objection which he has taken to the jurisdiction in this case, and he has attacked the view there expressed by the learned President, pointing out that it was arrived at without argument and expressed obiter. I find myself so completely in agreement with what the learned President said that I do not wish to spend any further time in finding new language in which to express the same idea. I would like to adopt every word of what the learned President said, and, basing myself on that, it appears to me that there is no merit whatsoever in the objection to the jurisdiction which has been taken in this case.

Objection overruled.

F Solicitors: *Ford, Michelmores, Rose & Binning* (for the wife); *Hancock & Willis* (for the husband).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

ASTON CHARITIES TRUST, LTD. v. STEPNEY BOROUGH COUNCIL.

[COURT OF APPEAL (Somervell, Birkett and Hodson, L.JJ.), June 11, 1952.]

Compulsory Purchase—Compensation—“*Land devoted to a purpose of such a nature that there is no general demand . . . for land for that purpose*”—“*Reinstatement in some other place*”—*Acquisition of Land (Assessment of Compensation) Act, 1919 (c. 57), s. 2, r. (5)—Town and Country Planning Act, 1944 (c. 47), s. 57 (1).*

The claimant, a private limited company which was formed to administer a charitable trust, owned premises in Stepney which until 1940 it used as a Unitarian church and for religious and charitable activities connected therewith. After 1940, owing to war damage and to the departure from the neighbourhood of part of the local population in whose interest the trust was administered, a portion of the premises remained unused. In 1942 the organ was removed from the part of the premises used as a church, which was on the first floor, and was stored in one of the rooms on the ground floor, and a company agreed to take a tenancy of such parts of the premises as were not in use by the claimant to store and repair organs from other damaged churches. By a tenancy agreement, dated Sept. 4, 1944, the claimant let the premises to the company for the purpose of the company's business, but reserved the use of two rooms which it continued to occupy for the purposes of the trust, the intention being to terminate the tenancy and to resume possession of the entire premises for the purposes of the trust as soon as possible after the end of the war with Germany. On Sept. 15, 1945, the Minister of Health confirmed a compulsory purchase order made by the local authority in respect of the property, and on Feb. 25, 1946, the authority served a notice to treat on the claimant. It was now the intention of the claimant to set up a similar church and centre about four miles away from the acquired property, and it was contended on its behalf that compensation should be assessed on the basis specified in the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2, r. (5), as the land was devoted to a purpose of such a nature that there was no general demand for land for that purpose. The authority contended that r. (5) did not apply (a) as the premises did not come within the rule at the time of the notice to treat, and (b) as the setting up of a similar church and centre four miles away was not “reinstatement” within the meaning of the rule.

HELD: the words “devoted to a purpose” in s. 2, r. (5), of the Act of 1919 introduced a conception of intention and indicated a different test from that of the de facto use of the premises at the date of the notice to treat; in view of the circumstances which led up to the letting, during the currency of the letting the premises continued to be devoted to purposes of such a nature that there was no general demand for land for that purpose, within the meaning of r. (5), and they were so devoted at the date of the notice to treat; “reinstatement”, within r. (5), was a question of degree and of fact; on the facts, reinstatement in some other place was bona fide intended within the meaning of the rule; and, therefore, compensation was to be assessed in accordance with the rule.

EDITORIAL NOTE. The Town and Country Planning Act, 1944, s. 57, was repealed by the Town and Country Planning Act, 1947, s. 113 (2), and sched. IX, Part I, but by a proviso to s. 113 (2) the repeal was not to affect the operation of s. 57 of the Act of 1944 in its application to compensation in respect of land compulsorily acquired in pursuance of a notice to treat served before the date of the passing of the Act of 1947.

FOR THE ACQUISITION OF LAND (ASSESSMENT OF COMPENSATION) ACT, 1919, s. 2, r. (5), see HALSBURY'S STATUTES, Second Edn., Vol. 3, p. 977; and FOR THE TOWN AND COUNTRY PLANNING ACT, 1944, s. 57 (1), see *ibid.*, First Edn., Vol. 37, p. 476.

CASE STATED by the Lands Tribunal under the Lands Tribunal Act, 1949, s. 3 (4), and R.S.C., Ord. 58B, r. 2.

A The claimant, Aston Charities Trust, Ltd., a private company which was formed to administer certain charitable endowments and which was incorporated on Apr. 28, 1930, owned premises, known as Durning Hall, Elsa Street, Stepney. On the upper floor of the premises were a Unitarian church and a concert hall, and on the lower floor were a meeting room, a loan club room, a gymnasium, a minister's vestry, and several other rooms. The premises were designed and built for the religious and charitable purposes of the trust and were used exclusively for those purposes until August, 1940, when, owing to war damage and to the departure from the neighbourhood of much of the local population in whose interests the trust was administered, some parts of the premises remained unused by the claimant. In 1942, owing to further damage to the premises, the organ from the church on the first floor was removed to one of the rooms on the ground floor by Messrs. Kingsgate, Davidson and Co., Ltd., the makers of the organ, and, at a later date, that company agreed with the claimant to take a tenancy of such parts of the premises as the claimant was not using for the purpose of storing and repairing organs from other bombed churches. By a tenancy agreement, dated Sept. 4, 1944, the claimant let the premises to the company for the purpose of the company's business, but reserved out of the letting two rooms which it continued to occupy for the purpose of carrying out such objects of the trust as were still possible in the circumstances then prevailing. On Sept. 5, 1944, the acquiring authority, Stepney Borough Council, submitted for confirmation by the Minister of Health a compulsory purchase order in regard to the property. On Sept. 15, 1945, the Minister confirmed the order by the Stepney (Limehouse Fields Extension) Housing Confirmation Order, 1945, and on Feb. 25, 1946, the acquiring authority served a notice to treat on the claimant.

On a reference to the Lands Tribunal in regard to the assessment of the compensation payable to the claimant by the acquiring authority, the following facts were proved or admitted: (a) the letting to the organ company was necessitated by circumstances beyond the control of the claimant, and it was the intention of the claimant to terminate it and to resume possession of the premises for the purposes of the trust as soon as possible after the termination of the war with Germany; (b) up to the date when the occupation by the company commenced the land was devoted to a purpose of such a nature that there was no general demand for land for that purpose; and (c) as from the date of the notice to treat, the claimant had made diligent search for alternative premises in which to carry on the objects of the trusts and had had the funds to do so, and it was their bona fide intention to reinstate the premises in some other place. The claimant contended *inter alia* (i) that compensation should be assessed in accordance with the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2, r. (5), and (ii) that the expression "reasonable cost of equivalent reinstatement" in r. (5) meant the expense to be incurred at the time when such reinstatement was effected. The acquiring authority contended *inter alia* (i) that compensation should be assessed in accordance with the rule in the Town and Country Planning Act, 1944, s. 57 (1), and (ii) that, if compensation was to be assessed under s. 2, r. (5), of the Act of 1919, "reasonable cost" meant the cost as at the date of the notice to treat. The tribunal held *inter alia* (i) that at the date of the notice to treat the premises were "devoted" to the purposes of the trust so that there was no general demand for land for that purpose, within s. 2, r. (5), of the Act of 1919, and

that compensation should, accordingly, be assessed on the basis of the reasonable cost of reinstatement, as provided by r. (5), and (ii) that the reasonable cost of reinstatement should be calculated on the basis of prices ruling at the date of the notice to treat. The acquiring authority appealed from the decision of the tribunal, but there was no appeal by the claimant on the question of the reasonable cost of the reinstatement.

Mitchison, Q.C., and *Horner* for the acquiring authority.

Lawrence, Q.C., and *Comyn* for the claimant.

SOMERVELL, L.J.: This is an appeal from a decision of the Lands Tribunal who have stated a Case under the Lands Tribunal Act, 1949, s. 3 (4). The question raised by the Case is in regard to the proper basis of compensation in respect of the compulsory purchase by the metropolitan borough of Stepney of premises known as Durning Hall, which were the property of Aston Charities Trust, Ltd.

By the Town and Country Planning Act, 1944, s. 57 (1):

“Compensation for the compulsory purchase of an interest in land by a government department or a local or public authority within the meaning of the Acquisition of Land (Assessment of Compensation) Act, 1919, compensation to be estimated in connection with such a purchase for damage sustained by reason of the severing of land the subject thereof from other land held therewith or otherwise injuriously affecting such other land, and compensation under s. 68 of the Lands Clauses Consolidation Act, 1845, in respect of land injuriously affected by the execution of works on land acquired by such a department or authority, shall, except in the case of compensation assessed on the basis specified in r. (5) of the rules set out in s. 2 of the said Act of 1919, be assessed subject to the rule following . . .”

The rule in s. 57 (1), which can be summarised as the figures in this case are agreed, contained a provision that the value of the interest compulsorily purchased should be taken as on Mar. 31, 1939, and under s. 58 of the Act of 1944 there was a supplement to the compensation in the case of an owner-occupier. The question is whether these premises, Durning Hall, come within the cases specified in the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2, r. (5), or under what I will call the general provisions of s. 57 (1) of the Act of 1944. The Lands Tribunal have decided that the premises come within r. (5), and the compensation payable under that rule is substantially larger than if they came within the general provisions of s. 57. The Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2, r. (5), is as follows:

“In assessing compensation, an official arbitrator shall act in accordance with the following rules . . . (5) Where land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the compensation may, if the official arbitrator is satisfied that reinstatement in some other place is bona fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement.”

[HIS LORDSHIP stated the facts, and continued:] The findings of the tribunal are set out in para. 10 of the Case, and the first is this:

“10 (i) That for the purpose of r. (5) of s. 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919, the meaning of the word ‘devoted’ in relation to land differs from the meaning of the word ‘used’ and there may be circumstances in which the tribunal may decide that land which is devoted to purposes of such a nature that there is no general demand for land for such purposes may continue to be so devoted while being temporarily used for purposes not so qualifying.”

The first question is whether that is right in law. Counsel for the acquiring authority does not dispute that prior to the war the premises, as then used, came within r. (5), but he submits that the words in r. (5):

“Where land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature . . .”

A point to the de facto use at the time of the notice to treat—subject, of course, to the principle of de minimis, e.g., if it happened that on the day of the notice to treat the premises in question were temporarily let for a day or some short period to some other body, that, of course, could be disregarded. On this matter I have come to the conclusion that the tribunal were right. I think that the words “devoted to a purpose”, in r. (5), introduce a conception of intention and are indicating a different test from that of the de facto use at the date of the notice to treat. Circumstances created by bombing caused a temporary interruption, all over the country, of the purposes to which many pieces of land were devoted. I think that the tribunal were right in holding that interruption of that kind which affected the de facto use at the date of the notice to treat could be disregarded. The point is a short one and I do not think it is capable of much elaboration. I agree with the way in which it is put by the C Lands Tribunal in para. 10 (i) of the Case. It seems to me that para. 10 (ii) of the Case indicates that the tribunal have properly addressed their minds to the facts of this case. They find:

D “10 (ii) That having regard to the circumstances of and leading up to the aforesaid letting to Messrs. Kingsgate, Davidson & Co., Ltd. [the organ company] the said premises continued to be devoted to the special purposes aforesaid during the currency of the said letting and were so devoted on the date of the notice to treat.”

I think, therefore, that the first point taken by counsel for the acquiring authority fails.

E The second point was with regard to reinstatement. The tribunal found as a fact, proved or admitted, that it was and is the claimant's bona fide intention to reinstate the said premises in some other place. The main controversy below appears to have been based on the fact that the evidence indicated that the claimant was proposing to set up a similar church and centre, not in Stepney, but some four miles away in Forest Gate. Counsel for the acquiring authority submitted that that was too far away and that, therefore, there F was not sufficient identity in law to satisfy the word “reinstatement”, within the meaning of r. (5). I think that this is a question of degree and of fact. Examples were given in the course of the argument of cases where reinstatement, in the ordinary sense, might take place a long way off but, having regard to the purpose, could still be described as “reinstatement”. On the other hand, G one can imagine a purpose confined locally to a narrow area, and, if the same sort of activity was started somewhere else, it might be said not to be “reinstatement”. It must, in my opinion, be a question of degree, and, having regard to the facts, I am not satisfied that in dealing with this question, which is a question primarily of fact, the Lands Tribunal in any way misdirected themselves or misconstrued the words of r. (5). For these reasons I think that the two points taken by counsel for the acquiring authority fail, and, in my H opinion, the appeal should be dismissed.

BIRKETT, L.J.: I agree with the judgment of my Lord.

HODSON, L.J.: I also agree.

Appeal dismissed.

Solicitors: *J. E. Arnold James*, town clerk, Stepney Borough Council (for the acquiring authority); *Cummings, Marchant & Ashton* (for the claimant).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

BANKS v. BANKS.

[COURT OF APPEAL (Birkett and Hodson, L.JJ.), June 12, 1952.]

Divorce—Practice—Particulars—Adultery—Allegation that husband not father of wife's child—Need for particulars of facts on which statement based.

On a petition by a husband for divorce on the ground of the adultery of the wife at a place and with a man unknown to the husband the wife asked for particulars of the date and place of the alleged offence, and, if those particulars could not be furnished, the nature of the husband's case. In reply the husband stated that he was unable to furnish the particulars requested, but that the nature of his case was that he was not the father of a child born to the wife.

HELD: the assertion that the husband was not the father of the child could only be established by inference from facts, and those facts, as opposed to the evidence in support of them, should have been set out either in the petition, or should now be included in further particulars or an explanatory affidavit.

AS TO PARTICULARS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 709, 710, paras. 1067-1070; and FOR CASES, see DIGEST, Vol. 27, pp. 399, 400, Nos. 3956-3980.

APPEAL by the wife, respondent to a petition by the husband for divorce on the ground of her adultery, from an order of WALLINGTON, J., dated Apr. 29, 1952, allowing an appeal by the husband from an order of the registrar on an application by the wife for particulars of the husband's allegations. The registrar ordered the husband to deliver an affidavit setting out the nature of his case which in particulars delivered by him he stated to be that he was not the father of a child born to the wife.

Loudoun for the wife.

Fairweather for the husband.

BIRKETT, L.J.: I will ask HODSON, L.J., to deliver the first judgment.

HODSON, L.J.: This is an appeal from an order of WALLINGTON, J., allowing an appeal from an order of Mr. Registrar PEREIRA. The petition is for divorce presented by the husband on the ground of adultery. The averment of adultery in the petition is as follows:

"That on an occasion in or about April, 1946, the respondent committed adultery at a place unknown to the petitioner with a man whose name and identity are unknown to the petitioner."

Leave has been given to dispense with a co-respondent. Further and better particulars were asked for by a letter dated Feb. 7, 1952. The particulars requested were:

"Specify the date on which and the place at which adultery is alleged to have been committed. If these particulars cannot be furnished, give the nature of the petitioner's case."

The reply to that request was:

"The petitioner is unable to furnish the particulars requested. The nature of the petitioner's case is that he is not the father of the child born to the respondent on Jan. 15, 1947."

The question is whether that is a sufficient indication of the case which the wife has to meet, it being settled in all Divisions of the court that a litigant is entitled to such particulars as will reasonably enable him or her to meet the case made on the other side. The allegation that the wife has given birth to a child, of course, discloses of itself no case, but the husband says that the further averment that he is not the father of the child is sufficient to enable

the wife to meet the case made against her. I think that that is wrong. The assertion that the husband is not the father of the child can be established only by inference from other facts, and it is right that those other facts, as opposed to the evidence in support thereof, should be set out in the pleading or in particulars given following on the original pleading.

During the argument it was suggested that there might be various circumstances from which the inference could be drawn that the husband was not the father of the child—either that he was abroad, or that he was not having sexual intercourse with his wife, although he was living with her, or that he was taking steps to prevent conception, or that the child was of a different blood group. Whatever the circumstances may be from which the inference is to be drawn, I think that the wife is entitled to have the nature of the case made clear, either by particulars of dates and places of adultery or by the explanatory affidavit which has been ordered. I see no reason to interfere with the form of the order. I understand the husband, through his counsel, takes no point whether the nature of the case should be included in the explanatory affidavit or should be part of the particulars. In substance, therefore, the order of the learned registrar was right, and, in my judgment, this appeal should be allowed.

BIRKETT, L.J.: I agree.

Appeal allowed.

Solicitors: *Waterhouse & Co.*, agents for *F. B. Jevons & Riley*, Tonbridge (for the wife); *C. R. Enever, Freeman & Co.* (for the husband).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

FERRIS v. WEAVERN.

[QUEEN'S BENCH DIVISION (Jones, J.), May 23, 1952.]

Husband and Wife—Deserted wife in occupation of husband's dwelling-house—Licence to occupy—Purchaser acquiring property with notice of licence.

A husband, after deserting his wife, sent her a letter in which he said: "I will carry on paying on the house [the matrimonial home] providing you do not annoy me. If you come here, I will not pay another penny, and don't forget you have my house of furniture." The wife continued to reside in the house and the husband paid the rates and certain mortgage instalments in respect of it. After ten years the husband sold the house for £30 to a purchaser who bought it with full notice of the arrangement between the husband and the wife and of the fact that that arrangement had been, and was being, acted on, and with the intention of enabling the husband to defeat any right which the wife had as a result of that arrangement. In an action by the purchaser for possession of the house,

HELD: the wife was a licensee with a contractual right to remain in the house as a result of the arrangement with her husband, and in the circumstances the purchaser was not entitled to recover possession of the house.

Bendall v. McWhirter ([1952] 1 All E.R. 1307), applied.

AS TO A LICENCE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 8-12, paras. 5, 6; and FOR CASES, see DIGEST, Replacement, Vol. 30, pp. 526-543, Nos. 1635-1773.

Cases referred to:

- (1) *Thompson v. Earthy*, [1951] 2 All E.R. 235; [1951] 2 K.B. 596; 115 J.P. 407.
- (2) *Errington v. Errington*, [1952] 1 All E.R. 149; [1952] 1 K.B. 290.
- (3) *Winter Garden Theatre (London), Ltd. v. Millennium Productions, Ltd.*, [1946] 1 All E.R. 678; *revsd.* H.L., [1947] 2 All E.R. 331; [1948] A.C. 173; [1947] L.J.R. 1422; 177 L.T. 349; 2nd Digest Supp.

(4) *Foster v. Robinson*, [1950] 2 All E.R. 342; [1951] 1 K.B. 149; 31 Digest, Replacement, 697, 7888.

(5) *Bendall v. McWhirter*, [1952] 1 All E.R. 1307.

ACTION for possession of a dwelling-house.

The defendant, Mrs. Violet Ferris Weaven, was the occupier of a dwelling-house, 24, Ivy House Road, Ickenham, Middlesex, which from 1941 till June, 1951, had belonged to her husband, whom she had married in 1932. In 1941 her husband deserted her, leaving her in the dwelling-house, which had been the matrimonial home of the parties. Shortly afterwards the wife received a demand note for rates in respect of the house which she sent on to the husband. In 1941 he replied by an undated letter as follows:

"Vi, I have no money to send you. I have sent you money when I have it. I am now out of work this past fourteen days and if you come here I shall be out. Will send money when I have some. Jack. P.T.O. I will carry on paying on the house providing you do not annoy me. If you come here, I will not pay another penny, and don't forget you have my house of furniture. You are all right as you are and if you don't like it come and I will take the matter further."

From 1941 to 1951 the wife and the husband lived apart. The wife lived in the house and the husband paid the building society mortgage instalments and the rates on the house, but he made her no allowance for the maintenance of herself or her daughter, who lived with her, and, apparently, she worked to support herself. In June, 1951, wishing to obtain possession of the house so that he could dispose of it, the husband sold it for £30 to his brother-in-law, Herbert James Ferris, the plaintiff. The £30 was not, in fact, paid to the husband, the plaintiff entering into the transaction only to oblige the husband and enable him to obtain possession of the house from the wife. He did not exercise any act of ownership in respect of it, and the husband continued to pay the rates and the mortgage instalments, the amount of which due at the time of the sale was £1,600. On July 2, 1951, the solicitors for the plaintiff, who had also acted for the husband, wrote to the wife demanding possession of the house, and subsequently they issued the writ in the action. The wife contended that she was entitled to continue in possession of the house by virtue of a licence granted to her by her husband in the letter of 1941.

Jellinek for the plaintiff.

B. R. Braithwaite for the defendant.

JONES, J., stated the facts, said that it was impossible to decide whether the true bargain between the plaintiff and the husband was, as stated by the plaintiff, that the proceeds of the sale of the house should be divided between them, found as a fact that the plaintiff knew what was the arrangement between the defendant and her husband, and continued: This, of course, is a very material finding, as, if the plaintiff were a purchaser of the house for value without any notice of any claim by the wife, the wife would not, in my opinion, have any defence to the plaintiff's claim for possession. In *Thompson v. Earthy* (1) **ROXBURGH, J.**, laid down a general proposition as to the position of a deserted wife remaining in her husband's house. In that case from their marriage in 1935 until July 25, 1946, the defendant and her husband lived together in a house which was the freehold property of the husband. On July 25, 1946, the husband deserted the defendant and the children of the marriage, leaving them in the matrimonial home while he went to live elsewhere. On Oct. 20, 1946, before a court of summary jurisdiction on a summons by the defendant for the custody of the children and maintenance, the husband undertook to allow the defendant and the children to continue to live in the matrimonial home rent free and to pay all outgoings in respect thereof. On June 17, 1950, the husband conveyed the house to the plaintiff, who thereupon sought possession

of it from the defendant. It was held that the defendant had no legal or equitable interest in the premises which ran with the premises and were capable of binding them in the hands of a purchaser, and, therefore, she was a trespasser and must deliver up possession to the plaintiff. It does not appear that in that case there was any arrangement between the husband and the wife giving the wife a licence to remain on the premises. In his judgment ROXBURGH, J., said ([1951] 2 All E.R. 237):

“So far as I know, there is no legal obstacle to prevent the plaintiff from bringing an action in tort against the defendant. The real question is whether or not the defendant has any legal or equitable interest in the premises which is capable of running with the premises so as to bind them in the hands of a purchaser. I have never heard of any estate or interest of this character in land, and no authority has been cited to me which suggests that there is any. The authorities which were cited suggest (though they do not decide) that there is no such estate or interest . . . For these reasons, I should pause long before declaring the existence of a new species of equitable right hitherto never suggested, especially as the husband himself has a right to apply to the court for possession against the defendant under the Married Women’s Property Act, 1882, s. 17 . . . The plaintiff has proved her title to the land. The defendant has proved no estate or interest, legal or equitable, in the land, and, accordingly, she is a trespasser, and I must order her to deliver up possession to the plaintiff.”

In the present case counsel for the wife contends that she has established an equitable interest on which she can rely, but there certainly is no support for that contention in that decision of ROXBURGH, J.

In *Errington v. Errington* (2) the rights of husband and wife were not in issue. In 1936 a father bought a house for his son and daughter-in-law, paying £250 in cash and borrowing £500 from a building society on the security of the house, the loan being repayable with interest by instalments of 15s. a week. The house was in the father’s name, and he was responsible to the building society for the payment of the instalments. He told his daughter-in-law that the £250 was a present to her and her husband. He handed the building society book to her, and said that, if and when she and her husband had paid all the instalments, the house would be their property. From that date onwards the daughter-in-law paid the instalments as they fell due out of money given to her by her husband. The father died in 1945, and by his will he left the house to his widow. Later on the widow brought an action against the daughter-in-law for possession. The Court of Appeal decided that the daughter-in-law and her husband were licensees, having a permissive occupation short of a tenancy, but with a contractual or equitable right to remain in possession so long as they paid the instalments which would grow into a good equitable title to the house when all the instalments were paid, and, therefore, the widow was not entitled to an order for possession. Counsel for the wife referred me particularly to the judgment of DENNING, L.J., but counsel for the plaintiff later submitted that some of the observations in the judgment of DENNING, L.J., on which the wife relied were not material to the decision and were only obiter. It is material to notice that the judgments were read, and that SOMERVELL, L.J., at the end of his judgment says ([1952] 1 All E.R. 152):

“I think, therefore, that the son and his wife were licensees, and for the reasons elaborated by DENNING, L.J., in his judgment, which I have had the advantage of reading, there is no legal obstacle to holding that as licensees possession cannot be claimed so long as the instalments are paid.”

DENNING, L.J., said (*ibid.*, 153) that the relationship of the parties in that case was “open to three possible legal constructions . . .”, and the third of those in his view was (*ibid.*, 154):

"That the couple [the son and daughter-in-law] were licensees, having a permissive occupation short of a tenancy, but with a contractual right, or, at any rate, an equitable right to remain so long as they paid the instalments, which would grow into a good equitable title to the house itself as soon as the mortgage was paid."

and he went on to refer to one or two decisions. The court held that these people were, not tenants, but licensees. DENNING, L.J., went on (*ibid.*, 155):

"They were not tenants at will, but licensees. They had a mere personal privilege to remain there, with no right to assign or sub-let. They were, however, not bare licensees. They were licensees with a contractual right to remain. As such they have no right at law to remain, but only in equity, and equitable rights now prevail. I confess, however, that it has taken the courts some time to reach this position. At common law a licence was always revocable at will, notwithstanding a contract to the contrary . . . The remedy for a breach of the contract was only in damages. That was the view generally held until a few years ago . . . The rule has, however, been altered owing to the interposition of equity. Law and equity have been fused for nearly eighty years, and since 1948 it has become clear that, as a result of the fusion, a licensor will not be permitted to eject a licensee in breach of a contract to allow him to remain: see *Winter Garden Theatre (London), Ltd. v. Millennium Productions, Ltd.* (3) ([1946] 1 All E.R. 680), per LORD GREENE, M.R. ([1947] 2 All E.R. 336), per VISCOUNT SIMON; nor in breach of a promise on which the licensee has acted, even though he gave no value for it."

Then he refers to the judgment of the Master of the Rolls in *Foster v. Robinson* (4) where the learned Master of the Rolls said ([1950] 2 All E.R. 346) that, as a result of an oral arrangement, a party to that action "was entitled as licensee to occupy the cottage without charge for the rest of his days". DENNING, L.J., then went on to say ([1952] 1 All E.R. 155):

"This infusion of equity means that contractual licences now have a force and validity of their own and cannot be revoked in breach of the contract. Neither the licensor nor anyone who claims through him can disregard the contract except a purchaser for value without notice."

In *Bendall v. McWhirter* (5) the right of a deserted wife to stay in the matrimonial home was considered in great detail by the Court of Appeal. A number of authorities were cited and the judgments were read. The headnote states:

"The right of a deserted wife to stay in the matrimonial home proceeds out of an irrevocable personal licence which the husband is presumed in law to have conferred on her. Her occupation is comparable with that of a contractual licensee, save that her licence is not revocable except by an order of the court, and, as a contractual licensee who is in actual occupation of the land, she has an interest which is valid, if not at law, then in equity, against the successors in title of her husband, including his trustee in bankruptcy. The property of the bankrupt passes to the trustee in bankruptcy subject to all the equities and liabilities which affect it in the bankrupt's hands, and, therefore, the trustee takes the property subject to the clog or fetter that the wife cannot be ejected from the property."

Counsel for the plaintiff referred me to the judgment of ROMER, L.J., and submitted that the court was considering particularly the position of a trustee in bankruptcy, but it seems to me that the effect of the decision is to support the contention of the wife in the present action. I was also referred to *Foster v. Robinson* (4) but I do not think that I need deal in detail with that case.

Having regard to the facts which have been admitted or found by me and to these authorities, I have come to the conclusion that the wife was a licensee

with a contractual right to remain in this house which arose from the arrangement made between her and her husband in 1941 and acted on by them from that time until, at any rate, June or July, 1951, being in force when the sale to the plaintiff was completed and the writ in this action was issued. I find that the plaintiff bought the house with full notice of the details of this arrangement and of the fact that it had been acted on and was being acted on at the time he completed the purchase. I find that he bought the house by agreement with the husband, not because he wanted to buy it, but simply to enable the husband to defeat a right which the husband believed the wife possessed as a result of the arrangement which the husband had made with her in 1941. In those circumstances, I hold that the plaintiff has failed to make out his claim and there must be judgment for the defendant.

Judgment for the defendant.

Solicitors: *Champion & Co.*, agents for *Turberville Smith & Co.*, Uxbridge (for the plaintiff); *Speechly, Mumford & Craig*, agents for *Woodbridge & Sons*, Uxbridge (for the defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

BIBERFELD v. BERENS.

[COURT OF APPEAL (Singleton, Denning and Hodson, L.JJ.), May 27, 28, 1952.]

Husband and Wife—Necessaries—Wife independently possessed of means—Liability of husband to repay loans made to her to buy necessities.

A wife, who was compelled to leave her husband by reason of his cruelty, borrowed money from the plaintiff for the purchase of necessities. The wife possessed savings certificates worth £1,125, a balance of £37 at her bank, a co-operative society's dividend of £7 5s. 9d., and jewellery worth £250. The plaintiff sued the husband for repayment of the money lent on the ground that the wife had borrowed it as the husband's agent of necessity.

HELD: in considering whether a wife, who has been compelled by her husband's conduct to leave him, is her husband's agent of necessity, regard must be had to her means; in the present case the wife had assets which she could have been reasonably expected to use to pay for necessities; and, accordingly, she was not her husband's agent of necessity and the plaintiff's claim failed.

Direction of LORD ELLENBOROUGH, C.J., in *Liddlow v. Wilmot* (1817) (2 Stark. 86), applied.

Dicta of McCARDIE, J., in *Callot v. Nash* (1923) (39 T.L.R. 293), criticised.

AS TO WIFE'S IMPLIED AUTHORITY TO PLEDGE HUSBAND'S CREDIT WHILE LIVING APART, see HALSBURY, Hailsham Edn., Vol. 16, pp. 697-701, paras. 1122-1132; and FOR CASES, see DIGEST, Vol. 27, pp. 196-202, Nos. 1648-1735.

G Cases referred to:

- (1) *Liddlow v. Wilmot*, (1817), 2 Stark. 86; 171 E.R. 581; 27 Digest 199, 1681.
- (2) *Johnston v. Sumner*, (1858), 3 H. & N. 261; 27 L.J.Ex. 341; 31 L.T.O.S. 166; 157 E.R. 469; 27 Digest 198, 1680.

- (3) *Re Wood's Estate*, (1863), 1 De G.J. & Sm. 465; 32 L.J.Ch. 400; 8 L.T. 476; 27 J.P. 628; 46 E.R. 185; 27 Digest 203, 1757.

- (4) *Bazeley v. Forder*, (1868), L.R. 3 Q.B. 559; 9 B. & S. 599; *sub nom.* *Baseley v. Forder*, 37 L.J.Q.B. 237; 18 L.T. 756; 32 J.P. 550; 27 Digest 205, 1784.

- (5) *Litson v. Brown*, (1866), 26 Harrison Indiana Reports, 489.

- (6) *Callot v. Nash*, (1923), 39 T.L.R. 292; 27 Digest 194, 1622.

- (7) *Manby v. Scot*, (1663), 1 Lev. 4 (83 E.R. 268); 1 Keb. 482 (83 E.R. 1065); 1 Mod. Rep. 124 (86 E.R. 781); 1 Sid. 109 (83 E.R. 1000); 27 Digest 183, 1498.

(8) *Deare v. Soutten*, (1869), L.R. 9 Eq. 151; 21 L.T. 523; 34 J.P. 244; 27 Digest 205, 1773.

(9) *War v. Hunty*, (1703), 1 Salk. 118; 91 E.R. 111; *sub nom. Warr v. Hunty*, Holt, K.B. 102; 90 E.R. 955; 27 Digest 199, 1687.

APPEAL by the plaintiff from an order of LYNSEY, J., dated Dec. 20, 1951, dismissing the plaintiff's claim on the ground that, having regard to the means of the defendant's wife, she was not the defendant's agent of necessity.

Burton, Q.C., and *Heilpern* for the plaintiff.

D. P. Bailey and *Greenburgh* for the defendant.

SINGLETON, L.J.: This is an appeal by the plaintiff from a judgment of LYNSEY, J., given at Manchester Assizes on Dec. 20, 1951.

The plaintiff is brother to the defendant's former wife, Ena Berens, who married the defendant on Sept. 25, 1939. On Mar. 28, 1949, she left him, alleging cruelty. She consulted solicitors, who wrote to him on Apr. 13, 1949, saying:

"We have been consulted by your wife, Mrs. Ena Berens, with reference to your matrimonial affairs and in particular with reference to your continued cruelty culminating in further physical violence on Mar. 28 last. As a result of your above-mentioned conduct your wife had no alternative but to leave the matrimonial home, and we are instructed to commence proceedings for divorce on the grounds of cruelty. If you would be good enough to nominate your solicitors we will communicate with them in order to make the necessary financial arrangements and to effect service of the petition."

The defendant acknowledged that letter and said that he did not intend for the moment to nominate any legal representative. On June 1, 1949, the wife's solicitors sent by registered post a copy of the petition to the defendant, and in their letter there is this passage:

"We have not included in the petition any claim for maintenance and have taken no action with regard to the question of our client's furniture and other effects which are at present in your custody. We think you will agree that it is desirable to avoid any unnecessary proceedings in this unfortunate matter and we should be glad to have your proposals on the subject of maintenance and the return of the furniture and effects the property of our client."

The petition was heard on Oct. 5, 1949. No answer had been filed, and Mrs. Berens obtained a decree nisi on that day on the ground of her husband's cruelty. On Dec. 29, 1949, that decree was made absolute. On Oct. 10, 1950, there was an order by consent on the wife's summons for maintenance, under which the wife was to have £286 a year maintenance dating back to the decree absolute—that was, £5 10s. a week. She might have applied for alimony under s. 190 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925, a section which is now replaced by s. 19 (1) of the Matrimonial Causes Act, 1950, but no such application was made.

In the present action the plaintiff claimed against the defendant in this way:

"Since the said Ena Berens left the defendant and until the making of the said decree absolute the defendant has wholly omitted and refused to provide her with any maintenance. By reason of the premises the plaintiff from Mar. 28, 1949, until Dec. 29, 1949, lent to the said Ena Berens the sum of £5 per week making a total sum of £195 in order that she might purchase or obtain the necessities of life and in particular food and clothing."

The plaintiff claimed £195 and the defence was a denial.

It was submitted to LYNSEY, J., as, indeed, it was in this court, that once a wife is turned out of the house, the family home, the husband is liable to provide her with necessaries even though she has adequate means herself, and

that, if somebody else provides her with necessaries or with money to obtain necessaries, that person has a right over against the husband entirely apart from the question whether the wife has means of her own or not. The submission of counsel for the plaintiff in this court was that, however much money the wife has, the husband is bound to keep her if she is turned out of doors or there is impropriety on the part of the husband which causes her to leave the house, and that the wife's income does not enter into the question.

Over and above that, the submission was made that the wife was virtually without means in this case, that she had no income, or nothing which could be taken as income, to provide her with necessaries. The wife's position was that at the time she left her husband she had £1,125 in savings certificates, a balance at the bank in her favour of £37, a dividend of £7 5s. 9d. from a co-operative society, and jewellery which she valued at £250, although the husband said it was worth much more. LYNKEY, J., having heard evidence given by the plaintiff and his sister and by the defendant, and having had authorities cited to him, said at the conclusion of his judgment:

"Following the decision of LORD ELLENBOROUGH, C.J., in this case [*Liddlow v. Wilmot* (1)] I am satisfied that, although the defendant was bound by law to afford his wife means of support adequate to their station in life, she was possessed of means from other sources and as a result was prevented from pledging her husband's credit either in law or in equity. The plaintiff has not established that there was an insufficiency in Mrs. Berens' funds to enable her to support herself in a manner suitable to her husband's situation. In the result, there must be judgment for the defendant."

The learned judge came to the conclusion that before the plaintiff could succeed in a case of this kind it must be shown that there was insufficiency of funds, and he did not think that had been shown, and, therefore, he gave judgment for the defendant.

The authorities which have been cited to us go back many years. The first to which I propose to refer is *Liddlow v. Wilmot* (1), the report of which gives this direction of LORD ELLENBOROUGH to a jury in 1817 (2 Stark. 86):

"In an action against the husband for lodging and necessaries supplied to his wife, who lives separately from him without any fault of her own, and who is possessed of funds of her own, the question is, whether she has such means as are adequate to her support, according to her husband's situation in life. This was an action against the defendant for lodging and for necessaries supplied to his late wife. It appeared that the defendant and his wife had separated thirty years before the time of bringing the action; that she had separate funds of her own, of which she had all along been in the receipt, amounting after all deductions, to about £110 per annum. The defendant had been for eleven years a prisoner in France, and was afterwards a captain on half-pay. At the time the lodgings were occupied by his wife, he lived in lodgings with another woman, with whom he had long cohabited, and by whom he had a daughter who was then of the age of twenty-five; who lived with him, and he paid £20 per annum for his lodgings, and had been heard to say that he had an estate in Worcestershire. It appeared that his wife at her death was in possession of two boxes of plate, which she desired might upon her death be delivered to a gentleman whom she had appointed to be her executor. These boxes had been so delivered, but upon a demand made by the husband, they had been delivered up to him. The question was, whether under these circumstances the defendant was liable. LORD ELLENBOROUGH in summing up to the jury observed: This case presents circumstances of an unusual nature. A separation between the defendant and his wife had taken place thirty years before. It does not appear what the original cause of separation was,

but a reason for the continuance of the separation does appear, since the defendant formed another connection, and had a daughter who was living with him of the age of twenty-five. During the whole period of separation, it does not appear that any application was made to him for any funds subsidiary to the support of his wife; she had all along resources of her own, which the plaintiff was acquainted with, and no resort was had to the husband. The first question for consideration is, whether the defendant turned his wife out of doors, or by the indecency of his conduct precluded her from living with him, for then he was bound by law to afford her means of support adequate to her situation, but if either from her husband, or from other sources, she was possessed of such means, the law gives no remedy against the husband. He is liable only in case of the insufficiency of her funds . . . The only credit given to the husband, is an implied one, which arises from his situation, and the inadequacy of the funds of the wife."

That direction seems to me to state the law accurately, if I may say so with respect. It is said that there is no certainty as to how husband and wife had come to part in that case, but in the next case to which I propose to refer, *Johnston v. Sumner* (2), POLLOCK, C.B., said (3 H. & N. 270):

"In *Liddlow v. Wilmot* (1) the husband was living with another woman, consequently the wife was necessarily away."

In *Johnston v. Sumner* (2) the headnote reads:

"During cohabitation, a wife has an implied authority as agent of her husband to pledge his credit for necessities suitable to her station, notwithstanding any private agreement between them. If a husband turns his wife away and she is unable to maintain herself, she has an authority of necessity to pledge his credit for necessities supplied to her. Sed quaere, whether, if a labouring man turns his wife away, she being capable of earning, and earning as much as he did; or if a man turned his wife away she having a settlement double his income in amount, the wife in such cases could bind the husband. If a wife leaves her husband without his consent, she has no authority whatever to bind him."

It was held in that case that the husband was not liable for necessities supplied to his wife, the plaintiff having failed to show that her allowance was insufficient, or that she had any authority to pledge her husband's credit. At the end of his judgment the learned Chief Baron said (3 H. & N. 270):

"Upon the ground then that the question is one of the wife's authority; that the creditor had to make that out; that to make it out he must show that the wife, living separate, did so under circumstances from which an authority might be implied; and, assuming that a separation by consent and no allowance, or an insufficient allowance, would give rise to such implication (which we doubt), we are of opinion that it was for the plaintiff in this case to show the allowance was insufficient; and, that not being done, the nonsuit was right, there being no evidence that the plaintiff was authorised to charge the husband."

It was submitted to us that the effect of those two cases was reduced, or weakened, by that which was said in *Re Wood's Estate* (3). I have read with care the facts and judgment in that case, and, though there may be a line or two in the judgment of WOOD, V.-C., which gives some support for the plaintiff's contention, I feel satisfied myself, when the judgment of KNIGHT BRUCE, L.J., with which judgment TURNER, L.J., agreed, is examined, that no support can be found for the submission which is made on behalf of the plaintiff that that decision is a departure from the law as stated by LORD ELLENBOROUGH in his direction to the jury in *Liddlow v. Wilmot* (1).

In 1868 there was before the court *Bazeley v. Forder* (4), in which the headnote reads:

A "The plaintiff, on the order of the defendant's wife, supplied clothes for the defendant's child; the wife was living separate from him for reasons which justified her doing so, and the child, which was under seven years of age, was living with her, against the defendant's will, an order of the Master of the Rolls having been made, under 2 & 3 Vict. c. 54, giving the wife the custody. The wife had no means adequate to support her according to her husband's degree:—Held, by BLACKBURN, MELLOR and LUSH, JJ. (COCKBURN, C.J., dissenting), that as the child was by law properly in the care of the wife, the reasonable expenses of providing for it were part of the reasonable expenses of the wife, for which she had authority to pledge her husband's credit."

B The judgment of the majority of the court was given by BLACKBURN, J. The lines which I read from that judgment are in a sense obiter, but, none the less, it is interesting, and I think useful, to see how BLACKBURN, J., expressed himself on the problem which is before this court. He said (L.R. 3 Q.B. 562):

C "There was some evidence that the wife had some separate property, but the jury found (and on the evidence were justified in finding) that it was inadequate to support the wife according to her husband's degree. A wife, when separated from her husband in consequence of misconduct on his part rendering it improper for her to remain with him, is in the same position as if he turned her out of doors, and is by law clothed with power to pledge his credit for her reasonable expenses, according to her husband's degree, unless she is in some other way supplied with the means of providing them."

E Evidence as to the wife's separate property had been given before the court of first instance, and it does not appear that any question was raised as to its relevance or admissibility. The important part of that which I read is the last line: "... unless she is in some other way supplied with the means of providing them." LYNKEY, J., adopted the view expressed by LORD ELLENBOROUGH in *Liddlow v. Wilmot* (1). He was not satisfied that there was any insufficiency of funds, and that was a question of fact for him. I do not think it can be said that the fact that a wife has not a very large income means than she has an insufficiency of funds when she is waiting for a decree of divorce, particularly as she knows, or must be advised, of her right to apply for alimony.

F It seems to me that this appeal fails on the grounds I have stated. But there are two further matters to which I think I should refer. One is that counsel for the defendant referred to decisions which are not binding on this court. One of them states the position, perhaps, more clearly than the English authorities do. That is *Litson v. Brown* (5), a case decided in the State of Indiana, in the United States of America. The report begins:

G "If a wife, while separated from her husband, has the means of support, whether furnished by the husband or arising from her separate estate, the husband, though the separation may have taken place on account of his misconduct, can only be held liable, while she has such means, for necessities furnished to her, upon his express promise to pay. . . . But if the separation was produced by his misconduct, and she had no means of support till some time after the separation, he would be liable for necessities furnished to her in the interim."

H That was an appeal from the common pleas, and the judgment was given by ELLIOTT, J., about a year after the end of the civil war. I read this passage from the judgment of ELLIOTT, J. (26 Harrison Indiana Reports, 491):

"The husband is bound to support and maintain the wife, and to furnish her with necessities, and during cohabitation there is a presumption of law,

arising from that fact, that the husband assents to contracts made by the wife for the supply of articles suitable to their means and station in life. It is an implied agency, arising from the marriage relation, during cohabitation. But when the parties cease to live together, then a new state of things arises, and with it new rules of law. The implied agency of the wife to contract for necessaries, arising from cohabitation, no longer exists. If the wife, of her own will, elopes or leaves the husband, without his fault, he is not responsible even for necessaries furnished her by one having a knowledge of the separation. But if the husband expels the wife from his house without her fault, or compels her to leave his house by cruelty to her, and without the means of support, he sends with her credit for her reasonable expenses. This liability does not, in such case, rest upon an implied agency, but is an obligation imposed by the law from necessity, and is founded on the marital relation, and the duty of the husband to maintain the wife."

I pause there to point out the two different positions which are dealt with, and I do so because of the question asked during the course of the argument: Why should the wife be worse off after she is turned out of the family home than she was before? I think the answer probably is that in the eyes of the law she is not, but this judgment makes clear the true position. So long as husband and wife are living together in the family home the wife is the husband's agent to order things for the home, but if the wife is turned out without means there arises an obligation imposed by the law of necessity, an agency of necessity, and then it is important, as I think, to consider what means the wife has. The judgment continues (*ibid.*):

"If the husband who, in violation of his marital obligations, drive his wife from his house without the means to procure the necessaries of life, could also deny the credit to supply them, she would be liable to suffer or perish from want. The law, therefore, from necessity, authorises anyone to supply her necessary wants, under such circumstances, and to look to the husband for compensation. But if she has the means of support, while so separated from her husband, come from what source they may, whether furnished by the husband, or arising from her separate estate, no necessity exists that they should be furnished by others, and in such case the husband could only be held liable upon an express promise to pay."

The learned judge cited a passage from an early edition of CHITTY ON CONTRACTS, and he also cited from the case of *Liddlow v. Wilmot* (1) the direction to the jury given by LORD ELLENBOROUGH. I think it right to refer to that judgment, as it puts the matter so clearly, and though it is not binding on this court, it is, I think, in accord with the judgments to which I have referred and which, I think, correctly state the law, and it is complete support for the proposition which counsel for the defendant put forward.

[HIS LORDSHIP examined the evidence, and came to the conclusion that there was no agency of necessity in the present case because the money was advanced by the plaintiff to his sister in consequence of her acceptance of his offer to do so and not in response to a request by her.] I think the decision of LYNKEY, J., that the plaintiff failed to establish his case was correct, and, though he was doing the right thing in supporting his sister, he had no right to recover from the defendant the money which he advanced to her, and it follows that this appeal should be dismissed.

DENNING, L.J.: I agree. The argument of counsel for the plaintiff was that where husband and wife are living together, the husband is bound to provide necessaries for his wife even though she has much more money than he. He said that she can spend her own money in the most extravagant way on articles of luxury, and, nevertheless, at the same time pledge her husband's credit for necessaries. A wife's means, he said, are not relevant to the husband's obligation

to maintain her when they are living together. Starting from that position, counsel argued that, if the husband afterwards turned his wife out, or by his cruelty forced her to leave him, her means were still irrelevant. The husband, he said, ought not to be better off by turning her out than by living with her. He ought still to keep her, even though she had ample means to keep herself.

A I do not accept the proposition that when husband and wife are living together the means of the wife are irrelevant. I know that in *Callot v. Nash* (6), MCCARDIE, J., said (39 T.L.R. 293):

“The law draws no distinction between a wife with a large income and a wife with no income at all . . . The wife may accumulate all her income and throw the whole burden of her keep on her husband.”

B I do not think that is right. At the present day, when a wife is in nearly all respects equal to her husband, she has to bear the responsibilities which attach to her freedom. If she is a rich woman, I see no reason why her own means should not come into the family pool just as his do. When they are living together, she can, of course, pledge his credit for the household necessities, but I doubt whether she can pledge his credit for her own private necessities, like dresses and hats, when she has ample means with which to buy them.

C Whatever may be the true position when they are living together, nevertheless the law when they are separate is quite clear. It is that, if a wife is deserted by her husband or he treats her with such cruelty that she is forced to leave him, she is entitled at common law to pledge his credit for necessities, subject, however, to this qualification, that, if she has earning power of her own, or money of her own which she could reasonably be expected to use to pay for the necessities, then she has no authority to pledge his credit for them. In addition to the authorities which my Lord has cited, I would refer to the notes to *Manby v. Scot* (7) at p. 470 of vol. 2 of SMITH'S LEADING CASES (13th ed.), where the same proposition is stated.

E There is, however, a distinction between necessities and money. At common law a wife only had authority to pledge her husband's credit for actual necessities such as food and clothing and board and lodging. She had no authority to borrow money on his credit. That was only introduced in equity: see *Deare v. Soutten* (8). It is to be remembered, however, that equity only intervenes where there is no other adequate remedy. Nowadays there are remedies in magistrates' courts and in the High Court by which the husband can be made to pay maintenance to his wife. In all these courts, in assessing maintenance, F regard is had to the earning power of the wife and to her means. It would be a remarkable thing if equity should disregard her means when all other courts take it into account. It cannot be supposed that a wife can get more out of her husband by borrowing from her relatives than by going to the courts. In my opinion, a loan to a wife will only be enforced in equity against the husband if it is needed to meet a present emergency and a court order for maintenance is G inadequate, or not available in time, to meet the difficulty, and in every case the means of the wife must be taken into account.

H Applying this principle, I am prepared to assume that it would take a few weeks before the wife could get an order from the courts for maintenance. The question is whether there was such an emergency during that time as to entitle her to borrow money on her husband's credit. I confess that I have been a good deal troubled about this because all she had was about £1,000 worth of savings certificates and a small sum of cash at the bank. I can see that in many cases a wife could not reasonably be expected to realise her capital assets. For instance, if all she had was the house in which she lived with her children, she could not be expected to sell it, or if all she had was an insurance policy, she could not be expected to surrender it. It all depends on what could reasonably be expected of her. In the present case the wife had only a few months to go before she would get a divorce and an order for maintenance. The judge must

have thought that she could reasonably be expected to get the necessary money for that period from her cash at bank or by realising some of her savings certificates. There is no such emergency as to entitle her to borrow money on her husband's credit. On this reading of the judgment, I agree that the appeal should be dismissed.

HODSON, L.J.: I agree. The plaintiff is the brother of a Mrs. Berens, and he claims £195 as money lent to Mrs. Berens, the wife of the defendant, in sums of £5 a week, making a total of £195, in order that she might buy the necessities of life—in particular, food and clothing. The learned judge found that Mrs. Berens had to leave her husband, the defendant, because of his cruelty, that during the material time the defendant had made no provision for her maintenance, and that during this time the plaintiff lent to Mrs. Berens £195, not giving credit to her, but hoping to recover the money from the defendant. The learned judge also found that the money was spent by her on necessities, and finally that she had certain assets of a value of about £1,400 which she did not realise. A
B

I proceed on the basis that those findings of fact were justified by the evidence. Those findings were substantially those which the plaintiff sought to obtain, and the question to be determined was whether the plaintiff was entitled to recover on the footing that his sister was an agent of necessity. The learned judge put the matter in this way: C

“Without reference to authority I should have thought that a wife could only be an agent of necessity if the necessity for that agency in fact existed. The doctrine was evolved in the days when a wife had no property. All her property on marriage became the property of the husband. She could not even make a contract and could not even sue except through a next friend. Unless she could pledge her husband's credit when deprived of her home and her husband's support she would starve. If, however, by way of settlement of property to her separate use or if she could earn her livelihood or was being maintained by some third person such as her father or widowed mother the necessity no longer existed.” D
E

That has been the contention put forward on behalf of the defendant in the court below and here. Counsel for the plaintiff has argued that that is not the true test; that the word “necessaries” does not involve that the wife is herself in necessity, but only refers to the character of the goods which are provided, particularly food, board and lodging, and clothes. F

I think that the learned judge, having stated the law in that way, and having considered the authorities, was right. He relied on *Liddlow v. Wilmot* (1), in which LORD ELLENBOROUGH, in charging the jury, directed them in this way (2 Stark. 87):

“The first question for consideration is, whether the defendant turned his wife out of doors, or by the indecency of his conduct precluded her from living with him, for then he was bound by law to afford her means of support adequate to her situation, but if either from her husband, or from other sources, she was possessed of such means, the law gives no remedy against the husband. He is liable only in case of the insufficiency of her funds.” G

The learned judge also considered *Johnston v. Sumner* (2), in which the law, as indicated by LORD ELLENBOROUGH, was re-stated. Counsel for the plaintiff said, first, that this authority is not binding on this court, and, secondly, that it is inconsistent with the view taken by the Court of Exchequer in *Re Wood's Estate* (3). That case was not cited to LYNKEY, J., but, in my view, it does not detract from the view of the law which had previously been stated. It was a case in which a solicitor had advanced money to a wife who had been put to the expense of moving herself and her husband to London, he being a lunatic, H

she herself having some means. On the facts of that case, the means of the wife being small, it was held that the liability of the husband to provide necessaries for his wife was sufficient to found the action by the solicitor. That seems to me not to involve the proposition that the previous cases, particularly *Liddlow v. Wilmot* (1), were doubted; indeed, there is no indication in the judgments that the proposition laid down by LORD ELLENBOROUGH was doubted.

A The industry of learned counsel referred us to a much older case, *War v. Huntly* (9), a case tried at nisi prius before HOLT, C.J., and shortly reported (1 Salk. 118):

“The case was, an ordinary working-man married a woman of the like condition; and after cohabitation for some time the husband left her, and, during his absence, the wife worked; and this action being brought for her diet, it was held, that the money she earned should go to keep her.”

B That statement of the law has, I think, never been doubted in any of the subsequent authorities, but counsel for the plaintiff argued that it was inconsistent with a rule of law that a husband's liability to maintain his wife is absolute and does not depend on her means, and that, so long as she does not forfeit her right by her misconduct, or, at least, part from the husband by mutual consent, he is bound to provide her with necessaries in accordance with his own means. C There are, undoubtedly, dicta in the cases which go to support that argument. I have in mind particularly the dicta of MCCARDIE, J., in *Callot v. Nash* (6), but I think, in so far as they are of general application, those dicta go too far, but it must be remembered that that was a case in which the parties were living together, and it was merely an illustration of the principle that where husband and wife are living together, prima facie if she orders goods for the household, those goods are ordered with the husband's authority. D

I think the true position in law is that the absolute liability of the husband to maintain his wife remains alive while they are living apart through his fault and is not extinguished, so that the husband may be called on at any time to fulfil his obligation should circumstances render it necessary, such as the

E insufficiency of the fortune of the wife, or even circumstances of a temporary nature, such as her inability to obtain possession of her fortune. This does not, however, in my judgment, involve the proposition contended for—that a wife may, if she chooses, deliberately abstain from using her own means and rely on the husband's duty to maintain her. It is not, however, necessary to decide that problem in the case of a husband and wife living under the same roof, but, F if they are apart through the husband's fault, the position is, I think, quite clear from the authorities. It is to some extent supported by the practice in the Divorce Court, which inherits the ancient practice of the ecclesiastical courts, that where a wife has means approximately equal to, or greater than, those of her husband, and there are no children or special circumstances, such as ill health, involving heavy expenditure, she cannot expect to obtain an order for G alimony or maintenance. In my judgment, a person who advances money to a wife turned away by her husband cannot maintain that the means of the wife are irrelevant in an action which he seeks to maintain against the husband for the price of necessaries lent to her. I think the sufficiency of the means of the wife in each case is a matter of fact and degree. An action could be maintained although the wife is not in a state of complete destitution, as is H shown by *Re Wood's Estate* (3), but that case does not dispose of *Liddlow v. Wilmot* (1).

In coming to the facts of the present case, where the wife has a comparatively small capital sum and no income, I think no question of principle is involved. It was argued on behalf of the plaintiff that where a wife has capital, you ought not to resort to capital, and the most you ought to do is to treat her as having a notional income corresponding to a percentage rate on that capital. In my judgment, that is essentially a matter of fact to be determined in each particular

case. I am not saying that, if a wife has a house in which she lives or an insurance policy of small surrender value, those assets must necessarily be sold or surrendered, either actually or notionally, but a wife's means as a whole have to be considered, and on the facts I think that the learned judge was right in finding that the realisable assets of the wife were sufficient—at any rate, to such an extent as to bar the claim of the plaintiff. I would only add that the learned judge did refer in passing to the fact that the wife had not exhausted her remedies because she could have applied to the court for alimony pendente lite as between the plaintiff and defendant. I think that consideration was rightly excluded by the learned judge. The fact that the wife did not exhaust her remedies would not, I think, in a proper case prevent an agency of necessity arising. In this case I think no agency arose, and, therefore, this appeal fails.

Appeal dismissed.

Solicitors: *Manches & Co.*, agents for *David Blank, Alexander & Co.*, Manchester (for the plaintiff); *Sidney Torrance & Co.*, agents for *Cecil Ellison*, Manchester (for the defendant).

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

STEVENS v. DICKSON AND ANOTHER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Slade and Parker, JJ.), June 12, 1952.]

Intoxicating Liquor—Offences—Found drunk on licensed premises—Upper room let to private party—Defendants found drunk there—Licensing Act, 1872 (c. 94), s. 12.

An upper room of licensed premises was hired out for a wedding reception. Alcoholic liquor was supplied to the party, and later two of the guests were found drunk in the room. They having been charged with being found drunk on licensed premises, contrary to s. 12 of the Licensing Act, 1872,

HELD: the room was part of the licensed premises, and, therefore, the offence charged had been committed.

AS TO "LICENSED PREMISES," see HALSBURY, Hailsham Edn., Vol. 19, p. 9, para. 5; and FOR CASES, see DIGEST, Replacement Vol. 30, p. 111, Nos. 808-811.

CASE STATED by Middlesex justices.

At a court of summary jurisdiction sitting at Tottenham on Jan. 11, 1952, informations were preferred by the appellant, William Stevens, an inspector of police, charging the respondents, Walter Dickson and Sidney Beattie, with having, on Dec. 8, 1951, been found drunk on licensed premises at the Northern Star public house, High Road, New Southgate, N.11, contrary to s. 12 of the Licensing Act, 1872. It was proved or admitted that on Dec. 8, 1951, a wedding reception was held in an upper room forming part of the public house which room was hired for the purpose from 2.30 to 10.30 p.m. A special order of exemption under the Licensing Acts, 1910 and 1921, was granted in respect of the premises for the occasion from 2.30 to 5.30 p.m., the permitted hours under the Licensing Acts being from 11.30 a.m. to 2.30 p.m. and from 5.30 to 10.30 p.m. Alcoholic liquor was supplied to the members of the party in the room, and at about 8.15 p.m. the respondents, who were guests, were found drunk there.

The appellant contended that the alcoholic liquor was served in the upper room by virtue of the licence and the room was, therefore, part of the licensed premises. The respondents contended that there was no case to answer as, by

reason of the private hiring, the upper room was not licensed. The justices held that, the special order of exemption having expired, the normal justices' licence and the normal licensing hours were in force at the material time; that, the upper room having been privately hired for the reception, the public had no right of access thereto; that the hiring party had exclusive possession and there was no possession in the licensee; and that, therefore, the room ceased to
A be licensed premises. They dismissed the information, and the appellant appealed.

F. H. Lawton for the appellant.

The respondents did not appear.

LORD GODDARD, C.J., stated the facts and continued: The justices
B were wrong because [see s. 110 of the Licensing (Consolidation) Act, 1910] the expression "licensed premises" means

"premises in respect of which a justices' licence has been granted and is in force."

C A licence is granted in respect of the whole of the premises. The justices seem to have thought that it mattered that the wedding party had been given the exclusive use of the upstairs room, but that room was part of the premises, and there is no ground for saying that the respondents were lodgers. Even if they were, they were found drunk during the time at which the premises were open for ordinary purposes. It may be that when the case goes back to the justices, as it must, they will not think that it is a serious matter. The position is not the
D same as if the respondents were charged with having been drunk in the bar. However that may be, the cases must go back to the justices with an intimation that they must be heard.

SLADE, J.: I agree.

E **PARKER, J.**: I agree.

Case remitted.

Solicitor: *Solicitor for the Metropolitan Police* (for the appellant).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

BAKER v. BAKER.

[COURT OF APPEAL (Somervell, Birkett and Hodson, L.J.J.), June 16, 1952.]

Divorce—Desertion—Parties living under same roof—House owned by both spouses—No allowance paid to wife—Provision of meals separately—Occupation of separate rooms—Other parts of house shared.

On an undefended petition for divorce brought by a husband against his wife on the ground of desertion it was proved that for more than three years before the presentation of the petition the parties had lived in the same house, which belonged to them both, but each occupied a separate bedroom and sitting-room and cooked their own food separately. During that time the husband had not paid any allowance to the wife. They shared the kitchen and the passages and other parts of the house, but whenever possible they avoided meeting.

HELD: on these facts the parties had ceased to be one household and had become two separate households, and the wife had deserted the husband.

Walker v. Walker (ante, p. 138), followed.

Decision of WILLMER, J. ([1952] 1 All E.R. 297), reversed.

AS TO WHAT CONSTITUTES DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, p. 835, para. 1338; and FOR CASES, see DIGEST, Vol. 27, pp. 307-310, Nos. 2840-2880, and p. 322, Nos. 3000-3013, and Digest Supps.

Cases referred to:

- (1) *Hopes v. Hopes*, [1948] 2 All E.R. 920; [1949] P. 227; [1949] L.J.R. 104; 113 J.P. 10; 2nd Digest Supp.
- (2) *Walker v. Walker*, [1952] 2 All E.R. 138.

APPEAL by the husband from an order of WILLMER, J., dated Jan. 11, 1952, and reported [1952] 1 All E.R. 297, dismissing an undefended petition for divorce on the ground of desertion. It was conceded that the parties lived in the same house throughout the three years before the presentation of the petition and WILLMER, J., held that on the facts it could not be said that they had ceased to be one household and had become two separate households and, therefore, desertion had not been proved.

J. K. Wood for the husband.

SOMERVELL, L.J.: The husband petitioned for divorce on the ground of his wife's desertion, and sought to establish that desertion although during the relevant period the parties had continued to live under the same roof. The principle to be applied in such cases has been considered on more than one occasion by courts of first instance and in this court. In *Hopes v. Hopes* (1) BUCKNILL, L.J., after reviewing a number of cases on the subject, said ([1948] 2 All E.R. 924):

"The cases to which I have referred establish that there may be desertion, although husband and wife are living in the same dwelling, if there is such a forsaking and abandonment by one spouse of the other that the court can say that the spouses were living lives separate and apart from one another."

DENNING, L.J., said (ibid., 925):

"That line [i.e., the line between desertion and gross neglect or chronic discord] is drawn at the point where the parties are living separately and apart. In cases where they are living under the same roof, that point is reached when they cease to be one household and become two households, or, in other words, when they are no longer residing with one another or cohabiting with one another."

In the present case the parties were married in September, 1936. The husband was away during the war. When he came back in 1945 his wife not only received

him coldly, but also arranged that he should sleep apart from her in a room with a Mr. Knight, who was lodging in the house, and she locked her door against him. Since that date the parties have occupied separate bedrooms, and in that sense have ceased to cohabit. In March, 1948, the husband stopped paying his wife an allowance, and since then she has not cooked or done anything else for him. They use the same kitchen and lavatory accommodation, but, so far as possible, they never meet, even in the kitchen. She has her own bedroom and sitting-room and he has his. She did clean the bedroom in which he and Mr. Knight were sleeping so long as Mr. Knight remained there, but after he left she ceased to do that. She cleaned the kitchen, though it is clear from the evidence that, so far as the implements which the husband used for cooking were concerned, he cleaned them himself, and he cleaned the bath after he had used it. The learned judge raised the question whether the husband had sought to get other accommodation, and the husband gave as his reason for remaining that the house was the joint property of himself and his wife. Though, no doubt, the fact that a husband or wife has tried and failed to get separate accommodation may be material, the fact that that has not been done cannot, I think, be in any way conclusive of the question whether there are two households and the parties are living separate and apart. The learned judge was not satisfied, to take the phrase of DENNING, L.J., that there were two households. He refers to the reason for the husband not leaving the house, to the fact that there was no separate kitchen, and to the fact that the parties shared the passages, stairs and other offices of the house. With regard to the sharing of the passages and stairs, I think that has almost always been so in cases where the two parties have been living under the same roof.

Since the learned judge gave his judgment there has been a decision of this court in *Walker v. Walker* (2). There a husband and wife lived in the same house, but occupied separate rooms. The husband, although sharing the kitchen, did all his own cooking, and his wife did nothing for him. The husband appealed against the dismissal of his petition for divorce on the ground of desertion. In allowing the appeal this court held that, but for the imperative need to use the same kitchen, in no sense could it be said that there was one household. BIRKETT, L.J., with whom the other lords justices agreed, summed it up in this way (ante p. 141):

“The only element of living together was that the husband and the wife were actually residing in one house and there was no physical separation between the parts of the house in which they were living. They were compelled to cook their meals in the same kitchen, and the only thing the husband did in that way was to cook his meal on Sunday morning at some time different from the time at which the wife used the kitchen. To say that these people were in any sense living together—that in any sense there was one household—is impossible on the facts in this case.”

The only difference that could be suggested between that case and the present, is that in the present case the husband cooked his meals more often than once a week. To my mind, that cannot lead to a different conclusion. Apart from that fact, in principle this case is indistinguishable from *Walker v. Walker* (2), and the ingredients which the learned judge relied on as preventing him from finding a separate household were in substance the ingredients which this court decided did not prevent such a conclusion in *Walker v. Walker* (2). For these reasons I would allow the appeal and grant a decree.

BIRKETT, L.J.: I am of the same opinion.

HODSON, L.J.: I agree.

Appeal allowed.

Solicitors: *Sidney Davidson & Co.* (for the husband).

[*Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.*]

HEWITT v. HEWITT.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Devlin and Gorman, J.J.),
May 23, June 10, 1952.]

Husband and Wife—Maintenance—Enforceability of order—Husband returning after interval to live with wife—Residence for more than three months under same roof—No resumption of cohabitation—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (c. 51), s. 1 (4), s. 2 (2). A

A husband and wife resided in a dwelling-house of which they were joint owners. On May 26, 1950, the husband was ordered by a court of summary jurisdiction to make certain payments to the wife on the ground that he had been guilty of wilful neglect to provide reasonable maintenance for her and her infant children. He continued to reside in the house until June, 1950, when he left to live elsewhere. In October he returned to live in the house and remained there until Nov. 30, 1951. After May 26, 1950, the husband, when living in the house, occupied a separate room and the wife performed no domestic duties for him, and there was no cohabitation by the parties. The husband failed to make payments in accordance with the order of the court of summary jurisdiction in respect of a period during which both husband and wife lived in the house. B

HELD: (i) the effect of s. 1 (4) and s. 2 (2) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, was that an order for maintenance under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, should be suspended so long as the wife continued to reside with the husband after the date of the order, and should cease to have effect if that residence continued for a period of three months, but that if, before the end of that period, the parties ceased to reside together, the order then became effective and ceased to have effect only if the parties resumed cohabitation. C

(ii) as the husband had ceased to reside in the house within three months of the order and did not resume cohabitation on returning to reside there, notwithstanding his residence for more than three months in the house, the order had not ceased to be in force and he remained liable under it. D

FOR THE SUMMARY JURISDICTION (SEPARATION AND MAINTENANCE) ACT, 1925, s. 1 (4), and s. 2 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 11, pp. 864, 865. E

Cases referred to: F

- (1) *Evans v. Evans*, [1947] 2 All E.R. 656; [1948] 1 K.B. 175; [1948] L.J.R. 276; 112 J.P. 23; 2nd Digest Supp.
- (2) *Wheatley v. Wheatley*, [1949] 2 All E.R. 428; [1950] 1 K.B. 39; 113 J.P. 459; 2nd Digest Supp.
- (3) *Thomas v. Thomas*, [1948] 2 All E.R. 98; [1948] 2 K.B. 294; [1948] L.J.R. 1943; 112 J.P. 345; 2nd Digest Supp.
- (4) *Hopes v. Hopes*, [1948] 2 All E.R. 920; [1949] P. 227; [1949] L.J.R. 104; 113 J.P. 10; 2nd Digest Supp. G

CASE STATED by Warwickshire justices.

At a court of summary jurisdiction sitting at Coventry a complaint was preferred by the respondent, the wife of the appellant, under the Summary Jurisdiction (Married Women) Act, 1895, that her husband had not made to her payments totalling £15 in accordance with an order of the same court made on May 26, 1950, as varied by an order of Nov. 17, 1950. H

The complaint was heard on Nov. 30, 1951, when the following facts were proved. On May 26, 1950, on a complaint by the wife that the husband had been guilty of wilful neglect to provide reasonable maintenance for her and her two infant children, an order was made under the Summary Jurisdiction (Married Women) Act, 1895, s. 5, as amended by the Married Women

(Maintenance) Act, 1949, s. 1, by a court of summary jurisdiction sitting at Coventry, that the custody of the children of the marriage, while under the age of sixteen years, should be committed to the wife and that the husband should pay to the wife, through the collector of the court, the sum of £2 weekly together with a weekly sum of 10s. for the maintenance of each child. On Nov. 17, 1950, the order was varied by an order increasing the weekly sum payable in respect of the older child to £1. At the date of the making of the original order both the husband and the wife resided in a house at 113, Meadow Road, Nunts Park, Exhall, which had been purchased by them previously and conveyed to them as joint owners. After the order they separately paid their shares of mortgage payments to a building society in respect of the purchase. They continued to live in the house until June, 1950, when the husband left to live at an address in Coventry. In October, 1950, the husband returned to the house at Meadow Road where the wife had continuously resided meanwhile and both resided in the house until Nov. 30, 1951, when the complaint was heard. After May 26, 1950, the husband and wife, while residing in the house together, occupied separate rooms, and the wife performed no domestic duties for the husband, and at no time since that date had they cohabited. The arrears of £15 had accrued in respect of a period during which they had both resided in the house. The justices inquired into the husband's means and were of opinion that his refusal was due to wilful default or culpable neglect.

For the husband it was contended that by reason of the provisions of s. 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, the order of May 26, 1950, was not enforceable, and no liability under it accrued during the period in which the £15 became payable because the wife resided with the husband during the whole of that period. The wife denied that she had resided with the husband, and contended, alternatively, that, as she had resided apart from her husband from June to October, 1950, the order would cease to have effect only if there were a resumption of cohabitation and not if they merely resided together for three months; that s. 1 (4) of the Act of 1925 applied only where residence together for three months followed immediately on the making of the order; and that under s. 2 (2) the order continued to be enforceable unless there was a resumption of cohabitation.

The justices held that, as the parties were not living apart at the date of the order, the order was not enforceable merely because the cohabitation required to bring the case within s. 2 (2) of the Act of 1925 had not taken place: *Thomas v. Thomas* (3) distinguished; but that, as the husband after a period of absence had returned to the residence which the parties jointly owned, the case was distinguishable from *Evans v. Evans* (1); and there was evidence on which they could find that the wife was not residing with the husband, and they so found. They, therefore, ordered the husband to pay the £15 or in default to be imprisoned for thirty-one days. The husband appealed.

A. M. Wallace for the husband.
N. R. King for the wife.

Cur. adv. vult.

June 10. The following judgments were read.

LORD GODDARD, C.J., stated the facts and continued: Under s. 1 (1) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, a wife was given the right to apply for an order of maintenance on the grounds mentioned in the section although she had not at the time of making the complaint left her husband, and by sub-s. (4) of the same section it is provided that the order shall not be enforceable and no liability shall accrue under it while the married woman resides with her husband and that the order shall cease to have effect if for a period of three months after it is made the married woman continues to reside with her husband. Then by s. 2 (2), it was provided that, where a married woman resumed cohabitation with her husband after living apart from

him, the order should cease to have effect on the resumption of such cohabitation. In *Evans v. Evans* (1) this court decided that "resides with" meant "living in the same house with", and that judgment was re-affirmed by this court in *Wheatley v. Wheatley* (2), but in *Thomas v. Thomas* (3) the court distinguished *Evans v. Evans* (1) and held that where the parties were living apart when the order was made and afterwards came to live in the same house the provisions of s. 2 (2) applied and that the order which had become effective was not ended unless cohabitation was resumed. In giving judgment in that case, and having regard to the facts there found, I said ([1948] 2 All E.R. 100):

" . . . the words of the Act seem to me clearly to show that, if the parties are living apart when the order is made, it is not residence, but cohabitation, that will put an end to the order . . . when the judgments in *Evans v. Evans* (1) are read carefully, it will be seen that the court visualised that there might arise the very case which has arisen here, and we pointed out the difference between the residence which was sufficient to prevent the order taking effect under s. 1 (4) and the resumption of cohabitation which was required to put an end to an order which had taken effect because the parties were living apart."

In *Thomas v. Thomas* (3) the parties came to live in the same house under an arrangement whereby the wife was admitted to the house as a tenant, or, at any rate, as something in the nature of a tenant, and under an agreement which had been sanctioned by the justices whereby the husband was allowed to diminish the payment which they had ordered by a sum of 10s. a week which the wife had agreed to pay as rent for the rooms she occupied.

It is argued in the present case that, as there was no such arrangement as there was in *Thomas v. Thomas* (3), the decision in *Evans v. Evans* (1) applies, and it was argued that *Thomas v. Thomas* (3) depended entirely on the fact that the parties were living apart when the order was made, but, in my opinion, that is not the true distinction. Section 1 (4) appears to me clearly to visualise the case of an order being made while the parties are living together and to provide that, so long as they continue to live together, the order is not to take effect, and if that state of affairs lasts for three months the order ceases to have effect. In other words, the parties are given that period in which to make arrangements for living apart. Once they part the order becomes effective, and if the order does become effective it must remain in force unless the state of affairs visualised by s. 2 (2), namely, the resumption of cohabitation, takes effect, or unless the justices put an end to the order, as they can do on the application of a husband if, for instance, the wife commits adultery, as provided by s. 7 of the Summary Jurisdiction (Married Women) Act, 1895.

In my opinion, the order of the justices came into force as soon as the husband left the house in June, 1950, and, as there has never been a resumption of cohabitation, the order still remains in force. I regard s. 1 (4) as dealing with the period following the making of the order. The order never becomes effective while the residence existing at the time when the order was made continues, and, if that state of affairs lasts for three months, the order comes to an end. But once the order has become effective, as it does when the spouses separate, it requires a resumption of cohabitation or an order of the justices to put an end to it. I desire, however, to reserve my opinion as to what the position would be if a wife left her husband's house before the three months had elapsed and then returned in circumstances showing that there was not a genuine break in the residence but merely one for the purpose of endeavouring to make the order effective. This court has already pointed out that the difficulties which arise with regard to these matters are very largely due to the present shortage of houses, which makes it very difficult in many cases for the spouses to find separate accommodation, a state of affairs which did not exist when the Act was passed. It is not a satisfactory state of affairs and the position which arises under the

Act of 1925 is eminently one which might be considered by the Royal Commission on Divorce which is now sitting, with a view to the attention of the legislature being called to the difficulties which arise. In my opinion, the justices came to a perfectly proper decision in this case, and, as we intimated at the conclusion of the argument, the appeal is dismissed.

DEVLIN, J.: The presumed object of s. 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, has been several times stated by this court and cannot be in doubt. Parliament intended to relieve a wife of the necessity of having to leave home without knowing what support she could count on. It followed that she must be given a reasonable time (which Parliament considered to be three months) after she got her order within which to arrange for another dwelling. The corollary to that was that she should not enforce her order until she left home. Otherwise she might get the benefit both of the joint establishment and of the means to maintain another one. I should not myself doubt, even without the authority of *Evans v. Evans* (1), that, in the provision that the order should not be enforced while the wife "resides with" the husband, the choice of a wider expression than "cohabit" was deliberate. It was not intended that the wife should obtain the benefit of the order merely by ceasing to live with her husband as his wife. She must forgo the order for so long as she stayed under his roof.

Parliament is gifted with no greater prevision than the ordinary man. It could not, in 1925, foresee the time when it would be quite common for an injured wife to continue to live permanently in her husband's house, for the simple reason that she had nowhere else to go, and when the separated parties would make two dwelling-places out of the same structure. That was the situation that confronted this court for the first time in *Evans v. Evans* (1) and has been before the justices in varying forms ever since. In such a situation this court is not free, as Parliament would be, to make such provision as is best fitted to the changed circumstances. It has to apply the language of the Act. This court, therefore, found itself compelled to hold that, notwithstanding the change in conditions, the wife was residing with her husband within the meaning of the Act. It might have taken the same view as DENNING, L.J., did in *Hopes v. Hopes* (4) ([1948] 2 All E.R. 924-926) that, while there was residence at the husband's house, it was not residence *with* him. But it did not, and *Evans v. Evans* (1), affirmed by this court in *Wheatley v. Wheatley* (2), is the basis so far as any other Divisional Court is concerned for the construction of s. 1 (4).

We are now faced with a case in which the wife, if she does not reside in the same house as her husband, will not only have to find somewhere else to live, but may lose to some extent the benefit of her joint ownership of the matrimonial home. As in *Evans v. Evans* (1), we are free to do justice only through the channel of an Act of Parliament. If the Act unexpectedly creates injustice, it is for Parliament to remove it and not for us. It is this consideration, and this only, which has caused me to hesitate a little before agreeing with the solution propounded by the Lord Chief Justice. When s. 1 (4) is dealing with the enforceability of the order, it uses the word "reside". When it is dealing with the cessation of the order, it uses the words "continues to reside". It may seem at first sight an unwarranted modification of s. 1 (4) to read it as if it said "continues to reside" in both places. Given its literal meaning, it may be argued, s. 1 (4) fits in happily with s. 2 (2) to produce a piece of intelligible and workable machinery. So construed together, the sections provide for suspension of the order during residence at any time, and for its destruction in two events—resumption of cohabitation and extension of residence for three months after the making of the order. But this, I think, is a superficial interpretation which makes sense of the words and almost nonsense of the enactment. It is clear in the first place that the period of three months' residence must be immediately after the making of the order. LORD GODDARD, C.J., so said in *Thomas v.*

Thomas (3). The word "continues" points inevitably to that conclusion, and pre-supposes the wife to be in residence at the time of the order. Now, one could understand Parliament thinking that, while residence simpliciter should merely suspend, residence for a continuous period should destroy, but I can think of no reason for attributing different results to the same length of residence according to whether it occurred initially or at some subsequent time. Why should three months initially destroy, and three months later (or, indeed, six or twelve months or indefinite residence later) merely suspend? The only sensible answer, I think, is that the section does not contemplate different periods of residence. It contemplates only one period, and that is the initial one. That fits in perfectly with the presumed object of the section as I have stated it above. There is, indeed, no meaning in any period of three months except as a period of transition after the making of the order. The change in phraseology from "resides" to "continues to reside" would not appear significant to someone who never thought of the residence as being other than continuous. That was the position in 1925. No one would then have contemplated the likelihood of a wife, who had got her order and had ceased to reside with her husband, returning to his home without also resuming cohabitation. A

There is nothing in this reasoning which clashes with the reasoning in *Evans v. Evans* (1). The nature of the residence referred to in s. 1 (4) is one thing and is defined by *Evans v. Evans* (1). The period of residence covered by the section is another thing, and, whatever view is taken of the nature of the residence, does not affect the period. But it must be recognised, I think, that this decision and *Evans v. Evans* (1) do not between them make of s. 1 (4) a coherent and logical piece of legislation. The ill-advised wife who lets the three months run out will lose her order. The wife who leaves her husband's roof for long enough to break the residence may return and keep her order. Thus *Evans v. Evans* (1) may be a trap for the unwary. I think the decision in that case is best regarded as an outgrowth from certain words of the Act rather than as a manifestation of the meaning of the Act as a whole. Since Parliament alone can amend its words, the decision must stand until Parliament finds time to review it. But until that happens it can stand by itself. C D E

On the facts of this case it is not disputed that the residence was broken by the husband's departure and that the initial period of residence was under three months. It is unnecessary, therefore, to consider what acts are sufficient to break the period of residence. The residence that satisfies the test in *Evans v. Evans* (1) can be purely physical and can exist although the wish and intention of the parties is to live as far as possible apart. It may be that a physical change of residence, however short, and even if accompanied by an intention to resume the old residence at a later date, is enough to break the period. On this point I reserve my opinion. I agree that the decision of the justices should be upheld. I must add, in deference to one of the points stated in their opinion, that I cannot regard the joint ownership of the house as a ground for distinguishing *Evans v. Evans* (1). It seems to me to strengthen rather than weaken the case of residence with the husband. F G

GORMAN, J.: I agree that the decision of the justices must be upheld. I, too, am clearly of the opinion that s. 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, visualises that the period of three months' residence must be that period after the making of the order, and that the order ceases to have effect if the parties continue to reside together beyond such period of three months. In this case, the parties ceased to reside together, by reason of the husband's departure, before the expiry of the period of three months after the making of the order, and nothing has happened subsequently to put an end to the order. I desire, too, to reserve my opinion as to what would be the legal effect if the break in the "residence" by one spouse within the H

before-mentioned period of three months was merely for the purpose of bringing the order into effect, and was not a genuine break in the residence.

Appeal dismissed.

Solicitors: *Callingham, Griffith & Bate*, agents for *Varley, Hibbs & Co.*, Coventry (for the husband); *Julius White & Bywaters*, agents for *Penman, Johnson & Ewins*, Coventry (for the wife).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

NATIONAL ASSISTANCE BOARD (by J. R. Beattie) v. WILKINSON.

B [QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Devlin and Gorman, JJ.), May 22, June 10, 1952.]

Husband and Wife—National assistance given to deserting wife—Liability of husband to National Assistance Board—National Assistance Act, 1948 (c. 29), s. 42 (1) (a).

C *National Assistance—Wife deserting husband—Grant of national assistance—Liability of husband to National Assistance Board—National Assistance Act, 1948 (c. 29), s. 42 (1) (a).*

A married woman, who without justification refused to live with her husband in the matrimonial home which he offered her, received assistance from the National Assistance Board. In proceedings by the board before justices for an order against the husband for the payment of sums paid to the wife by way of assistance,

HELD: section 42 (1) (a) of the National Assistance Act, 1948, did not impose an absolute liability to maintain his wife on the husband, and, as the wife was guilty of desertion, he could not be ordered to pay the sums claimed.

E FOR THE NATIONAL ASSISTANCE ACT, 1948, s. 42 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 16, p. 968.

Cases referred to:

(1) *R. v. Flintan*, (1830), 1 B. & Ad. 227; 9 L.J.O.S.M.C. 33; 109 E.R. 771; 37 Digest 233, 255.

(2) *Culley v. Charman*, (1881), 7 Q.B.D. 89; 50 L.J.M.C. 111; 45 L.T. 28; 45 J.P. 768; 37 Digest 233, 256.

(3) *Jones v. Newtown & Llanidloes Union*, [1920] 3 K.B. 381; 89 L.J.K.B. 1161; 124 L.T. 23; 84 J.P. 237; 37 Digest 233, 254.

(4) *Minet v. Leman*, (1855), 20 Beav. 269 (52 E.R. 606); 7 De G.M. & G. 340 (44 E.R. 133); 24 L.J.Ch. 545; 25 L.T.O.S. 284; 19 J.P. 499; 38 Digest 741, 857.

(5) *Aldritt v. Aldritt*, not reported (1951), June 12.

(6) *Baker v. Baker*, (1949), 66 (pt. 1) T.L.R. 81; 2nd Digest Supp.

(7) *Middlesex County Council v. Nathan*, [1937] 3 All E.R. 283; [1937] 2 K.B. 272; 106 L.J.K.B. 818; 157 L.T. 24; 101 J.P. 441; Digest Supp.

CASE STATED by justices for the county of Durham.

H At a court of summary jurisdiction sitting at Bishop Auckland two complaints were preferred by the National Assistance Board by J. R. Beattie, their officer (the appellant), against the respondent under the National Assistance Act, 1948. The complaints alleged that the respondent was the husband of one Edith Wilkinson, whom he was liable to maintain under s. 42 (1) of the National Assistance Act, 1948, and who had been given assistance by the board amounting to £26 18s. between Apr. 30, 1951, and Oct. 22, 1951, under Part II of the Act and was continuing to be given assistance at the rate of £1 4s. 6d. a

week. The appellant applied for summonses to be served on the respondent calling on him to show cause why orders should not be made on him to repay the sum of £26 18s., and to pay such sum, weekly or otherwise, as the court might consider appropriate.

The complaints were heard on Nov. 29, 1951, when the following facts were proved or admitted. The respondent was married to his wife on Mar. 16, 1949, and by agreement the parties set up the matrimonial home in the house of the wife's mother. A child of the marriage was born in December, 1949. On or about Jan. 7, 1951, the respondent left the matrimonial home to live with his parents. Until Feb. 23, 1951, he paid his wife the weekly sum of £2 by way of maintenance of herself and the child and thereafter the sum of 15s. in respect of the maintenance of the child only. The wife was unable to earn money herself owing to the state of her mother's health and the need to look after the child. As a result of correspondence between the solicitors of the parties the respondent found two rooms which would become vacant in about eight weeks, and he invited his wife to join him there, but after inspection of them she refused to do so. The rooms were still available at the time of the hearing of the complaints, but the wife maintained her refusal. The respondent was earning between £7 and £8 a week and had no unusual expenses which would prevent him from making a proper payment to the wife or the board.

For the respondent it was contended that s. 43 (2) of the National Assistance Act, 1948, directed the court to have regard to all the circumstances, that this included the wife's conduct, and that she had deserted the respondent and he was no longer liable to maintain her. For the appellant it was contended that for the purposes of the National Assistance Act, 1948, a husband was at all times liable to maintain his wife, that the board were entitled to obtain orders against the respondent under s. 43 (2) of the Act even if the wife could not obtain an order for maintenance against him under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, and that s. 43 (2) did not permit the board to disregard his absolute liability to maintain his wife to the extent of the assistance which had been or would be granted to her.

The justices held that the wife was unreasonable in refusing to go and live with the respondent and was deserting him, that the liability under s. 42 (1) of the National Assistance Act, 1948, was not absolute, and that the wording of s. 43 (2) enabled them to have regard to the conduct of the wife. They held that the respondent was not liable to maintain the wife under s. 42 (1) and dismissed the complaints. The board, through their officer, appealed.

J. P. Ashworth for the appellant.

Sheen for the respondent.

Cur. adv. vult.

June 10. The following judgments were read:

LORD GODDARD, C.J., stated the facts and continued: The contention of the board was that s. 42 (1) of the National Assistance Act, 1948, imposes an absolute obligation on a husband to maintain his wife, and that, if assistance is given to her by the board, they have a right to apply for an order against him on the ground that his liability exists notwithstanding that his wife may unreasonably refuse to live in a home which he has provided or may even have deserted him for such length of time as would entitle him to apply for a divorce or even if she has committed adultery—in short that, so long as the marriage exists and has not been dissolved, the husband can have no answer to the claim.

Section 42 (1) of the National Assistance Act, 1948, is in these terms:

"For the purposes of this Act—(a) a man shall be liable to maintain his wife and his children, and (b) a woman shall be liable to maintain her husband and her children."

Section 43 provides that:

"(1) Where assistance is given or applied for by reference to the requirements of any person (in this section referred to as a person assisted), the

board or the local authority concerned may make a complaint to the court against any other person who for the purposes of this Act is liable to maintain the person assisted. (2) On a complaint under this section the court shall have regard to all the circumstances and in particular to the resources of the defendant, and may order the defendant to pay such sum, weekly or otherwise, as the court may consider appropriate."

A The justices, having found that the wife was in a state of deserting her husband, were of opinion that the liability under s. 42 (1) was not absolute and that the wording of s. 43 (2) enabled them to have regard to the conduct of the wife, and, being of opinion that the husband was not liable to maintain his wife under s. 42 (1), dismissed the complaints.

B Before dealing specifically with the contentions advanced on behalf of the appellant, it is necessary briefly to state the course of legislation which has led to the right of authorities giving poor relief to recover from a husband some amount for the maintenance of his wife. The Act which established the poor law is the well known Poor Relief Act, 1601, by s. 7 of which it was provided:

C "and . . . the father and grandfather, and the mother and grandmother, and the children of every poor . . . person . . . being of a sufficient ability, shall, at their own charges, relieve and maintain every such poor person in that manner, and according to that rate, as by the justices of peace of that county where such sufficient persons dwell, or the greater number of them, at their general quarter sessions shall be assessed; upon pain that every one of them shall forfeit 20s. for every month which they shall fail therein."

D It will be observed that a husband is not mentioned in the section, no doubt for the reason that a husband was and is by common law bound to maintain his wife and the remedy of a wife at common law if her husband failed to maintain her was to pledge his credit. The obligation of the other relatives to maintain members of the family which is imposed in the section is to be enforced

E by a penalty but there was no provision for the overseers to recover the cost of any relief which they might give. By the Vagrancy Act, 1824, s. 3, a person who wilfully refused or neglected to maintain his family was liable to be dealt with as an idle and disorderly person and was punished by imprisonment and on a second offence could be dealt with as a rogue and vagabond and thereafter as an incorrigible rogue and became liable to the penalties imposed by the statute. In 1834 boards of guardians were established by the Poor Law Amendment Act of that year and the whole administration of the poor law was reformed and from that time forward unions were established and the administration of the poor law was placed under boards of guardians.

F The first Act which enabled the cost of the maintenance of a wife to be recovered from a husband by an order of the court was the Poor Law Amendment Act, 1850. That Act dealt only with the recovery of the cost of maintenance of a lunatic married woman maintained in an asylum or registered hospital and who had thereby become chargeable to the union. By s. 5 the guardians could obtain an order on the husband to pay such sum weekly or otherwise towards the maintenance of the lunatic as after a consideration of all the circumstances should appear to the justices to be proper. A considerable

G addition to the law was made by the Poor Law Amendment Act, 1868, which by s. 33 provided that, when a married woman required relief without her husband, the guardians of the union or the overseers of the parish to which she became chargeable might apply to the justices to require the husband to show cause why an order should not be made on him to maintain his wife and the justices, after a consideration of all the circumstances of the case, could make such order as they thought proper. And so the matter remained until the passing of the Poor Law Act, 1927, which, as its title shows, was an Act to

consolidate the enactments relating to the relief of the poor. By s. 41 (1) of that Act it was provided that:

“It shall be the duty of the father, grandfather, mother, grandmother, husband or child, of a poor . . . person . . . if possessed of sufficient means, to relieve and maintain such person.”

and this is the first time that the obligation of a husband appeared in a statute. The reason would seem to be that, as the Act was a consolidating Act and as the immediately succeeding sections deal with the liability of the husband to have an order made against him for the maintenance of his wife, it was thought right to include him in the section dealing with the liability to relieve and maintain relatives, for there was never any doubt that, so far as a wife was concerned, a husband always had been liable at common law, though, as is well known, a father was under no civil liability apart from the poor law to maintain his children. True, if he failed to do so, he would become amenable to the criminal law, but a child never had the right to pledge the father's credit as the wife could her husband's, and there is no doubt that, anomalous as it may seem, a father is not by the civil law liable for a child's maintenance. The whole of the Act of 1927 was repealed by the Poor Law Act, 1930. The sections to which I have referred were repeated in that Act in exactly the same terms and no change was made in this position by reason of the repeal and re-enactment.

Now, there can be no doubt that neither by the common law nor by the poor law was a husband ever liable to maintain an adulterous wife or a wife who refused to live with him in the matrimonial home which he had provided, at least unless she had good cause for so refusing. The distinction between adultery and desertion was that an adulterous wife forfeited all rights of maintenance while a deserting wife's right to maintenance was only suspended. In *R. v. Flintan* (1) LITTLEDALE, J., said with regard to an adulterous wife (1 B. & Ad. 230):

“Having rendered herself unworthy of her husband's protection, she returns to the same state as if she were not married.”

and (*ibid.*, 231):

“If the husband is not obliged to answer for the wife's contracts, or to receive her into his house, it cannot be said that he is ‘legally bound to maintain her’.”

That case was quoted in *Culley v. Charman* (2) (7 Q.B.D. 90), where it was held that a husband was not liable to have an order made against him under the Poor Law Amendment Act, 1868, to maintain a wife with whom he ceased to cohabit in consequence of her adultery. The difference between the position of an adulterous wife and one who refused without justification to live with her husband was pointed out in *Jones v. Newtown & Llanidloes Union* (3), where it was stated that the husband's obligation was only suspended as long as she continued wilfully to absent herself. During that time it was quite clear that he was not bound to maintain her and he could not be ordered to do so.

It is said that the National Assistance Act, 1948, has entirely altered the law on this subject and that a husband is liable to an order being made against him to maintain his wife whether she be guilty of adultery or desertion, provided only that she becomes in need of assistance and obtains it from the board. Counsel for the appellant did not shrink from the position that it would follow that, if a woman left her husband to live in adultery and the man with whom she was living and continuing to live fell out of work, so that she had to seek support from the board, her husband would still be liable to maintain her unless and until he ceased to be her husband by a decree of divorce. This would, indeed, be a remarkable result, and it is difficult to believe that Parliament

could have had any such intention. It is said that this construction is unavoidable by reason of the section being prefaced by the words "for the purposes of this Act", but it may be presumed that the legislature does not intend to make a substantial alteration in the law beyond what it expressly declares. In *Minet v. Leman* (4) SIR JOHN ROMILLY, M.R., stated as a principle of construction which could not be disputed that (20 Beav. 278):

A " . . . the general words of the Act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched . . . "

B In my opinion, it is perfectly possible to give an intelligent meaning to s. 42 (1), while bearing in mind to the full the prefatory words, without construing it in such a manner as would make a husband liable, for the first time in the history of the law, to maintain a wife who was either living in adultery or refusing to live in the home which he had provided and where he was willing to receive her, and indeed would equally compel a wife to maintain a husband from whom she had been obliged to depart by reason of his brutality, or who might himself be living in open adultery with another woman. It is impossible to suppose that Parliament intended this section to have any such effect. In my opinion, it was inserted for the purpose of limiting the class of persons who were liable to maintain a family. The obligation of children to maintain their parents has disappeared, the obligation by grandparents or to grandparents has disappeared. From the passing of the Act husband and wife have to support each other and have to support their children, but it is not necessary to hold that this section takes away from either spouse the defences which have always been open to them against a claim, whether arising out of the common law or the poor law statutes, and, in my opinion, a husband is no more liable since the Act of 1948 to support an adulterous or deserting wife than he was before.

E Before parting with this branch of the case I ought to refer to *Aldritt v. Aldritt* (5) in which a Divisional Court of the Probate, Divorce and Admiralty Division consisting of the President and HAVERS, J., gave judgment on June 12, 1951. It may be that it was some expression of opinion in that case that induced the National Assistance Board to bring the present proceedings. That was a case in which a wife applied, under the provisions of the Summary Jurisdiction (Married Women) Act, 1895, s. 4, for a maintenance order against her husband on the ground of wilful neglect to provide reasonable maintenance. F The justices had made an order on him, and, in allowing the appeal, the court pointed out that there had been a consensual separation, and that, as the husband had not been proved to have either expressly or impliedly agreed to maintain the wife notwithstanding the separation, she could not obtain an order. The court were following a previous decision of *Baker v. Baker* (6). G It is true that both members of the court in giving their judgments did express an opinion indicating that, if proceedings were taken by the National Assistance Board against the husband, he might have no answer to it, and, indeed, HAVERS, J., is reported as saying:

H " Under the National Assistance Act, 1948, for the purposes of that Act, a man appears to be under an absolute liability to maintain his wife and children, and a woman seems to be exactly in the same position in regard to her husband and her children."

How far the point which now falls for the express decision of this court was argued in that case does not appear, but it seems clear, at any rate, that the court did not review the poor law legislation as we have been obliged to do to decide the matter now before us. We may, therefore, say with all respect that any expression of opinion to which they gave effect was obiter, and they certainly did not decide that the National Assistance Board were entitled in

all the circumstances to recover from the husband the relief they had given to his wife without regard to the circumstances which had led to his not supporting her.

This is enough to dispose of the case, but I should certainly also agree with the justices that among the considerations which they were entitled to regard was that the husband was always ready in this case to provide a home for his wife, and that it was open to them, therefore, to consider that no payment was appropriate in such a case, but I should regret having to decide the case entirely on that ground, because that might put an adulterous wife in a better position than a deserting wife. As I have already said, a deserting wife's right is only suspended, and if she returns to her husband her right of support revives. An adulterous wife has no right to return to her husband, and so, if this court had to give effect to the decision of the board, it would seem to follow that the justices could not consider her conduct in this respect while in the case of a deserting wife they could consider the fact that the husband was willing to receive her home. For these reasons I am of opinion that the justices came to a correct decision in point of law and I would dismiss the appeal, and would like to express my appreciation of the careful and sensible way in which the justices dealt with the matter.

DEVLIN, J.: I agree. It is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion. Accordingly, if the words "a man shall be liable to maintain his wife" in s. 42 (1) (a) of the National Assistance Act, 1948, stood by themselves, I should read them subject to the common law, and should not conclude that they were intended to disturb the principle that a wife forfeited her right to maintenance by the commission of a matrimonial offence. Against this it is argued that the initial phrase "for the purposes of this Act" makes it possible to give the wide words that follow their full meaning without altering the general law. The same sort of wide words were, however, used in the Poor Law Act, 1927, s. 41 (1), which provided that it should be the duty of the husband of a poor person to maintain her. These words were not subject to any limitation to the purposes of the Act, and they were, moreover, contained in a consolidating Act. I could not, therefore, hold that the Act of 1927 altered the common law, and it is noteworthy that no one has in twenty years ever suggested that it did, but, if words of this sort are not to be widely and literally construed in 1927, why should they in 1948? The qualifying phrase "for the purposes of this Act" is not, in my judgment, sufficient to effect the alteration. The use of the phrase is sufficiently explained by the inclusion in the section of a novel liability in the case of women, and by a wish to avoid the consequences, as demonstrated in *Middlesex County Council v. Nathan* (7), of the unrestricted words in the Act of 1927. It is another principle of statutory construction that the court leans against an interpretation which produces unjust and arbitrary consequences. I think it would be unjust if a husband were compelled to support a wife in open and admitted adultery, and it would be arbitrary if the amount of money he had to spend on her depended on the speed with which he was able to obtain his decree absolute.

GORMAN, J. (read by **DEVLIN, J.**): I agree, and would merely add that I am quite unable to accept the contention that the effect of the words "for the purposes of this Act" in s. 42 (1) of the National Assistance Act, 1948, is to make it possible to give to the words following their full and wide meaning without altering the general law. *Appeal dismissed.*

Solicitors: *Solicitor, Ministry of National Insurance and National Assistance Board* (for the appellant); *Field, Roscoe & Co.*, agents for *Dowling & Hewitt*, Bishop Auckland (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

In the Estate of KAUFMAN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), June 10, 23, 1952.]

Intestacy—Grant of administration—Deceased domiciled abroad—Grant to person entitled to administer under law of domicile—Discretion of court—Court of Probate Act, 1857 (c. 77), s. 73—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 162 (1) (as amended by Administration of Justice Act, 1928 (c. 26), s. 9).

The deceased died domiciled in Holland and an application for letters of administration was made by his brother, as being the person entitled in English law to such a grant. The registrar, in accordance with a Procedure Direction by the learned President, dated Mar. 1, 1951, ordered that evidence be filed as to the person who, according to Dutch law, would be entitled to administer the estate. On appeal,

HELD: the direction of Mar. 1, 1951, correctly set out the practice to be followed, but in the circumstances of this case, by virtue of the discretionary power conferred on the court by s. 73 of the Court of Probate Act, 1857, and s. 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 9 of the Administration of Justice Act, 1928, a grant should be made in the applicant's favour.

Per LORD MERRIMAN, P.: Whether the applicant is a person who has been entrusted with the administration by a court of foreign domicile, or is merely entitled by the law of the domicile to administer, although no such grant has been obtained, it is perfectly correct that the grant should be made as a "section grant", but, in my opinion, it is desirable that it should appear on the face of the grant in which of these capacities he is being given the grant.

AS TO GRANT UNDER DISCRETIONARY POWER OF THE COURT, see HALSBURY, Hailsham Edn., Vol. 14, pp. 246-248, paras. 424-430; and FOR CASES, see DIGEST, Vol. 23, pp. 164-170, Nos. 1774-1873.

Cases referred to:

- (1) *In the Goods of Earl*, (1867), L.R. 1 P. & D. 450; 36 L.J.P. & M. 127; 16 L.T. 799; 23 Digest 174, 1935.
- (2) *In the Goods of Briesemann*, [1894] P. 260; 63 L.J.P. 159; 71 L.T. 263; 23 Digest 37, 121.
- (3) *In the Estate of Humphries*, [1934] P. 78; 103 L.J.P. 31; 150 L.T. 220; Digest Supp.
- (4) *Duncan v. Lawson*, (1889), 41 Ch.D. 394; 58 L.J.Ch. 502; 60 L.T. 732; 53 J.P. 532; 11 Digest 362, 439.
- (5) *Pepin v. Bruyère*, [1902] 1 Ch. 24; 71 L.J.Ch. 39; 85 L.T. 461; 11 Digest 342, 299.

APPLICATION, by way of appeal against a direction of Mr. Registrar LONG on an application for letters of administration, that evidence should be filed as to the person who, according to the law of the deceased's domicile, would be entitled to administer the estate.

A. R. Ellis for the applicant.

Victor Russell as amicus curiae.

Our. adv. vult.

June 23. LORD MERRIMAN, P., read the following judgment. This is an application by way of appeal from a direction of Mr. Registrar LONG in connection with an application for letters of administration to the estate of Gustave Kaufman, deceased, by his brother, as being the person entitled in English law to a grant of administration. The learned registrar directed that evidence should be filed as to the person who, according to Dutch law, would

be entitled to administer the estate. In so doing, he was founding himself on a Procedure Direction of Mar. 1, 1951, which appeared in [1951] W.N. 167. The real substance of this appeal is to challenge the propriety of that direction, which was published by my authority in order to effect a change in the practice of the Principal Probate Registry, but, being a mere administrative direction regarding practice, it has no binding force and is plainly open to modification or reversal by judicial decision. As the point at issue is one of general interest in connection with grants of administration of the estates of persons dying domiciled in foreign countries, the Treasury Solicitor has been good enough to assist the court and to instruct counsel so that all relevant considerations might be laid before me. A

The history of the matter is that for some time past the practice had grown up in such cases of making grants of administration to those persons who, according to English law and practice, would have been entitled to a grant if the deceased had died domiciled in this country. It is not clear when or how this practice first arose. However it originated, the registrars of the Principal Probate Registry unanimously came to the conclusion in 1950 that the practice was wrong, and that, speaking generally, the proper course was to make a grant either to the person who had actually been entrusted with the administration by the court of the deceased's domicile, or was, by the law of the deceased's domicile, entitled to administer the estate, but, of course, without prejudice to the right to make a grant to other persons by virtue of the discretionary powers contained in s. 73 of the Court of Probate Act, 1857, or s. 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 9 of the Administration of Justice Act, 1928, commonly referred to as a "section grant". B C

The leading authority after the Court of Probate Act, 1857, is *In the Goods of Earl* (1). After examining the older authorities SIR JAMES WILDE, J., said (L.R. 1 P. & D. 452): D

"The result of the cases is that in the Prerogative Court the tendency was to follow the foreign grant where it could be done, but there was a reluctance to lay down any absolute rule in the matter, whilst the decisions in the Court of Probate . . . have militated against the rule of following the foreign grant." E

and he expressed his opinion that the court ought to act on s. 73 and make the grant in all such cases to the person who has been clothed by the court of the country of domicile with the power and duty of administering the estate, no matter who he is or on what grounds he has been clothed with that power. Following that case, SIR FRANCIS JEUNE, P., in *In the Goods of Briesemann* (2) said ([1894] P. 261): F

"The principle on which grants should be made by the courts of this country in respect of persons domiciled in foreign countries appears to me to be settled by the case of *In the Goods of Earl* (1). That principle I take to be, that regard should be had to the law of the domicile, in order to determine what power or authority has been vested in any one with regard to dealing with the estate, and then to give such a grant to such person as will enable him to perform in this country the duties imposed on him." G

Another decision to the same effect is *In the Estate of Humphries* (3), though, curiously enough, this case is cited in certain text-books as an authority for the proposition that it is optional whether to apply for the grant according to English law or to the law of the domicile. The point of *In the Estate of Humphries* (3) is that on an application for a grant of letters of administration to the attorneys of a daughter of the deceased, who had been appointed administratrix under the law of his foreign domicile, the registrar refused to make the order on the ground that the practice of the registry required that the daughter should take the grant by her attorneys in that character according to English law and not as the person entrusted by the law of the domicile with the administration of the H

estate. The object of the motion was to obtain the grant to the attorneys of the foreign administratrix as such, regardless of any title she might have in English law as next of kin. Having been referred to what was said by SIR JAMES WILDE in *In the Goods of Earl* (1), BATESON, J., made an order in the terms of the motion. Against this uniform current of authority reliance was placed on certain observations of KAY, J., in *Duncan v. Lawson* (4), which, in relation to leaseholds in England belonging to a domiciled Scotsman, suggested that the administrator would be appointed according to English law. But, as appears from the learned judge's reasoning (41 Ch.D. 398), the point of the decision was that, owing to the natural immobility of leaseholds as distinct from movables properly so called, the accidental situs of which is disregarded, their devolution must follow the law of their situation and not that of the person: see also *Pepin v. Bruyère* (5).

In my opinion, Mr. Russell, as amicus curiae, was right in submitting that the practice laid down in the Procedure Direction is fully supported by the authorities, but it is argued that most of the cases depend on the fact that administration had already been granted to the applicant by the law of the domicile and that there is no ground for extending this to cases in which the applicant is not actually clothed with the authority of the foreign court, even though he is entitled by the law of the domicile to the administration. The point of these decisions is that the English law is irrelevant and that what matters is the law of the domicile. There is, therefore, in my opinion, no ground for drawing this distinction. The argument was pressed that the Procedure Direction is couched in language which fetters the discretion of the court. If so, I am sure that it was unintentional. To avoid any such implication, and bearing in mind that in *In the Goods of Earl* (1) SIR JAMES WILDE laid it down that the court should make a grant under the section to the person who has been clothed by the court of the country of domicile with the power and duty of administering the estate, I would prefer to re-state the practice as follows: Whether the applicant is a person who has been entrusted with the administration by a court of foreign domicile, or is merely entitled by the law of the domicile to administer, although no such grant has been obtained, it is perfectly correct that the grant should be made as a "section grant", but, in my opinion, it is desirable that it should appear on the face of the grant in which of these capacities he is being given the grant.

There remains the question: What should be done in this particular case? I am invited to depart from the practice of which I am approving because of the smallness of the estate. I do not think that that by itself is a sufficient reason for a special order, and it would obviously introduce difficulties of administration in the registry were it held to be so. But I think that this is an exceptional case. The deceased died in 1943 in a concentration camp in Poland, whither, I understand, he had been deported when Holland was overrun. His daughter was the only person entitled by Dutch law to his estate, but she died without having taken administration on herself. On June 8, 1951, the applicant was granted letters of administration to her small estate by the Principal Probate Registry. Even if that grant was not in conformity with what I think is the correct practice, it seems to me that it is manifestly convenient that, having obtained that grant, the applicant should administer the deceased's estate also. Accordingly, I am prepared to make an order in his favour under the section.

Order accordingly.

Solicitors: *Hardman, Phillips & Mann* (for the applicant); *Treasury Solicitor*.

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

LEACH v. EVANS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Devlin and Gorman, JJ.),
May 23, 1952.]

Street Traffic—Charge of motor vehicle while under influence of drink—"In charge"—Driver walking towards vehicle with intention of driving—Road Traffic Act, 1930 (c. 43), s. 15 (1).

The respondent approached a motor van which was stationary at the side of a road, and, when he was about three yards from it, he informed a police officer that he was looking for his van, that the van in question was his, and that he was going home. Observing that he was under the influence of drink, the police officer arrested him. On a charge against the respondent of being in charge of a motor vehicle on a road while under the influence of drink to such an extent as to be incapable of having proper control of the vehicle, contrary to the Road Traffic Act, 1930, s. 15 (1),

HELD: there was evidence that the respondent was "in charge" of the van at the material time, within s. 15 (1) of the Act of 1930.

FOR THE ROAD TRAFFIC ACT, 1930, s. 15 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 589.

CASE STATED by Middlesex justices.

On Nov. 19, 1951, at about 10.40 p.m., a police constable observed a motor van stationary and unattended and without lights in Great Cambridge Road, Edmonton. The respondent approached the van from the direction of a public house, staggering continually and on one occasion almost falling on his knees. When he was about three yards from the van, he told the police constable that he was looking for his van. The constable pointed to the van and asked him if it was his, and he replied: "That's it. I am going home," and started to walk towards the van. Observing that he was under the influence of drink, the constable stopped him while he was still at a distance of about three yards from the van and arrested him on a charge of being in charge of a vehicle while under the influence of drink to such an extent as to be incapable of having proper control of the vehicle. At the police station an ignition key which fitted the van was found in his possession, and, when he was released on bail on the following morning, he drove away in the van. At a court of summary jurisdiction sitting at Tottenham on Dec. 7, 1951, he was charged on an information preferred by the appellant with having been, while in charge of a motor vehicle on a road, under the influence of drink to such an extent as to be incapable of having proper control of the vehicle, contrary to the Road Traffic Act, 1930, s. 15 (1). At the close of the case for the prosecution it was submitted on his behalf that on the facts he could not be deemed to be in charge of the van at any material time and that there was no case to answer. The justices, being of the opinion that there was no evidence that the respondent was in charge of the van, held that there was no case to answer and dismissed the information.

Wigoder for the appellant.

I. Percival for the respondent.

LORD GODDARD, C.J.: I cannot understand the difficulty which the justices of Middlesex, sitting at Tottenham, found in this case. Here is a van driver who comes out of a public house looking for his van when he is obviously under the influence of liquor to a very considerable extent. He tells the police officer that he is looking for his van, that the van in question is his, and that he is going home. It is said that he was not in charge of the van. If he was not, who was? The Case must go back to the justices with a direction that there was

evidence that he was in charge of the van. If he has any evidence to give afterwards, no doubt the justices will hear it. The appeal is allowed with costs.

DEVLIN, J.: I agree.

GORMAN, J.: I also agree.

Appeal allowed.

A Solicitors: *Solicitor, Metropolitan Police* (for the appellant); *Breeze & Wyles* (for the respondent).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

B CHIBBETT (INSPECTOR OF TAXES) v. HAROLD
BROOKFIELD & SON, LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.),
May 19, 20, 1952.]

C *Income Tax—Profits—Builder—Sale of house—Mortgage to building society by purchaser—Guarantee of repayment by builder—Deposit with building society of part of sum guaranteed.*

D In 1937 the taxpayers, who were carrying on the trade of builders, sold houses to purchasers who obtained loans on mortgage from a building society to enable them to complete. The building society advanced to these purchasers sums in excess of the amounts which they would normally lend, and as a condition of doing so obtained from the builders a guarantee of repayment in support of which the builders left certain sums on deposit with the society. By the terms of the contract between the builders and the society these deposits were not to be released to the builders until the amounts owing on the mortgages had been reduced to a certain figure, and not even then unless the society were satisfied with the security and in their discretion agreed to release the money. Failing release, the deposits were to be held until all the guaranteed mortgages were repaid. Neither at the time of making the deposits nor at any time thereafter had the taxpayers brought into the computation of their profits for assessment to tax any sum in respect of the deposits. In 1946 the society expressed its willingness to release to the taxpayers the full amounts of the deposits, which were then of their full face value, but they did not accept that offer. In computing the profits of the taxpayers for assessment to tax the Crown sought to include the amount of the building society deposits as a receipt of their trade.

E HELD: the deposits fell for inclusion in the profits of the taxpayer's trade for assessment to tax when they became capable of valuation, i.e., when they were released and paid to the taxpayers, or when, as here, although the money was not actually paid, there was the equivalent to release, and, therefore, the deposits in question were properly brought into charge.

G *Harrison v. Cronk & Sons, Ltd.* ([1936] 3 All E.R. 747), explained.

H AS TO TRADING PROFITS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 117-120, paras. 221-225; and FOR CASES, see DIGEST, Vol. 28, pp. 22, 23, Nos. 120-122, and Digest Supps.

Cases referred to:

- (1) *Harrison v. Cronk & Sons, Ltd.*, [1936] 3 All E.R. 747; [1937] A.C. 185; 106 L.J.K.B. 70; 156 L.T. 20; *sub nom. Cronk & Sons, Ltd. v. Harrison*, 20 Tax Cas. 612; Digest Supp.
- (2) *Absalom v. Talbot*, [1944] 1 All E.R. 642; [1944] A.C. 204; 113 L.J.Ch. 369; 171 L.T. 53; 26 Tax Cas. 166; 2nd Digest Supp.

- (3) *Gardner, Mountain & D'Ambrumenil, Ltd. v. Inland Revenue Comrs.*, [1947] 1 All E.R. 650; 177 L.T. 16; 29 Tax Cas. 69; 2nd Digest Supp.
- (4) *Gleaner Co., Ltd. v. Assessment Committee*, [1922] 2 A.C. 169; 28 Digest 49, n.

APPEAL by the Crown from an order of DONOVAN, J., dated Dec. 17, 1951, affirming the decision of the Special Commissioners that the deposits in question, being incapable of valuation at the date when they were made, were to be brought into account only when they were released. A

Millard Tucker, Q.C., and *Sir Reginald Hills* for the Crown.
Graham-Dixon, Q.C., and *E. W. Griffith* for the taxpayers.

SIR RAYMOND EVERSLED, M.R.: This is an appeal relating to the question of the taxability of certain sums which were deposited by the taxpayers in the course of their business with the Halifax Building Society. The short question which the appeal raises depends on the real effect of the speeches in the case, somewhat comparable on its facts, in the House of Lords of *Harrison v. Cronk & Sons, Ltd.* (1), and particularly on the form of order which the House made in that case. The taxpayers carried on business as builders, particularly as builders of small houses of the type commonly called working-class houses. To promote this business it was important that members of the public who were invited to buy the houses so built should be able to buy them with the least possible initial expenditure, that is to say, that the buyer would only have to pay in the first instance a small sum of £25 or £35 or thereabouts by way of a deposit or first payment. The arrangement had to be made by the builder for the benefit of the buyer that the whole of the rest of the purchase price should be advanced to the buyer by a building society, in this case the Halifax Building Society, on the terms that the sum so advanced was repayable over a period by instalments and would be secured by a mortgage on the house. What I have said will make it clear that the amount so advanced by the building society was far in excess of what a mortgagee would normally lend on the security of a house, namely, two-thirds or, perhaps at most, three-fourths of the valuation. Therefore, to make the business possible, the nature of the arrangement carried out was this. The builder had to enter into a covenant with the building society to guarantee to the society the due payment by the mortgagor, the house purchaser, of so much of the purchase price advanced as was in excess of what would be a normal sum to advance on the security of the house. Not only had the builder so to guarantee that part of the repayment, but, in order to give to the building society security for the guarantee, the builder was called on to deposit with the building society, as an ordinary deposit according to the terms on which deposits may be made with building societies, a proportion (but not the whole) of the excess of the sum advanced (or treated as advanced) over what might be called the normal amount of advance. B C D E F

In *Cronk's* case (1) that was the transaction which was there under review by the courts. In the course of *Cronk's* case (1) an illustration was given of figures which it may be convenient for me to mention because it will illustrate and make clear, perhaps, any deficiency in my exposition of the matter. The illustration was that of a house the purchase price of which was £625. Of that sum £35 was paid by the purchaser on the purchase and the whole of the rest was advanced, but of the sum which thus was advanced, £590, £31 13s. 4d. was left with or deposited with the building society, so that the builder in fact received two sums, £35 from the purchaser and £558 6s. 8d. from the building society, and the builder guaranteed to the building society a proportion of the £558 6s. 8d. so left outstanding. It was part of the arrangement that, when the buyer had paid off a sufficient amount of the outstanding purchase price, the builder was entitled to have released to him the sum deposited, in the case I have given by way of illustration, of £31 13s. 4d. The present case is further G H

complicated in this respect. Instead of having a series of separate individual transactions each relating to a particular house and a particular purchase, there was a composite arrangement made, the brief effect of which was that the total sums deposited in respect of a considerable number of houses together constituted, in the hands of the building society, security for the guarantees which the builder had to enter into in regard to all these houses. Whether in every respect a deed of Feb. 12, 1937, which I hold in my hand, gave effect to the scheme which I have attempted to outline is not entirely clear to me in certain respects, but beyond doubt what I have said was intended to represent the substance of the matter. So far as the right of the builder to recover the sum deposited is concerned, that is dealt with in cl. 8 and cl. 10 of the deed. Clause 8 says:

“No application for the release of the charge hereby created shall be considered until and unless the principal amount owing on each of the guaranteed mortgages is reduced to at least 66 2/3rds per cent. of the original valuation and any such release shall be at the discretion of the directors of the society for the time being and to their being satisfied with each security after re-valuation by the society's surveyor. Such valuation to be at the expense of the guarantor.”

Clause 10 provides:

“The security hereby created shall be purely personal to the society and shall not be transferred on any transfer of the moneys secured by any of the guaranteed mortgages and shall cease when the society shall have received all moneys secured by the guaranteed mortgages respectively.”

I should add, in addition to the provisions I have stated, that in this case the amount deposited carried interest at the rate, after deduction of tax, of 2½ per cent. It is clear that, before the builder could demand as of right to have the deposit released, the conditions would have to be such that every individual buyer should have paid to the society an amount of the purchase money under their several purchases equivalent to the total (in respect of each purchase) guaranteed by the builder. At all material times that situation does not appear to have arisen, and the inference is, and I read the finding of the Special Commissioners as indicating, that no such right to claim repayment of the deposits had ever arisen.

The significance of the present case has arisen from the fact that on Nov. 28, 1946, a special resolution was passed by the taxpayers for voluntary liquidation. The Special Commissioners have held—and there is no complaint about the finding—that thereafter the taxpayers must be treated as having ceased to carry on business. At that date the sums deposited, which amounted with accrued interest to a sum of over £5,000, had not in fact been repaid. The claim of the taxpayers in this case has been that, as a consequence of the decision in *Cronk's* case (1), sums so deposited or their value are not liable to be brought into account for tax purposes until they are or to the extent to which they are actually repaid, unless—and this does not arise in the present case—at the time when the transaction was originally entered into a proper valuation could be arrived at of the value to the builder of the sums deposited.

The claim of the Crown rests on this circumstance. Although no part of that deposited sum of £5,000 had been repaid before the liquidation, nevertheless, from July, 1946, onwards, the building society had made it plain that the total amount was there for the builders' asking if they wanted to have it. That arose, no doubt, from the fact that the building society was paying under this contract of charge a high rate of interest, and I take it that there had been sufficient paid by the purchasers to make it worth the while of the building society, if

they could, to get rid of their obligation to pay this relatively high rate of interest. The relevant finding in the Case is in the following terms:

“ Although the company were not entitled to demand the release of the deposits in November, 1946, we find, having regard to all the evidence and to the rate of interest they carried, that they were then worth their full face value.”

In the light of the evidence, which included evidence of the fact that the representatives of the Halifax Building Society had offered to repay, as soon as the builders asked for it, the sums deposited, I take that to mean that the money was there for the builders' asking. The Special Commissioners, however, say that they felt precluded by the effect of *Cronk's* case (1) from deciding that the value of these deposits could be brought into the trading account before liquidation, with the result that, if that view is right, they are not liable to be brought into any account which attracts tax. A

To determine the effect of *Cronk's* case (1), it will be necessary to spend a little time in looking at the argument there put forward on behalf of the Crown and the taxpayer and then to see precisely what the House of Lords decided. I think it is not open to question that, in the ordinary case of a trader who is selling goods of any kind, or, as in this case, selling houses which he builds, he is assessed for purposes of taxation in respect, not of the actual cash received, but of earnings. If, therefore, such a trader sells goods, *prima facie* he will be required to bring into his account for tax purposes the purchase price, even though the price has not been paid in fact. I say, *prima facie*, because I do not want to be understood as laying down some general rule which goes far beyond the requirements of this case or to comprehend transactions where the purchase price is by the terms of the contract payable only on some future and possibly distant date, but, in the ordinary case, where the buyer has become bound to pay, but has not paid, the amount of the book debt, that is a credit brought into account, subject only to this, that a proper allowance may be made for bad and doubtful debts. The two views of *Cronk's* case (1) may be put thus. Did the case really decide no more than that, in the peculiar circumstances which are involved in these building society deposits, practical considerations prevented the sums deposited (subject to the charge and the other obligations attached to it) effectively being brought into account in nine cases out of ten at the date when they came into existence, and, therefore, that the ordinary rule must fall to be modified so far as necessary in order to pay due regard to that practical circumstance? Or did it go the length of saying that in this class of debt and in this class of case a special, comprehensive and exhaustive rule was laid down that, unless the deposits can be given a proper value when they are first created, they are not to be valued at any stage thereafter but are to be treated purely on a cash basis. For my own part, I am not entirely clear, if a valuation is given in the first instance, what subsequently happens; but that, I think, does not matter. My own conclusion is that of those alternatives the former is the correct one and the House did not intend to lay down such a comprehensive and exhaustive rule as would make a striking exception to the general principle, and indeed would almost amount to a piece of special, albeit judicial, legislation. C

Accordingly, I turn to *Cronk's* case (1) to see what it decided. It was said on behalf of the company that in the computation for income tax purposes of the profits of the company for two specific years ending Jan. 31, 1931 and 1932, sums deposited by the company with the building society ought not to be treated as receipts of the company's trade except in so far as such deposited sums were released to the company during those years. There was an alternative contention that, if the first was not right, the deposits should be brought into account at figures not exceeding their actual present values as assets of the company's trade, or, if the deposits were brought into account at their nominal amounts, which would come to the same thing, deductions should be allowed D

in respect of the differences between such nominal amounts and the actual present value of the deposits as assets. Against that, the contention of the Crown was that the full nominal amounts of the deposits (being in effect part of the purchase money for the houses sold) should be brought into account as receipts of the trade and that any losses under the guarantees should be allowed at the time when they occurred. Those were the respective contentions.

A In the Court of Appeal a decision was reached by LORD HANWORTH, M.R., ROMER, L.J., and MAUGHAM, L.J., that the right view was to adopt the alternative contention of the company and to bring in the so-called assets, not at face or nominal value, but at their actual value at the date of the original transaction of sale. I would like to refer to a passage in MAUGHAM, L.J.'s, judgment in *Cronk's* case (1) (20 Tax Cas. 632), to which ROMER, L.J., referred during the argument in the present case:

C "I think one has to consider whether there have been profits or gains in these cases by the tests applied in ordinary business, and in my opinion the appellants, Messrs. Cronk, would not, according to ordinary business notions, be acting properly in regarding themselves as having received the whole of the purchase money in a case where they never have received, and never could receive, the whole of the purchase money except subject to the chance of a number of small instalments being paid monthly by people of the sort who enter into these transactions, and who are able only to pay the small monthly instalments out of their wages."

D There was an appeal by the Crown to the House of Lords. The first significant thing to note is that the appeal was dismissed. That leads me strongly to suppose that the House was not seeking to lay down what I have called a special or exhaustive rule, but was adopting the view that you had got to apply, so far as practical matters enabled you to do so, the ordinary business rule. Only one speech was delivered, and that was by LORD THANKERTON, the other noble Lords—LORD ROCHE, LORD ATKIN, LORD MACMILLAN and LORD RUSSELL OF E KILLOWEN—concurring. LORD THANKERTON, after saying that the view of the commissioners and of FINLAY, J., that deposits should be brought in at their face value did not commend itself to him, went on ([1936] 3 All E.R. 750):

F "In my opinion, it would be more correct to treat the retention of the deposit as a retention of part of the nominal purchase price with the consent of the company, such sum to be applicable to reduction of the advance made by the society to the purchaser, in the event of the latter's default, any surplus going eventually to the company. In other words, in the example referred to, the true purchase price was not £625, but two sums of £35 and £558 6s. 8d., payable at the time of the sale, with a further addition of any balance eventually available from the deposit. On the G other hand, I am not prepared to say that the view taken by the Court of Appeal is not a legitimate one, though I should prefer my own view expressed above. The view of the Court of Appeal, as I understand it, is that, at the time of the sale, the company received, in addition to the £35 and the cheque for £558 6s. 8d., an asset in the shape of a credit in the books of the building society, on which interest was payable to the company, but which was subject to a contingent liability, which materially affected H its value to the company; that such asset should be valued as at the time of the completion of the sale, and that such value should be entered as part of the price received for the house. It is unnecessary to consider now whether such valuation will be subject to revision or readjustment on its eventual realisation. I am therefore of opinion that the case of the Crown has not been made out and that the appeal fails, and, in the absence of a cross-appeal, the decision of the Court of Appeal will fall to be affirmed."

So far, I venture to think, no difficulty arises. But the learned and noble Lord then continues (*ibid.*, 751):

"But I have serious doubt as to whether the valuation ordered by the Court of Appeal is practicable in any proper sense; the commissioners, after hearing evidence, have expressed the view that an actuarial valuation is not possible, and it may well be that no proper valuation is possible. I propose, therefore, that the order of the Court of Appeal should be varied by adding that in the event of the commissioners finding such valuation to be impracticable, the sums deposited with the building society under the circumstances described in the Case Stated should not be treated as receipts of the company's trade except in so far as such sums, or any part thereof, were released to the company during the trading periods in question."

Be it noted that those last words are an echo of the first way in which the builders had put their case. Then the form of the order was as follows:

"That the order of the Court of Appeal be varied by adding that, in the event of the commissioners finding an actuarial valuation impracticable, the sums deposited with the building society under the circumstances described in the Case should not be treated as receipts of the company's trade except in so far as such sums or any part thereof were released to the company during the trading periods in question, and that subject to such variation the said order be affirmed and the appeal dismissed with costs."

Having regard to the form of order, it is natural, I think, that counsel for the taxpayer should say: Suppose in *Cronk's* case (1) that the Special Commissioners came to the conclusion, as I think we are all prepared to assume that they did, that no valuation was possible at the starting date, and then suppose that at some later date, though there had been no release, there had been such transactions as have occurred here, namely, an offer which, if accepted, would make a good contract for good consideration to repay at once the sum deposited, would it be consistent with the order of the House of Lords in *Cronk's* case (1) to treat the amount of the deposit which the society had then said they were willing and anxious to repay as an item to be brought into the trading account? Or must any bringing into account of the subject-matter of this transaction be necessarily excluded until the actual cash was received? I am ready to concede to counsel that, as regards *Cronk's* case (1), having regard to the particular order made in that case, he may well be right, and that nothing but the actual cash receipts would attract tax, but that is simply, as I follow it, the effect of the order made for the purposes of that case. The passage in the speech of LORD THANKERTON which I have read seems to me not properly capable of laying down a rule of the exhaustive character suggested, not only for *Cronk's* case (1), but also for every similar case. I attach for myself considerable importance to the use in his speech of the phrase "with a further addition of any balance eventually available from the deposit".

I think two views may be taken. I think, if I may respectfully say so, it is intelligible and legitimate to conclude that the peculiar obligations on the one side or the other which are entered into when a builder makes arrangements of this kind with a building society are such that you can at no stage postulate a "debt" due from the one to the other. The most you can say is that there is a bundle of mutual rights and obligations which, according to the happening of many events quite outside the control of both parties, may produce the result that either one party or the other in the end may have an asset, namely, a claim by the one against the other. I think that is the view which commended itself to LORD PORTER, for both in his speech in the later case of *Absalom v. Talbot* (2), and also in the case to which counsel for the taxpayers referred, *Gardner, Mountain & D'Ambrumenil, Ltd. v. Inland Revenue Comrs.* (3), I think LORD PORTER expressed that inclination of his mind.

As the matter does turn on a proper view of the extent of the decision in *Cronk's* case (1), it is perhaps right, out of respect to the noble Lords, that I should make this one reference to LORD PORTER's speech in the *Gardner, Mountain* case (3). After referring to *Cronk's* case (1) and the passage from LORD THANKERTON's speech which I have already read, he says, after stating the facts of that case ([1947] 1 All E.R. 663):

- A "In these exceptional circumstances it may well be said that a new
relationship has been established between the society and the company
under which, indeed, if it can be fairly estimated that some sum is due to
the latter by the former, the remuneration is regarded as earned though
its payment is postponed, but, if no estimate can be made, the contract
between the parties must be regarded as leaving no debt due on one side
B or the other, but only a position in which there are mutual obligations
which may as well show a credit to the one party as to the other. If I
may be permitted to quote from my own speech in *Absalom v. Talbot* (2)
I said ([1944] 1 All E.R. 651): 'In it [i.e., *Cronk's* case (1)] no debt remained
due from the purchaser to the owner, the full price was paid to the latter
by the building society. But lest the society should not be repaid by the
C purchaser in full, the owner deposited a sum of money with it and guaranteed
payment of an additional sum beyond the deposit. In these circumstances
there were contingent liabilities on each side—in the case of the society to
return the deposit or some part of it, if the money which was recovered from
the purchaser enabled this to be done: on the side of the owner to implement
his guarantee if the purchaser failed to pay even so much as with the deposit
D made up the full price . . . In such a case there was no debt either present
or future due to the appellants. It might eventually happen that something
would be found to be due to him, but, on the other hand, so far from
receiving, he might have to pay.'"

- If that view be the right view then, as it seems to me, it should follow that no
question of any valuation either initially or at any other time would be appropriate.
E There would be nothing to value. There was no asset to value. In
such a case the logical result might be to leave the matter entirely to be dealt
with quoad income tax liability on a cash basis. But the view which LORD
PORTER entertained was not, I think, the view of the majority of the noble
Lords either in *Absalom's* case (2) or in the case of *Gardner, Mountain & D'Ambrumenil* (3).
F It would be taking too much time if I were to refer at length to all
the speeches, but I note what was said by VISCOUNT SIMON, in the *Gardner, Mountain*
case (3) ([1947] 1 All E.R. 654) and what was said on the following
page by LORD WRIGHT in expressing his concurrence with VISCOUNT SIMON.
There is a sentence or two also from LORD SIMONDS' speech which is worth
quoting, because it was referred to by BIRKETT, L.J., in the present case.
G After referring to *Cronk's* case (1), LORD SIMONDS says ([1947] 1 All E.R. 666):

- "On the contrary, the profits not having been ascertained, the issue was
whether certain sums, which were admittedly subject to possible diminution,
should be brought into charge at their face value, as the Crown contended,
or, as the subject in the alternative successfully contended, should be
brought into charge at their then present value. It was the latter view that
H prevailed in this House, though, in consideration of the possibility that
no valuation was possible, the rider was added to the effect that in that
event only such sums should be treated as receipts of the period in question
as were actually received."

I have left to the last the reference which must be made to the *Absalom* case (2). The facts in that case were somewhat different. There was not a transaction between the builder and the building society, or not one which was relevant. The sum required by the purchaser to enable him to buy the house,

which was in excess of what the building society would advance, was charged by way of second mortgage or on the security of a promissory note entered into between the buyer or client and the builder. That second charge, providing for the repayment of the excess sum advanced, was treated as part of the price made payable over a long period of time by various instalments. The question involved was, though the facts were different, an analogous question to that in *Cronk's* case (1), namely, whether the sum which the purchaser was thus obliged to pay to the builders on the security of the second charge or promissory note over a period of years should be brought into account at the time of the sale of the house at an estimated value or at its full face value. The House of Lords decided in favour of the former view by a majority of three to two. *Cronk's* case (1) was not only carefully considered, but it is to be noted that, of the two Law Lords who were in the minority and who favoured in that case bringing in the sums at their full face value, LORD PORTER was one. The majority, consisting of LORD ATKIN, LORD THANKERTON and LORD RUSSELL OF KILLOWEN, all of whom had been in *Cronk's* case (1), favoured the conclusion that the sum should be brought in at its actual or estimated value. It is fair to say that, in considering the application of *Cronk's* case (1), LORD RUSSELL OF KILLOWEN, if left to himself, would have taken the view that transactions of this kind should always be brought into account for tax purposes purely on a cash basis. His view, therefore, would support the contention of counsel for the taxpayers in the present case, and is, indeed, fairly allied with LORD PORTER's view. But both LORD ATKIN and LORD THANKERTON clearly preferred the other view of *Cronk's* case (1), and LORD RUSSELL said that, in spite of his own inclination, he was not prepared to differ from what had fallen from LORD ATKIN and LORD THANKERTON, and, therefore, he formed with those two the majority of the House.

The matter was further complicated by a dissonance between the noble Lords as regards the correctness of a judgment in the Privy Council in *Gleaner Co., Ltd. v. Assessment Committee* (4). I do not think I need take time over that matter, but I must read certain passages from the speech of LORD ATKIN in *Absalom's* case (2). After referring to the *Gleaner* case (4), LORD ATKIN says ([1944] 1 All E.R. 647):

"There are more methods than one of calculating the profit in such cases as the present, and it may be that more than one may have to be adopted. For my part, I think that the most satisfactory course would be to put the debts at their face value on the one side and to open a suspense account on the other side which no doubt would be calculated upon the ordinary risk of bad debts and adjust it year by year in accordance with the actual payments made."

Then he deals with the point raised in the *Gleaner* case (4) about r. 3 (i) of the Rules Applicable to Cases I and II of sched. D. Then he proceeds (*ibid.*):

"Another method which is correct enough in theory is to value the debt. It would thus be treated as an asset received in part discharge of the price, and its value would be calculated according to the experience of the business . . . Another and more accurate method as long as the business continues is that which I understand is preferred by my noble and learned friend LORD RUSSELL OF KILLOWEN, which is to enter only in each year the instalments actually paid or at any rate payable. The difficulty as it appears to me is that, when the creditor retires from business, according to present accepted practice income tax would no longer be chargeable on instalments received after that date. I venture myself to doubt whether this practice is correct: the proceeds would be annual gains, and they would be due to carrying on a trade though not in the year of assessment; it is difficult to see how they would differ from instalments

received in the second or third year while business is still being carried on. I can express no final opinion about this for it has not been argued, but I should like to consider it an open point. However, there is, I think, no doubt about the practice, and I think, therefore, that, as the case must go back to the commissioners, it will be sufficient to leave it to them to settle the right method of adjusting the assessment, feeling that the method of valuation affords least scope for legal doubt, and that, in default of satisfactory valuation being possible, they may have to fall back upon the method of taxing instalments in each year as they fall due."

I hope I have referred sufficiently to *Absalom's* case (2) to justify my conclusion that the majority of the noble Lords in that case—and I think the same is true of the *Gardner, Mountain* case (3)—lent no support to the view that *Cronk's* case (1) lays down a principle which I will briefly describe as "taxing on cash received only".

Reverting to what I have earlier said, I think it would be surprising, having regard to the circumstances in *Cronk's* case (1) and the issues to be tried, and, particularly, to the form of judgment in the Court of Appeal, if the House of Lords in that case (1) were thought to have deliberately decided to do otherwise than apply the ordinary business methods, subject only to such qualifications as the practical circumstances of the case necessarily imposed. If the House had so decided, I cannot help thinking that they would not have dismissed the appeal, but would, as a matter of principle and logic, have discarded the Court of Appeal's direction for any valuation being made or attempted, and held, in accordance with LORD PORTER's view and LORD RUSSELL's inclination, that there was never any asset capable of valuation, so that in every case and for all purposes deposits of this kind should only be brought into account for tax purposes on a cash basis. If that is the right summary of the matter, the conclusion in this case seems inevitable. It is, perhaps fortunately, not necessary for me to say whether, in view of the order of the House of Lords in *Cronk's* case (1), it is right or proper to make a re-valuation periodically or to attempt to do so. All we have to decide in this case is whether (if the situation is reached when the sums deposited are not in truth released, but are as good as in the hands of the company, being theirs for the asking) as a matter of principle, logic, and common sense the equivalent to a return of the money has, on the strictest construction of *Cronk's* case (1), involved the right to tax, or, put in another way, whether these circumstances are not within the essential meaning of LORD THANKERTON's speech in *Cronk's* case (1), and particularly his phrase "with a further addition of any balance eventually available from the deposit". I think they are, and I think that any other conclusion would be one which the court should only adopt if it were compelled to hold that a new, singular, and, I think, artificial but exhaustive rule, applicable in these cases only, had been established by *Cronk's* case (1).

I am bound to say, speaking with the utmost possible respect, that the language in the various speeches of the noble Lords in these cases has given some justification for the difficulties in the argument which has been put forward. If I have misinterpreted what the noble Lords intended to say, no doubt on some occasion they will correct my error and state, as perhaps they best can state, what precisely the decision in *Cronk's* case (1) in the House of Lords did mean and what it was intended to cover. In my view, there was here an equivalent of a release. There was here available in the ordinary sense the sums of money in question at a time when this company had not gone into liquidation and had not ceased business. I, therefore, think that the Crown's case is correct and ought to succeed. I only add that I am unable to agree, with all respect, with the view of DONOVAN, J., who thought that there was such a firm rule established as the Special Commissioners also thought existed. There is one passage in his judgment that I would like to mention. He said

that the decision in *Cronk's* case (1) and the construction of it which LORD PORTER put on it—

“ . . . leaves no room for another alternative such as this: bring in the deposits as a profit for the one year in which they can be valued. The only case I can think of which might require different treatment is the case where deposits are freely available for recovery, but for some reason the trader deliberately refrains from collecting them.”

Although the learned judge says that is not found in this case, I think in substance that is indeed what happened in this case, and that is the one point we have to decide. For the reasons I have attempted to give, I think this appeal ought to be allowed, and that the Crown is entitled to succeed.

BIRKETT, L.J.: I agree with the judgment of SIR RAYMOND EVERSHED, M.R. The question to be determined is simply what is the proper method of computing the taxpayers' profits with regard to the deposits with the Halifax Building Society? The argument for the taxpayers had, at any rate, the great virtue that it came back time and time again to the simple point on which they relied: “I am covered by authority. The highest authority in the land, the House of Lords, has decided this case in terms conclusively in my favour. There is indeed no room for argument, once that decision is understood.” The House of Lords in *Cronk's* case (1), according to counsel for the taxpayers, said in the plainest possible terms that, if you can, you should value your assets at the time of the transaction, but, if that is impossible or impracticable, you bring them into account when you receive the money. The actual words of LORD THANKERTON were ([1936] 3 All E.R. 751):

“ . . . that such asset should be valued as at the time of the completion of the sale, and that such value should be entered as part of the price received for the house . . . I propose, therefore, that the order of the Court of Appeal should be varied by adding that in the event of the commissioners finding such valuation to be impracticable, the sums deposited with the building society under the circumstances described in the case stated should not be treated as receipts of the company's trade except in so far as such sums, or any part thereof, were released to the company during the trading periods in question.”

Counsel for the taxpayers came back time and time again to the assertion that, whatever else was arguable in this case, it could not be disputed that the taxpayers had never had the money, and, therefore, if *Cronk's* case (1) meant what it said, this case was evidently within that decision.

Counsel for the Crown contended that *Cronk's* case (1) is only decisive of the particular facts which were then under discussion. They were described by VISCOUNT SIMON in the later case of *Gardner, Mountain & Co.* (3), as “special and complicated facts”. They were referred to in the speech of LORD PORTER as the “exceptional and peculiar features” of *Cronk's* case (1). The argument for the Crown was that *Cronk's* case (1) was to be confined to its special and exceptional facts, and counsel added that the decision in *Cronk's* case (1) did not prevent such a situation arising that, when it was made clear by evidence that the asset was wholly good, as it was contended in this case it was according to the statement of the Halifax Building Society, it should be brought into account when valuation was possible. On that contention, all the argument has proceeded. It is plain that the Special Commissioners took the view for which counsel for the taxpayers has argued in this court. They said in the Case Stated :

“It was however contended on behalf of the Crown that, although it may have been impracticable to value the deposits when they were first made, it was nevertheless possible to value them in 1946 prior to the

liquidation; that they were then worth their full face value, and that such value should be treated as the trading receipt of the company for the period prior to liquidation, despite the fact that they had not at that time been released. Although the company were not entitled to demand the release of the deposits in November, 1946, we find, having regard to all the evidence . . . that they were then worth their full face value. We are, however, unable to accept the Crown's contention that they should be brought into account as trading receipts prior to liquidation."

Then here was the gist of the matter:

"We cannot find any justification for departing from the method of treatment indicated in *Cronk's* case (1), i.e., that the deposits, if not valued and brought into account when first made, should be brought into account when they are released."

They were plainly saying, "We decide this case because *Cronk's* case (1) covers it completely."

DONOVAN, J., out of his learning and experience of these matters, came exactly to the same view, for, after reviewing the whole case, he said this:

"But a deposit released in the same year as that in which it was made would never give rise to any problem requiring legal consideration right up to the House of Lords. It would be obvious that it had to be brought in for that year, and the House of Lords cannot have thought they were deciding only such a case. Nor can its order be reasonably read in any such limited sense. It appears on p. 642 of the report in 20 Tax Cases; and in effect says this: Value the deposit if you can at the time when the house is sold. If you cannot, bring the deposit in as a trade receipt when it is ultimately released. That seems to have been LORD PORTER's view also of the decision (see *Absalom v. Talbot* (2)) and it provides a complete code of treatment of these deposits while the trade continues. It leaves no room for another alternative such as this: bring in the deposits as a profit for the one year in which they can be valued."

He goes on to deal with people who deliberately refrain from collecting the deposits. It is plain that DONOVAN, J., said that the decision in *Cronk's* case (1) not only covers the present case and lays down a complete code of conduct for cases of this kind, but also does not permit of any alternative view. With the greatest respect to the learned judge in the court below, I venture to take a different view.

The question for determination is whether the language used by LORD THANKERTON in *Cronk's* case (1) is such that it lays down some all-embracing principle for cases of this nature. Does it in truth lay down a code of conduct for cases of this kind, or is it only applicable to the special and complicated facts, the exceptional and peculiar features, of *Cronk's* case (1)? I think the second, not the first, is the correct view. It seems to me that, if it is to be said that this language of LORD THANKERTON is laying down a complete code, I must say, with great respect to everybody, it is done in a very casual kind of way, almost as a postscript, almost as an afterthought, because it always must be remembered that the issue in *Cronk's* case (1) was really whether the debts or assets should be valued at their nominal value, their face value, or at their estimated value. In the words of LORD THANKERTON, the Court of Appeal unanimously held that the sums deposited with the building society should be brought in as trading receipts at the time of sale, not at their face value, but on a proper valuation. That was the issue—nominal value or actual value.

Counsel for the taxpayers put the question rather rhetorically in argument in this way: "Can it be supposed that the House of Lords, when considering the question in *Cronk's* case (1), never considered the question which has been the subject-matter of debate here in the Court of Appeal yesterday and today?"

The only answer I can make to that is that there is no record of any argument having been addressed to the House about that question. It would have seemed to me that, in such a case, the issue being whether it was nominal face value or estimated actual value, if it had been intended to lay down that there is an intermediate stage between the time when the debt was incurred and the time of payment, which may be very many years, and one must, therefore, exclude any possibility of a valuation being made at any period other than at the very beginning or at the absolute end, I think the House of Lords would have said so. The answer to the question: "Can it be supposed that the question was not considered?", is, I think: "Yes, I can conceive that." The issue that was being discussed was an important one—face value or actual value. LORD THANKERTON says that the Court of Appeal decided this matter properly; they decided not face value, but on a proper valuation, and the House agreed with them. But then he said in effect (putting my own gloss on his words): "I have serious doubts whether the valuation ordered by the Court of Appeal is practicable. I think the principle is right, but I doubt whether it is practicable. The commissioners are doubtful about it—they have expressed their doubts about it. I propose therefore that the order of the Court of Appeal, which we think right in principle, should be amended in this way. If, when this matter comes before the commissioners, they should still find it to be impracticable, then these sums should not be treated as receipts of the company's trade except in so far as such sum or any part thereof was released to the company during the trading period in question." It is a doubt about its quality and nature, not precisely an afterthought, but something superadded in this sense: "If you can do what we say, do it, but, as you have expressed a doubt whether it is practicable, let us add that, if valuation is out of the question, wait till the money is paid."

For my part, I cannot think that these speeches in the House of Lords preclude the idea that, if the stage is reached when the deposit can be valued, it should not be taken into account. For these reasons, and for the reasons which have been stated by my Lord, I agree with the conclusions at which he has arrived.

ROMER, L.J.: I also agree. Neither the order in *Cronk's* case (1) nor anything that LORD THANKERTON said in his speech in that case seems to me to present any obstacle to the conclusion which my Lord has expressed on this appeal. The Court of Appeal in *Cronk's* case (1) held that the sums deposited with the building society should be brought in as trading receipts at the time of each sale, not at their face value, but on a proper valuation, and remitted the case to the commissioners for determination of such values and the adjustment of the assessments. LORD THANKERTON said that he had serious doubts whether the valuation ordered by the Court of Appeal was practicable in any proper sense, and the language he used was substantially adopted in the order of the House varying the order of the Court of Appeal. The word "released" which was introduced into the order and used by LORD THANKERTON, obviously means released by the building society. What the learned lord had in mind when he used that phrase, "released to the company", can be seen from a passage in his speech where he said ([1936] 3 All E.R. 750):

"In my opinion, it would be more correct to treat the retention of the deposit as a retention of part of the nominal purchase price with the consent of the company, such sum to be applicable to reduction of the advance made by the society to the purchaser, in the event of the latter's default, any surplus going eventually to the company. In other words, in the example referred to, the true purchase price was not £625, but two sums of £35 and £558 6s. 8d., payable at the time of the sale, with a further addition of any balance eventually available from the deposit."

The word "applicable" which he uses in that passage is referable to the society's contractual right to retain the deposit and apply the sum in reduction of the

advances made by the society to the purchaser in the event of the latter's default. Subject to the exercise of that right, the deposits were recognised as belonging to the company. On the happening of certain events, the society would be bound to release the deposits from this right to apply them to the specified purposes, and the company would have a contractual right to payment. On this happening, and the company receiving the deposits, they would have to be treated as receipts in the company's hands, but exactly the same result would be arrived at if the society at any time offered to exonerate the deposits from the rights they had over them and hand them back to the company. If the offer were accepted, the deposits would be released and made available to the company in the same way as if they were paid over by the society under their contractual obligations so to do.

In the present case the building society wanted to repay these deposits because of the unfavourable rate of interest which they bore. If the builders had accepted the offer which the society had made to them in July, 1946, they would have acquired a contractual right to claim payment of the deposits, and that contractual right would be of an effect and force equal to their rights under cl. 10 of the deed, if that clause had ever been brought into operation. In each case the deposits would be available to the builders free from the rights in relation to the deposits which had been vested in the society down to that time. In each case, the "release" contemplated by LORD THANKERTON would have been effected, and I can see no reason for distinguishing between a release which is brought about by virtue of cl. 10 of the deed, on the one hand, and a release resulting from an offer by the society to repay the amounts, on the other. The latter is merely an acceleration by the society for their own purposes of the obligation imposed on them by cl. 10 of the deed, and so far as the builders are concerned would lead to precisely the same results. Counsel for the taxpayers sought to meet that by suggesting that the offer might have been withdrawn. If it had been accepted, it could not have been withdrawn, because there would be consideration moving from the builders in this case in accepting it, which would have sustained the acceptance and converted the offer into a contract. But, be that as it may, the commissioners found as a fact that the deposits had their full value as a result of the offer having been made. That shows that they treated the position as though the deposits were actually laid on the table, as it were, by the society, waiting only for the builders to pick them up and put them in their pocket. Accordingly, I do not think that our decision is in any way inconsistent with the decision in *Cronk's* case (1), and I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Potter, Sandford & Cosgrove*, agents for *W. T. Husband & Son*, Liverpool (for the taxpayers).

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

SEXTON v. SCAFFOLDING (GREAT BRITAIN). LTD.

[QUEEN'S BENCH DIVISION (Donovan, J.), May 20, 21, Jur ^{Reversed. C.A. post p. 1085.}

Building—Building regulations—Dismantling of scaffolding—Provision of guard-rail—Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), reg. 2 (1), reg. 24 (1).

When the lowest "lift" or level of scaffolding used in building operations was about to be dismantled a charge-hand of the employers ordered the removal of a guard-rail which had been erected for the protection of workmen on a ledge of the premises, twenty feet above the ground, on which the scaffolding rested. A workman walking along the ledge to assist in the dismantling fell into the street below and was injured.

HELD: the dismantling of the scaffolding was an operation on a building and the scaffolding was "plant" within reg. 2 (1) of the Building (Safety, Health and Welfare) Regulations, 1948, and, therefore, under reg. 24 (1), the workman's employers were in breach of their statutory duty to provide a guard-rail at the time of the accident and were liable to the workman in damages.

FOR THE BUILDING (SAFETY, HEALTH AND WELFARE) REGULATIONS, 1948, reg. 2 (1), and reg. 24 (1), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 8, pp. 210 and 220.

ACTION for damages for breach of statutory duty and negligence.

The plaintiff was one of three employees of the defendants who, on Dec. 2, 1950, were engaged in dismantling some tubular scaffolding erected in connection with building operations on premises comprising a shop, with living-rooms on three floors above, at Barnes. The living-rooms were set back from the building line of the shop so that there was a ledge above the shop from the back of which the rest of the building rose. The ledge was five feet wide except where the bay window of one of the living-rooms projected, it being there only two feet, one inch, wide. The ledge on the street side included a coping stone one foot, one inch, wide and two inches above the level of the rest of the ledge, the remainder of the ledge being a shallow trough, between the coping stone and the front of the building, which was thus about a foot wide at its narrowest point. The drop to the street from the ledge was just under twenty feet. The scaffolding consisted of uprights arranged in parallel rows, horizontal "ledgers" and transoms joining the two rows of uprights crossways. The upright poles of the scaffolding rested on base plates on the coping stone about five inches from its outer edge, and to a man passing outside the uprights only five inches of foothold was available. The scaffold was arranged so as to enable work to be done at a number of levels with several "lifts", each "lift" being six feet above the one below. On the occasion in question the plaintiff and the two other men had dismantled the upper "lifts" and were about to dismantle the last "lift", which was six feet above the ledge. They would do this by standing on the ledge, reaching up with their hands, and undoing with an instrument called a "podger" the clips and bolts which held the scaffold tubes together. On starting to dismantle the last lift, one Rock, one of the employees, on the orders of one Palmer, the charge-hand, removed a hand-rail consisting of a scaffold tube which had been erected at a height of three feet above the coping stone along the ledge and fixed to uprights at the flanks of the scaffold and was intended as a protection for anyone working on the scaffold against falling into the street below. While walking from one end of the scaffolding towards the other to begin further dismantling and when at the narrowest part of the trough by the bay window, the plaintiff fell into the street below and was injured.

The plaintiff alleged that Rock had piled some boards about one foot high in the trough of the ledge at the particular spot, and that while he was walking

with his right foot on the top of these boards and his left foot on the coping stone one of the boards struck his left leg knocking it off the coping stone. He said he made an instinctive grab for the hand-rail which was not there and fell into the street. The defendants denied that the boards were at that point and said that the plaintiff walked on the coping stone and outside the scaffold poles. The plaintiff contended that the defendants were in breach of their statutory duty to provide a guard-rail under reg. 24 (1) of the Building (Safety, Health and Welfare) Regulations, 1948, and that they were negligent in causing scaffold boards to be stacked on the ledge, in allowing the ledge to be slippery, in moving the boards while the plaintiff was walking on them, and in failing to provide a safe system of dismantling the scaffolding by removing the hand-rail before such time as the ledge was cleared of materials and there was no occasion for the plaintiff to walk along it. The defendants denied that the regulations were applicable to the work of dismantling the scaffolding or that they were in breach of such regulations if applicable. They denied negligence and alleged that the accident was caused or contributed to by the negligence of the plaintiff. Further, they set up a plea of *volenti non fit injuria*.

Buckee for the plaintiff.

Stephen Chapman for the defendants.

Cur. adv. vult.

June 13. DONOVAN, J., read a judgment in which he stated the facts, found that there were no planks where the plaintiff said there were, but that he walked on the outside of the scaffolding as the defendants alleged and for some reason lost his foothold and fell, and that, had the hand-rail not been dismantled, he would have held it as he made his way from one end of the scaffolding to the other, or, in any event, it would have been available for that purpose, and he continued: The removal of this hand-rail before it was necessary to remove it was, in my view, a breach of reg. 24 (1) of the Building (Safety, Health and Welfare) Regulations, 1948, which, subject to exceptions not here material, requires provision of a guard-rail at the side of every working place from which a person is liable to fall more than six feet six inches. The plaintiff at the time of his accident was working from such a place. The defendants contend that the regulations have no application having regard to reg. 2 (1), which, so far as relevant, is as follows:

“Application of Regulations. These regulations shall apply to the following operations where undertaken by way of trade or business or for the purpose of any industrial or commercial undertaking, or by or on behalf of the Crown or any municipal or other public authority, namely, the construction, structural alteration, repair or maintenance of a building (including re-pointing, re-decoration and external cleaning of the structure), the demolition of a building, and the preparation for, and laying the foundation of, an intended building whether or not the building is on or adjacent to the site of work of engineering construction within the meaning of the Factories Act, 1937, and to machinery or plant used in such operations; and Part VI of these regulations shall apply as respects persons employed in such operations as aforesaid.”

The defendants contend that the scaffold is not a building within the meaning of the regulations. But the regulations apply to specified *operations* being operations on a building, and the erection and dismantling of any necessary scaffold would certainly be part of such operations. I should also have thought that scaffolding was covered by the words “plant used in such operations”. If scaffolds were not within the regulation at all, then regs. 5 to 21 containing a number of directions to ensure that scaffolds are safe are either meaningless or are to be construed in such a way as to exclude scaffolders from their protection. It is true that those who employ scaffolders cannot fully comply with the

regulations. To take reg. 24 itself as an example, the hand-rail must at some time during the operation of dismantling be removed. Thus, on the top lift a man must stand somewhere to remove the hand-rail, because his working platform has to come down after the hand-rail. And in the work of erecting a scaffold other things must be done before the hand-rail can be provided. In such cases the employer is protected by reg. 97, the effect of which, *inter alia*, is to compel compliance with reg. 24 only so far as practicable, so long as the man has an adequate handhold or foothold as he well could have in the examples I have given. But in the present case the men were working on the bottom lift, and on a roof. There was no reason why the hand-rail should come off first except that the men had got into the habit of doing this elsewhere and it gave a little more room to manoeuvre the long uprights when these were being lowered to the ground. It was the practice, said Mr. Pearce, the defendants' supervisor, to remove the hand-rail first, even in the case of a bottom lift resting on a roof top. It was not necessary to do so. It was simply more convenient.

I reject the contention that on the language of reg. 2 the regulations are wholly inapplicable, and once the conclusion is reached that the erection and dismantling of a scaffold are operations within the scope of reg. 2 (as I hold they are in the present case), or, alternatively, that scaffolding is plant used in such operations, then every employer of workmen engaged in erecting or dismantling a scaffold for the purpose of such operations becomes liable to obey reg. 24, subject always to the terms of reg. 97. Regulation 4 imposes this obligation, and cannot, in my view, be read so as to exclude any obligation towards the scaffolders themselves. In breach of reg. 24, however, the defendants failed to provide a hand-rail because they removed it before such removal was necessary. It was unnecessary at the time to remove it either for the access of persons or the movement of materials. An accident then happened of the very type which the regulation was intended, so far as possible, to prevent. The accident must be attributed, in my view of the authorities, to the breach of the regulation unless the defendants can show that something else caused it, and this (subject to what I have to say about contributory negligence) they cannot do. In the circumstances, I think the plaintiff is entitled to recover damages for breach of statutory duty on the part of the defendants.

[HIS LORDSHIP held further that, if he was wrong in his finding that the defendants were guilty of a breach of the statutory regulations, he would have held them guilty of negligence at common law in removing the protective hand-rail when they did and failing to take reasonable care for the safety of the plaintiff and so carry on their operations as not to subject him to unnecessary risk. He held, further, that the defence of *volenti non fit injuria* did not apply, but that the plaintiff had been guilty of contributory negligence, and he awarded him two-thirds of the damages, which he assessed at £2,128 11s.]

Judgment for the plaintiff.

Solicitors: *Berry Tompkins & Co.* (for the plaintiff); *L. Bingham & Co.* (for the defendants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

Re SWORDS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Wallington, J.), May 21, 1952.]

Probate—Grant—Exclusion of words in codicil—Carrying out intention of testatrix.

On Feb. 24, 1948, the testatrix executed a will, which she deposited in a bank. She retained a copy of a draft of the will which differed from the executed will in that cl. 3 of the draft had not been included in the will, with the result that cl. 4 of the draft became cl. 3 of the will and cl. 5 became cl. 4. Later, in the mistaken belief that the copy draft in her possession was a true copy of the will, she executed a codicil revoking cll. 3 and 5 of the will. On a motion for probate with the exclusion from the codicil of the words of revocation,

HELD: since the excision of the words of revocation would carry out the intention of the testatrix the court had jurisdiction to make such a grant.

Re Horrocks ([1939] 1 All E.R. 579), applied.

AS TO CLERICAL ERRORS IN WILLS, see HALSBURY, Hailsham Edn., Vol. 14, p. 210, para. 349; and FOR CASES, see DIGEST, Vol. 23, pp. 137, 138, Nos. 1360-1372.

Case referred to :

(1) *Re Horrocks*, [1939] 1 All E.R. 579 ; [1939] P. 198 ; 108 L.J.P. 86; 160 L.T. 324; Digest Supp.

MOTION for grant of probate of will and codicil with the exclusion of certain words from the codicil.

On Feb. 24, 1948, the testatrix executed a will and deposited it with a bank. She had in her possession a copy of a draft of the will which differed from the executed will in that, on her instructions, cl. 3 of the draft had not been included in the will. The result was that cl. 4 of the draft became cl. 3 of the will and cl. 5 became cl. 4. On Sept. 14, 1948, having looked at the copy draft in her possession and in the mistaken belief that it was a true copy of the will, the testatrix executed a codicil in which she purported, inter alia, to revoke cll. 3 and 5 of her will and to substitute another clause for the latter. It was not disputed that the mistake was that of the testatrix and of no one else. The applicant now prayed for a grant of probate, but with the excision of the words of revocation contained in the codicil.

K. J. T. Elphinstone for the applicant.

Comyn for the residuary legatee.

Victor Russell for the Treasury Solicitor.

WALLINGTON, J.: This case is not exactly similar to any of the earlier cases dealing with this branch of the law. In approaching it the court must be careful to avoid anything which would in any way run counter to the intention of the testatrix. The basic principle appears to be that where there is evidence of a mistake made by the testatrix the court has jurisdiction to consider and decide the facts in order to determine whether the mistake was made by the testatrix and, if not remedied, would frustrate the intention of the testatrix, as such intention appears from all the facts and documents before the court, and the court may order that specified words shall be omitted from, but may not direct that words may be added to, the probate of a testamentary document. [His LORDSHIP stated the facts and continued]: The question is whether the present matter is one with which the court is competent to deal, and, secondly, whether it is one on which a question may arise as to the desirability, though not the competence, of the court to deal with it on motion. I am assisted on that second matter by these considerations. Whatever may be the result of the submission of these two documents, the will and the

codicil, to a court of construction, I have no doubt that the deletion of the words which I am asked to delete would give effect to the testatrix's intentions, and everybody who is interested in the matter is before me—there are no outstanding interests—and there is, therefore, no objection to the application being by motion.

I have considered the authorities cited by counsel for the applicant, and also *Re Horrocks* (1) cited by counsel for the residuary legatee, and I entertain no doubt that I ought to make the order sought on this motion. The principle which is applicable is clearly indicated by SIR WILFRID GREENE, M.R., in *Re Horrocks* (1). The court had formed the clear view that neither the testatrix nor the solicitor who had prepared the will had made any mistake as to the inclusion of the word "or" instead of "and" between the words "charitable" and "benevolent", and in delivering the judgment of the court the learned Master of the Rolls said ([1939] 1 All E.R. 584):

"The jurisdiction of the Court of Probate to grant probate of a will textually different from the actual document signed by the testator is a strictly limited one. If the testator himself approved the words to which he put his signature (and the presumption is that he approved them), those words must stand. If the words were selected by a draftsman to whom the testator confided the task of drafting his will, similarly the words so selected must stand, even if the testator was ignorant of the actual words used. The mistake of the testator, or of the draftsman employed by him, as to the legal effect of the words used is immaterial. The jurisdiction, where it exists, is admittedly confined to the exclusion of words, and does not extend to the insertion of words, since the insertion of words would run counter to the provisions of the Wills Act."

I interpret this as meaning that, if the court added or altered words—indeed, if it did anything but omit words—it would be making a different will from that which the testatrix had intended, or, perhaps, the court would be making a will without proof that the testatrix intended to make it. His Lordship continued:

"These matters are elementary, and there is no dispute about them. The question in the present case is whether or not, assuming that the word 'or' was inserted by a typist's error, as is alleged, the court has jurisdiction to strike it out. It cannot substitute the word 'and'. No claim is made for the excision of the word 'benevolent' as well as for that of the word 'or'. Indeed, no such claim could have been made, since the word 'benevolent' was deliberately chosen by [the solicitor who prepared the will]. Bearing all these considerations in mind, we turn to an examination of the question formulated above."

On those principles His Lordship refused to make the order asked for. I am satisfied that in the present case I should make an order in the terms of the prayer in the Case on Motion.

Order accordingly.

Solicitors: *Crane & Hawkins* (for the applicant); *Clayton, Leach, Sims & Co.* (for the residuary legatee); *Treasury Solicitor*.

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

CLEAVE v. ATTORNEY-GENERAL. HEADLEY, CHANNON
AND BARCLAYS BANK, LTD., INTERVENING.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), May 30, 1952.]

Legitimacy—Costs—Failure of petition—Costs of Attorney-General and interveners out of estate.

A The petitioner sought a declaration of legitimacy in order to establish a claim to the share of an estate of which the interveners were trustees. The petition was dismissed, and on an application by the Attorney-General, as respondent, and the interveners for costs,

HELD: the court had jurisdiction to make an order that the costs of the Attorney-General and of the interveners be paid out of the estate.

B AS TO PROCEEDINGS TO ESTABLISH VALIDITY OF MARRIAGE, see HALSBURY, Hailsham Edn., Vol. 16, pp. 606, 607, paras. 946-950.

Case referred to:

(1) *Fitzwilliam v. Attorney-General*, (1951), *The Times*, Mar. 15.

APPLICATION for costs.

C The petition having been dismissed, the Attorney-General and the interveners applied for their costs to be paid out of the funds of which the interveners were trustees under the will of John Robert Cleave deceased. It was submitted by counsel for the interveners (i) that a similar order had been made by PILCHER, J., in *Fitzwilliam v. Attorney-General* (1), and that, although that order had been made by consent, it had been made on the basis that the court had jurisdiction to make it, and (ii) that the learned judge had all the powers of a judge of the Chancery Division. Counsel said that PILCHER, J., in awarding costs "on the higher scale," had indicated that that was not to be taken as a precedent, but, nevertheless he (counsel) would ask for the same order in this case.

Melford Stevenson, Q.C., and *J. Stirling* for the petitioner.

Colin Duncan for the Attorney-General.

E *Simon, Q.C.*, and *J. L. Arnold* for the interveners.

F KARMINSKI, J.: I order the costs of the interveners of and incidental and preliminary to the petition to be taxed as between solicitor and client on the higher scale, including in such costs all costs properly payable by them in respect of inquiries made, preparations for trial undertaken, and work done in relation to the subject-matter of the petition, notwithstanding that the petition may not have been affected by the result of such inquiries, preparations, or work. I order the costs of the Attorney-General to be taxed as between party and party. I further order that such costs, when taxed, be raised, retained, and paid by the trustees out of the funds subject to the trusts of the will of John Robert Cleave dated Oct. 29, 1920.

G Solicitors: *Neish, Howell & Haldane* (for the petitioner); *Treasury Solicitor*; *Martineau & Reid* (for the interveners).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

HOLLINGSWORTH v. HOLLINGSWORTH.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood, J.), June 25, 1952.]

Divorce—Petition—Petition within three years of marriage—Leave to present—Cross-prayer in answer—Need to obtain leave to present cross-prayer—Matrimonial Causes Act, 1950 (c. 25), s. 2 (1).

The petitioner obtained the leave of a judge to present a petition for divorce notwithstanding the fact that three years had not passed since the date of the marriage. The respondent filed an answer which contained a cross-prayer alleging cruelty by the petitioner and asking for dissolution of the marriage on that ground. On a summons to strike out the cross-prayer,

HELD: section 2 (1) of the Matrimonial Causes Act, 1950, related solely to the petition and imposed a restriction on the initiation of a suit for divorce which did not apply to the cross-prayer in an answer, and, therefore, the respondent did not require leave to insert the cross-prayer in question.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 2 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 393.

SUMMONS adjourned into court for judgment.

The petitioner appealed to the judge in chambers against an order of Mr. Registrar LONG, dated Apr. 17, 1952, whereby he dismissed the petitioner's summons to strike out certain paragraphs of the answer and the prayer of the answer. The appeal related solely to that part of the prayer of the answer in which the respondent cross-pledged for dissolution of the marriage.

J. C. Mortimer for the petitioner.

M. R. Hoare for the respondent.

Cur. adv. vult.

COLLINGWOOD, J., read the following judgment. The parties were married on June 10, 1950. On Jan. 22, 1952, the wife obtained leave of a judge, under s. 2 (1) of the Matrimonial Causes Act, 1950, to present a petition for divorce notwithstanding the fact that three years had not passed since the date of the marriage. The petition is dated Jan. 23, 1952, and asks for dissolution of the marriage on the ground of the respondent's cruelty. By his answer dated Mar. 27, 1952, the respondent denied that he was guilty of cruelty as alleged or at all, and further pleaded condonation in the alternative. By para. 9 of the answer the respondent alleged that since the celebration of the marriage the petitioner had treated him with cruelty and in paras. 10 to 23 set out specific charges of such alleged cruelty. The answer then contained a cross-prayer, (i) that the prayer of the petition might be rejected and (ii) asking for dissolution of the marriage.

On Apr. 4, 1952, the petitioner took out a summons asking that paras. 9 to 23 of the respondent's answer, and paras. (i) and (ii) of the prayer of the answer should be struck out. This summons came before the registrar on Apr. 17, 1952, when he dismissed it, and the present appeal is against part of that dismissal. The appeal does not relate to the registrar's decision as to paras. 9 to 23 of the answer nor as to para. (i) of the prayer thereof, but relates solely to para. (ii) of the prayer, that is, the prayer for dissolution. The ground of the appeal is that the respondent has not obtained leave to ask for the dissolution of the marriage, and it was contended that s. 2 (1) of the Matrimonial Causes Act, 1950, applies to a cross-prayer for dissolution in the same way as to a petition, and that in default of leave the respondent has no right to insert a cross-prayer in the answer.

I am unable to accept this contention. Section 2 (1) of the Matrimonial Causes Act, 1950, provides that:

A "No petition for divorce shall be presented to the court unless at the date of the presentation of the petition three years have passed since the date of the marriage: Provided that a judge of the court may, upon application being made to him in accordance with rules of court, allow a petition to be presented before three years have passed on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent . . ."

B That section relates solely to the petition and is a restriction on the initiation of a suit for divorce during the first three years after marriage. The provision as to relief to a respondent on a petition for divorce is found in s. 6, which provides:

C "If in any proceedings for divorce the respondent opposes the relief sought on the ground of the petitioner's adultery, cruelty or desertion, the court may give to the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking such relief."

D That is to say, the relief which the court can give involves the assumption that he or she has, in fact, presented a petition. It does not subject the answer to the restriction which is applicable to the presentation of a petition. Further, to subject the answer to such restriction would, it seems to me, have one of two possible results. Either, where leave was withheld because the respondent's case was not within the proviso to s. 2 (1), the court would be precluded from doing justice as between the parties to the suit, or leave would be given as a matter of course on the ground of exceptional hardship, and the application therefor would be a mere formality, with the attendant unnecessary expense. Neither of these alternatives has anything to recommend it. In my opinion, the learned registrar was right in the course he took and this appeal must be dismissed.

E *Appeal dismissed.*

Solicitors: *G. E. C. Dougherty* (for the petitioner); *Warmingtons* (for the respondent).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

Re BRADWELL'S WILL TRUSTS. *GOODE v. BOARD OF TRUSTEES FOR METHODIST CHURCH PURPOSES AND OTHERS.*

[CHANCERY DIVISION (Roxburgh, J.), June 19, 1952.]

Accumulations—Accumulation of income of trust fund directed for excessive period A
—General charitable intent—Rights of next of kin—Law of Property Act, 1925
 (c. 20), s. 164 (1).

By his will, dated June 24, 1911, a testator, who died on Feb. 12, 1914, made certain provisions for his wife and issue and directed that in certain events (which happened) his trustees were to hold his residuary trust funds (which represented the proceeds of sale of his real and personal estate not otherwise by his will disposed of) and his premises called Granby Villa on trust "to permit the said Granby Villa to be used according and subject to such rules regulations and provisions for the administration and management thereof as shall from time to time be drawn up by my trustees for the time being as a cottage hospital or as a convalescent home for persons recovering from illness or for such other charitable purposes for sick infirm and needy inhabitants of the said township of Bradwell or children of such inhabitants as my trustees shall think proper and to apply the income of the said residuary trust funds in or towards the maintenance upkeep and support of the said Granby Villa and all additions to and extensions thereof and of the cottage hospital convalescent home or other charitable institution established there with power if my trustees shall think fit to expend any part of the income or capital of my residuary estate in making additions to and extensions of the said Granby Villa for any of the before-mentioned purposes I direct that duly qualified persons who or whose parents were born in the said township of Bradwell shall at all times have preference for benefits under the charities hereinbefore mentioned over other persons And if at the end of any year there shall be any surplus income remaining after providing for such maintenance upkeep and support and any extensions and additions aforesaid then I direct my trustees to appropriate such surplus income towards a fund to be called the 'Bradwell Wesleyan Methodist Endowment Fund' and to invest all moneys so appropriated and to pay and apply the income thereof towards the maintenance and support of a resident Wesleyan Methodist minister at Bradwell aforesaid for so long as such minister shall personally reside in the village of Bradwell." The trustees were unable to obtain vacant possession of Granby Villa, but, even if it could have been obtained, the income from the estate would have been insufficient for the upkeep of the premises either as a cottage hospital or as a convalescent home. Persons interested under the testator's intestacy claimed that it was not possible to carry out the trusts of the testator's will and that there was an intestacy.

HELD: the trusts for the setting up of the Wesleyan Methodist fund transgressed the Law of Property Act, 1925, s. 164 (1) (the effect of which was, by sub-s. (3), made retrospective to July 28, 1800) and could not take effect after the period allowed for accumulation, but, in view of the clear general charitable intention expressed in the will, the heir at law and next of kin were excluded, and a scheme must be directed.

Martin v. Margham (1844) (14 Sim. 230), and *Re Monk* ([1927] 2 Ch. 197), applied.

AS TO SCHEMES TO EFFECTUATE CHARITABLE TRUSTS, see HALSBURY, *Hailsham Edn.*, Vol. 4, pp. 211-234, paras. 302-347; and FOR CASES, see DIGEST, Vol. 8, pp. 336-344, Nos. 1244-1364.

Cases referred to:

- (1) *Wallis v. New Zealand Solicitor-General*, [1903] A.C. 173; 72 L.J.P.C. 37; 88 L.T. 65; 8 Digest 249, 90.
- (2) *Martin v. Margham*, (1844), 14 Sim. 230; 13 L.J.Ch. 392; 3 L.T.O.S. 433; 8 J.P. 532; 60 E.R. 346; 8 Digest 415, 2576.
- (3) *Re Monk*, [1927] 2 Ch. 197; 96 L.J.Ch. 296; 137 L.T. 4; Digest Supp.

A ADJOURNED SUMMONS to determine (inter alia) whether the trust declared in the will of Ebenezer Bradwell, deceased, for the support of a Wesleyan Methodist minister was void as infringing the Accumulations Act, 1800, and the Law of Property Act, 1925, s. 164.

Wilfrid Hunt for the plaintiffs, the trustees of the will.

B *Allan Heyman* for the first defendants, the Board of Trustees for Methodist Church Purposes.

N. S. S. Warren for the Attorney-General.

Monckton for the third, fourth and fifth defendants, next of kin.

C ROXBURGH, J.: This question is one of some difficulty, and, but for the authorities to which I am about to refer, I might well have decided it differently. The trusts of the will were, in the events which have happened, to hold both moieties of the testator's residuary trust funds

D "and the premises known as Granby Villa upon trust to permit the said Granby Villa to be used according and subject to such rules regulations and provisions for the administration and management thereof as shall from time to time be drawn up by my trustees for the time being as a cottage hospital or as a convalescent home for persons recovering from illness or for such other charitable purposes for sick infirm and needy inhabitants of the said township of Bradwell or children of such inhabitants as my trustees shall think proper and to apply the income of the said residuary trust funds in or towards the maintenance upkeep and support of the said Granby Villa and all additions to and extensions thereof "

E as a cottage hospital or convalescent home or other charitable institution established there. Pausing there, it seems to me that the will enables the trustees to apply the funds not only towards the maintenance, upkeep and support of the bricks and mortar, but to the maintenance, upkeep and support of the charitable institution which was to be established there. The will continues

F "... with power if my trustees shall think fit to expend any part of the income or capital of my residuary estate in making additions to and extensions of the said Granby Villa for any of the before-mentioned purposes."

G If at the end of any year there should be any surplus income remaining after providing for such maintenance, upkeep and support and any extensions and additions as aforesaid, then he directed his trustees to appropriate such surplus income towards a trust

H "... to be called the 'Bradwell Wesleyan Methodist Endowment Fund' and to invest all moneys so appropriated and to pay and apply the income thereof towards the maintenance and support of a resident Wesleyan Methodist minister at Bradwell aforesaid for so long as such minister shall personally reside in the village of Bradwell."

There were some prior interests under the will and when those interests came to an end the position was that Granby Villa was occupied by a statutory tenant, and, therefore, obviously the first trust was not immediately practicable. On the other hand, as I have already held, in answer to an earlier question in this summons, though the premises could never in any circumstances be used as a cottage hospital or a convalescent home, there are other charitable purposes specified in the will for which the premises could most conveniently be used as

soon as or shortly after vacant possession had been obtained. Therefore, the question in those circumstances is: Have the next of kin and heir at law—because the testator died at the time when the old legislation was operative—any interest in the income or rents and profits either before the actual establishment of the charitable institution or afterwards?

Prima facie, in my judgment, the answer would be clearly “No”, because it is plain that the testator intended, as from the date when the prior interests determined, to devote Granby Villa and the whole of the residue to charity. To such a situation prima facie the well-known passage in LORD MACNAGHTEN’S speech in *Wallis v. New Zealand Solicitor-General* (1) ([1903] A.C. 185) would apply:

“But it is well settled, as stated in TUDOR’S CHARITABLE TRUSTS, 3rd ed., p. 53, that where there is an immediate gift for charitable purposes, the gift is not rendered invalid by the fact that the particular application directed cannot immediately take effect, or will not of necessity take effect within any definite limit of time, and may never take effect at all.”

In TUDOR, 5th ed., p. 181, it is said: “. . . if the charitable trust takes effect there can be no resulting trust”. In the present case, however, there is a direction to accumulate which violates the Law of Property Act, 1925, s. 164 (1), because twenty-one years had already expired when the prior interests determined. That section provides that such a direction shall be void

“. . . and the income of the property directed to be accumulated shall, so long as the same is directed to be accumulated contrary to this section, go to and be received by the person or persons who would have been entitled thereto if such accumulation had not been directed.”

I must confess that, but for the two authorities to which I am going to refer, I should have thought that that statutory direction might be imperative, and that, as there is no gift in this will for the Wesleyan Methodist Endowment Fund—I use the word broadly—which is independent of the trusts for accumulation, there might be a great deal to be said for the view that there was an imperative direction in the statute which in the circumstances operated to bring about a trust in favour of the next of kin and the heir at law. There seems, however, to be a long-standing authority which is inconsistent with that view and which has received a blessing from the Court of Appeal. I can see no material difference between *Martin v. Margham* (2), and the present case on this point. In *Martin v. Margham* (2) the testator (14 Sim. 230):

“. . . bequeathed the whole of his property to trustees, in trust to convert the same into money and to invest the proceeds in the three per cents., and, after paying certain annuities, to add the dividends to the capital until it should produce an income of £600 a year; when he hoped that every five years’ receipt of that income would produce an increase of income of £150 a year . . .”

and his will was that every such increase of income should be appropriated as he should thereafter specify for the benefit of certain charity schools. It will be noticed that there was no gift to charity there independent of the trust to accumulate. What is given is an interest in the proceeds of the trust for accumulation and nothing else. At that date (1844) the Thellusson Act was in force. It was argued on behalf of the next of kin (*ibid.*, 231):

“that the accumulation directed by the testator was perpetual; that, regard being had to the amount of his property, which did not exceed £8,800, to the price of stock, and to the annuities, which amounted nearly to £200 a year, the accumulation must necessarily continue for a much longer time than the law permitted; and, therefore, the direction to accumulate and all the ulterior gifts must fail, and the next of kin must be declared to be entitled to the property, subject to the payment of the annuities.”

The Vice-Chancellor, SIR LANCELOT SHADWELL, interposed and said (ibid.):

"The whole scheme of the will, so far as the charities are concerned, is founded on a legal impossibility."

None the less he held that the next of kin were excluded altogether. He began his judgment by saying (ibid., 232):

"Although the particular mode in which the testator meant the benefits to be doled out to the objects of his bounty cannot take effect, yet, as there is confessedly a devotion of his personal estate to charitable purposes, my opinion is that his next of kin have no claim at all to his property. I conceive that, if a testator has expressed his intention that his personal estate shall be, in substance, applied for charitable purposes, the particular mode which he may have pointed out for effecting those purposes has nothing to do with the question whether the devotion for charitable purposes shall take place or not; and that, whatever the difficulty may be, the court, if it is compelled to yield to circumstances will carry the charitable intention into effect through the medium of some other scheme."

When the learned Vice-Chancellor said "cannot take effect" he meant, I am sure, "in law cannot take effect" because I must read what he said in conjunction with his previous interposition. The last words I have quoted I take to be a reference to the Thellusson Act in its context. That case seems to me to decide the question of principle which is involved here.

In *Re Monk* (3), *Martin v. Margham* (2) was approved of by the Court of Appeal—indeed, I think it was more than approved and up to a point was followed. *Re Monk* (3) is a good deal less close to the present case than *Martin v. Margham* (2). In *Re Monk* (3) LORD HANWORTH, M.R., treats the point in *Martin v. Margham* (2) as being the same point as that with which he was concerned in *Re Monk* (3), and obviously follows it. LAWRENCE, L.J., said ([1927] 2 Ch. 215):

"In my opinion the destination of the surplus income after the period allowed by law for the accumulation of income depends primarily upon whether or not there is to be found in this will a general intention to devote the residue to charity. It is not disputed that if there be such a general charitable intention any surplus income after the expiration of the period allowed by law will be applicable *cy-près*, and will not pass to the next of kin."

It seems to me that in the present case there can be no doubt that there was a general intention to devote the residue to charity. There does not appear to me to be any less an intention to devote it to charity because in fact it is split up as it were in unequal proportions between two charities. This direction to accumulate is a purely administrative direction, void though it is. It is really an accumulation the benefit of which was ultimately to enure to the Wesleyan Methodist fund. Though the facts in *Re Monk* (3) are not so close to the present case as those in *Martin v. Margham* (2), I think the decision in *Re Monk* (3) would lead to the same conclusion. I do not think I need pursue that matter any further. *Martin v. Margham* (2) is very near to this case and it has stood since 1844 and has been approved by the Court of Appeal and it is my duty to follow it. It is not necessary for me in this court to consider what might happen in a court in which *Martin v. Margham* (2) was not binding. Therefore, as I say, with some doubt until I saw *Martin v. Margham* (2), I must decide that the next of kin and the heir at law are altogether excluded.

Order accordingly.

Solicitors: *Jaques & Co.*, agents for *William Irons & Son*, Sheffield (for all parties other than the Attorney-General); *Treasury Solicitor*.

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

WAIGHT v. WAIGHT AND WALKER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood, J.), June 25, 1952.]

Appeal—Interpleader—Order for costs against petitioner in divorce suit—Execution on motor car—Claim to motor car—Appeal against registrar's order—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 59.

Divorce—Costs—Execution—Interpleader—Appeal from registrar—Jurisdiction of judge in chambers—Pledge of chattel—Need for registration as bill of sale—Bills of Sale Act, 1878 (c. 31), s. 10. A

The co-respondent to a divorce petition was dismissed from the suit with costs, and on Mar. 23, 1952, execution in respect of the order for costs was levied on a motor car. A claim was made to the car by a third party and in interpleader proceedings evidence was given that the car, with the registration book relating to it, had been pledged by the petitioner to the claimant in respect of a debt due to him from the petitioner and as a security for further advances. The registrar allowed the claim. On appeal,

HELD: (i) the appeal against the registrar's order lay to the judge in chambers by virtue of r. 59 of the Matrimonial Causes Rules, 1950. B

(ii) there was no ground on which to reverse the registrar's finding of fact that the transaction between the claimant and the petitioner was genuine, and, that being so, the transaction was a simple pledge and was not required to be registered under the Bills of Sale Acts. C

AS TO APPEAL FROM REGISTRAR, see HALSBURY, Hailsham Edn., Vol. 10, p. 777, para. 1231, and 1952 Supplement.

FOR THE MATRIMONIAL CAUSES RULES, 1950, r. 59, see RAYDEN ON DIVORCE, 5th Edn., Supplement p. A203. D

Case referred to:

- (1) *Bernbaum v. Bernbaum*, [1948] 2 All E.R. 1011; *affd.* C.A., [1949] 1 All E.R. 344; [1949] P. 325; 2nd Digest Supp.

SUMMONS adjourned into court for judgment. E

The judgment creditor, who as co-respondent had been dismissed with costs from a divorce suit, appealed against the order of Mr. Registrar COMPTON MILLER, dated Apr. 8, 1952, whereby a motor car seized in execution under a writ of fi. fa., was held to have been pledged by the petitioner in the suit to the claimant and, therefore, was not liable to execution.

Dobry for the judgment creditor. F

Vick for the claimant.

COLLINGWOOD, J., read the following judgment. This is an appeal from the decision of Mr. Registrar COMPTON MILLER dated Apr. 8, 1952, in interpleader proceedings whereby he allowed the claim of the claimant and held that she had established her claim to a motor car which had been seized in execution under a writ of fi. fa. in this suit. G

Counsel for the judgment creditor took the preliminary objection that the appeal lies to the Divisional Court, and not to the judge in chambers, so that I have no jurisdiction to hear it. I was referred to R.S.C., Ord. 54, r. 22A, which provides:

"(1) There shall be a right of appeal from any finding decision order or judgment arrived at made given directed or entered by any master of the King's Bench Division on the hearing or determination by him of . . . (b) Any interpleader or garnishee matter or issue whether by way of summary decision or adjournment of the interpleader or garnishee summons or order nisi or on an issue directed or otherwise and whether by consent or otherwise."

H

It was contended that this rule was applicable to the Probate, Divorce and Admiralty Division by virtue of the Matrimonial Causes Rules, 1950, r. 80, which provides:

“Subject to the provisions of these rules and of any enactment, the Rules of the Supreme Court shall, notwithstanding the provisions of Ord. 68 thereof, apply with the necessary modifications to the practice and procedure in any cause or matter to which these rules apply.”

Rule 59 of the Matrimonial Causes Rules, 1950, is as follows:

“A party may appeal from an order or decision of a registrar to a judge in chambers by summons to be issued within seven days of the order or decision complained of and returnable on the first day on which summonses are heard after that period has elapsed, but the appeal shall not, unless otherwise ordered, act as a stay of the order or decision complained of.”

It was contended on behalf of the judgment creditor that r. 59 did not apply to the registrar's order in the present case, but was confined to what counsel described as “ordinary summonses”, whereas in interpleader proceedings the registrar was himself exercising the functions of a judge. It was submitted that, there being no special rule dealing with such a case in the Matrimonial Causes Rules, the effect of r. 80 was to apply the provisions of R.S.C., Ord. 54, r. 22A. A similar submission was made to BARNARD, J., in *Bernbaum v. Bernbaum* (1), in respect of an appeal from an order of a registrar on an application under s. 17 of the Married Women's Property Act, 1882. It was rejected by BARNARD, J., who said ([1948] 2 All E.R. 1013):

“... the registrar, although armed with the jurisdiction and powers of a judge under this section, still remains a registrar, and, therefore, I think an appeal from him is governed by the Matrimonial Causes Rules, 1947, r. 59, and lies to a judge in chambers.”

This decision was upheld by the Court of Appeal. It is to be observed that the application of the Rules of the Supreme Court under r. 80 of the Matrimonial Causes Rules is “subject to the provisions of the Matrimonial Causes Rules”. In my opinion, r. 59 of the Matrimonial Causes Rules, 1950, applies in the present case, and I hold that the appeal lies to the judge in chambers and that I have jurisdiction to hear it.

Coming to the facts of the case, the appellant was the co-respondent in the husband's suit, and, after a hearing before Mr. Commissioner GRAZEBROOK, he was, on Oct. 23, 1951, dismissed from the suit with costs. On Mar. 23, 1952, execution in respect of the order for costs was levied on the motor car. It was claimed by the claimant, and after hearing oral evidence on Apr. 7 and 8, 1952, the registrar allowed the claim. Her case was that on Sept. 26, 1950, the car was pledged to her in respect of a debt due from the petitioner and as security for further advances by her to him. It was submitted, in the first place, that no such transaction had in fact taken place, but that, while he had allowed her to register the car in her own name, it was only a colourable transaction, intended to put the car beyond the reach of creditors. In support of this submission, my attention was directed to certain considerations, but they were all present to the mind of the learned registrar and he had the additional advantage of seeing the witnesses and hearing them cross-examined. There is the guidance of the House of Lords in saying that where you get a finding of fact by the judge who hears the witnesses and appreciates the issue which he has to decide, the Court of Appeal and the House of Lords, who do not see the witnesses, should be slow to interfere with the finding of fact of the judge below. The same considerations apply here, and the learned registrar, in the advantageous position which he held, accepted the claimant's evidence absolutely with regard to the transaction entered into in September, 1950, namely, that the car was taken by her as a security for past indebtedness and

anticipated indebtedness which was subsequently incurred. The registrar having found that there was a genuine transaction, I find myself quite unable, on the evidence before me, to reverse his finding. I would add that, having considered all the matters urged on behalf of the judgment creditor, I quite agree with that finding.

It was further contended that, even if it were a genuine transaction, it should have been registered as a bill of sale and was void for want thereof. In my opinion, this transaction was not affected by the Bills of Sale Acts. This was a simple pledge in which immediate possession of the car was transferred to the pledgee and the transaction was complete without any writing, and the fact that the registration book was also handed over does not bring it within the Acts. The whole transaction was one of pledge, and the Acts have no application to a pledge as distinguished from an assurance or licence to take possession. The Acts are aimed at documents, not at transactions. They do not forbid a loan on the security of chattels; they merely provide that, if the transaction be recorded in writing, it shall be void unless made in the prescribed form and registered. I think the registrar was right in the view he took as to this also. In the result, therefore, the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Markham Thorp & Co.* (for the judgment creditor); *Bateman & Co.* (for the claimant).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

READ v. ASTORIA GARAGE (STREATHAM), LTD.

[COURT OF APPEAL (Jenkins and Morris, L.JJ.), June 12, 1952.]

Company—Director—Managing director—Removal—Notice required—Companies Act, 1929 (c. 23), Table "A", art. 68.

A private company, incorporated in 1932, adopted as its articles Table "A" of the Companies Act, 1929, art. 68 of which provides: "The directors may from time to time appoint one or more of their body to the office of managing director . . . for such term and at such remuneration . . . as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the rotation or retirement of directors; but his appointment shall be subject to determination ipso facto if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director . . . be determined." In January, 1932, at the first meeting of the directors of the company it was resolved that the plaintiff "be and he is hereby appointed managing director of the company at a salary of £7 per week as from Monday, Feb. 1, 1932." At a later date the salary was increased. At a meeting of the directors on May 11, 1949, it was resolved that the plaintiff's "employment be terminated," and the secretary was instructed to send him a month's notice, but the company paid him his salary until, on Sept. 28, 1949, an extraordinary general meeting of the company was held at which a resolution approving the action of the directors in removing him from his office was passed. In an action by the plaintiff claiming, inter alia, damages for wrongful dismissal and breach of contract on the ground that he had not been given reasonable notice,

HELD: since the resolution of the directors appointing the plaintiff as managing director contained no special terms beyond the fixing of his remuneration and neither amplified nor was inconsistent with the provisions of art. 68, the plaintiff was appointed managing director on the terms of art. 68, with such tenure of office as was provided for by that article; in the absence of any contract between the parties independent of art. 68 and the

resolution there was no ground for implying a term as to reasonable notice; and, therefore, the plaintiff had no special right to receive any particular notice of the termination of his employment when the company decided to determine it and did so by a resolution in general meeting.

Decision of HARMAN, J. ([1952] 1 All E.R. 922), affirmed.

AS TO MANAGING DIRECTORS, see HALSBURY, Hailsham Edn., Vol. 5, p. 317, note (g); and FOR CASES, see DIGEST, Vol. 9, pp. 528, 529, Nos. 3490-3492, and Digest Supps.

Cases referred to:

- (1) *Beattie v. Beattie, Ltd.*, [1938] 3 All E.R. 214; [1938] Ch. 708; 107 L.J.Ch. 333; 159 L.T. 220; Digest Supp.
- (2) *Nelson v. Nelson (James) & Sons, Ltd.*, [1914] 2 K.B. 770; 83 L.J.K.B. 823; 110 L.T. 888; 9 Digest 529, 3492.
- (3) *Southern Foundries (1926), Ltd. v. Shirlaw*, [1940] 2 All E.R. 445; [1940] A.C. 701; 109 L.J.K.B. 461; 164 L.T. 251; 2nd Digest Supp.
- (4) *James v. Kent (Thomas H.) & Co., Ltd.*, [1950] 2 All E.R. 1099; [1951] 1 K.B. 551.

APPEAL by the plaintiff from an order of HARMAN, J., dated Mar. 14, 1952, and reported [1952] 1 All E.R. 922, in an action for a declaration that the plaintiff was the chairman of the defendant company, Astoria Garage (Streatham), Ltd., and that his appointment as managing director of the company had not been validly terminated, and, alternatively, for damages for wrongful dismissal or breach of contract.

The company was a private company, incorporated in 1932 to carry on a garage business which had theretofore been carried on by the plaintiff. Table "A" of the Companies Act, 1929, with some amendments, was adopted as the articles of the company which provided that the plaintiff was to be chairman. By a resolution of the directors at their first meeting after the company was formed, the plaintiff was appointed managing director at a salary of £7 a week as from Feb. 1, 1932. On Apr. 15, 1938, a resolution was passed at a directors' meeting that the plaintiff be no longer chairman of the company and that the articles be altered accordingly. On June 30, 1938, at an extraordinary general meeting of the company a special resolution was passed altering the articles and appointing one Colonel Day chairman in place of the plaintiff. On Mar. 15, 1949, the directors resolved:

"The directors, after discussion, decided to relieve [the plaintiff] of his position as managing director of the company and to give him two months' leave on full pay."

They then purported to appoint another managing director as from Mar. 16, 1949. The plaintiff did not agree that he could be relieved of his position in that manner, but, as he was in bad health, he agreed to take leave for two months. At a meeting of the directors on May 11, 1949, it was resolved that the plaintiff's employment be terminated, and the secretary was instructed to send him one month's notice determining his employment, but, in fact, the company paid him his salary for four months thereafter. On Sept. 28, 1949, at an extraordinary general meeting of the company a resolution approving the action of the directors in removing the plaintiff was passed on a poll vote by the necessary majority. HARMAN, J., held (i) that the plaintiff had failed to discharge the onus which was on him of showing that the resolution of June 30, 1948, was not validly passed, and, accordingly, as from that date he was not entitled to act as chairman of the company; (ii) that his claim to be managing director failed; and (iii) that it was not a breach of contract on the company's part to dismiss him without notice, the company having, by art. 68 of Table "A", expressly retained that power.

H. J. Brown for the plaintiff.

Bradburn for the defendant company.

JENKINS, L.J., reviewed the evidence on the plaintiff's claim concerning his removal from the office of chairman of the company, held that there was no reason for interfering with the decision of the learned judge on the matter, and continued: There remains the second point, viz., the claim in respect of the alleged wrongful dismissal of the plaintiff from his office of managing director. There is no record anywhere of any terms on which the plaintiff was appointed managing director beyond the minute of resolution No. 4 which was passed at the first meeting of directors and the articles of association of the company. The company adopted as articles Table "A" of the Companies Act, 1929, with certain modifications. Among the articles of Table "A" adopted was art. 68, which provides:

"The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term and at such remuneration (whether by way of salary, or commission, or participation in profits, or partly in one way and partly in another) as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the rotation or retirement of directors; but his appointment shall be subject to determination ipso facto if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined."

It is argued by counsel for the plaintiff that, notwithstanding the provisions of art. 68, there was a contract between the plaintiff and the defendant company in the nature of a contract of general hiring—a plain contract of employment, one of the terms of which was that the plaintiff's employment should not be determined by the defendant company except by reasonable notice. The learned judge came to the conclusion that the terms of the plaintiff's appointment were not such as to entitle him to any notice in the event of the company choosing, under art. 68, to resolve in general meeting that his tenure of office as managing director be determined, and, in my judgment, the learned judge was clearly right. Counsel for the plaintiff put his case in two ways. He called our attention to *Beattie v. Beattie, Ltd.* (1), in which it was held that a provision in the articles of a company providing that all disputes between the company and its members should be submitted to arbitration had no contractual effect, and, therefore, was not a written agreement for submission to arbitration within the Arbitration Act, 1889, s. 4. That case proceeded on the principle that the contractual force given to articles of association by the Companies Act, 1929, s. 20 (1), extends only to the rights and liabilities of members in their capacity as members, and that provisions as to other matters outside that field of rights and liabilities have no contractual effect. Counsel for the plaintiff has asked us to adduce from that decision that, in considering the rights of the plaintiff as managing director, the existence and terms of art. 68 of Table "A" must be ignored.

With all respect to counsel, I find it impossible to follow that argument. The principle stated in the *Beattie* case (1) really comes to no more than this—to take an example germane to this case—that, if there was a provision in the articles of association of a company to the effect that A.B. should be managing director at a salary of £x per annum, and there was no contract with A.B. apart from that provision in the articles, the mere fact that the articles purported thus to appoint A.B. as managing director would not of itself constitute a contract between him and the company on which he could sue. I fail to see how that principle can assist the plaintiff here. The directors purported by a resolution of the board to appoint him managing director. In my view, it is clear beyond argument that the directors must be taken to have been making that appointment with reference to the provisions of art. 68 of Table "A". It was only under that article that they could make the appointment. Accordingly, in my view, the resolution, containing, as it did, no other special terms beyond the fixing of the remuneration

of £7 a week and nothing whatever amplifying or inconsistent with the provisions of art. 68, must be taken to have been an appointment of the plaintiff as managing director on the terms of art. 68, and, accordingly, an appointment on the terms, inter alia, that it should be subject to termination if the company in general meeting resolved that the plaintiff's tenure of office of managing director be determined.

Counsel for the plaintiff said alternatively that, even if the appointment made by the resolution of the board must be taken as, in effect, incorporating the provisions of art. 68, nevertheless the provisions of the article as so incorporated must be held to be subject to an implied term that the plaintiff's employment could not be determined without reasonable notice. For my part, I see no ground for implying any such term. Indeed, to imply one comes back to saying over again that the appointment was not on the terms of art. 68, but on some other and different terms, including a term as to reasonable notice. I see no ground for implying any such term in the absence of any contract outside the article and the resolution, and in the absence, moreover, of any provision about it in the resolution itself.

We were referred to various authorities on this topic which, in one form or another, has been fairly frequently before the courts. In *Nelson v. James Nelson & Sons, Ltd.* (2):

"The articles of association of the defendant company provided that the board of directors might appoint one of their number to be managing director for such period as they deemed fit, and might revoke the appointment. The board appointed the plaintiff to be managing director upon the terms of an agreement which provided that he should hold the office so long as he should remain a director of the company and retain his due qualification and efficiently perform the duties of the office. Subsequently, while the plaintiff was still fulfilling the conditions of the agreement, the board revoked the appointment. The plaintiff sued the company for damages for breach of agreement:—*Held*, that the articles of association did not empower the board to revoke the appointment at will, or otherwise than in accordance with the terms of the agreement under which the plaintiff was appointed managing director, and that the plaintiff was entitled to recover damages against the company."

It is to be observed that that was a case in which there was an actual agreement with the plaintiff that he should be managing director for a period which was inconsistent with the unfettered exercise by the directors of their power under the articles to revoke the appointment of a managing director, and it seems to me that this is a vital distinction from the present case, in which there is no vestige of any contract beyond the minute of the resolution making the appointment and the article by reference to which, in my view, the appointment was made.

The learned judge referred in the course of his judgment ([1952] 1 All E.R. 924) to a passage in the judgment of SWINFEN EADY, L.J., in the *Nelson* case (2), in which the learned lord justice drew a distinction between a case like the one there under consideration, where the directors were seeking to exercise a power to revoke an appointment, and one where the managing director is, as in the present case, made subject to a power conferred on the company to deal with the revocation of his appointment in general meeting. After referring to that kind of article, the learned lord justice continued ([1914] 2 K.B. 779):

"With an article in that form it is manifest that the directors can only appoint a managing director subject to the right of the company in general meeting to resolve at any time that his tenure of the office of managing director is to be determined. That, however, is not the article which we have to construe."

It will be seen that SWINFEN EADY, L.J., there recognised that, where a company in general meeting reserves the right to determine the appointment of a managing

director, the directors cannot, by the appointment of a managing director for some fixed term, override that power in the company. At all events, I think it is plain that, where there is an article in that form, a managing director, whose appointment is determined by the company in general meeting in exercise of that power, cannot claim to have been wrongfully dismissed unless he can show that an agreement has been entered into between himself and the company, the terms of which are inconsistent with the exercise by the company of the power conferred on it by the article to determine a managing director's appointment in general meeting. In the present case, as I have said before, there is no evidence of the existence of any such contract.

We were also referred to *Southern Foundries (1926), Ltd. v. Shirlaw* (3), a decision of the House of Lords. In that case the majority of their Lordships held the managing director concerned to be entitled to damages. That is, however, an entirely different case from the present one, for two reasons. In the first place, there was a contract of service between the company and the managing director dehors the articles of association, and, in the second place, the contract was sought to be determined by a power which was not present in the articles of association of the company as they stood at the date of the contract, but was inserted in the articles by subsequent alteration. In my view, therefore, the case was wholly different from the present case, and it does not seem to me that any assistance can be obtained from it for the present purpose.

Lastly, we were referred to *James v. Thomas H. Kent & Co., Ltd.* (4), on which some reliance was placed by counsel for the plaintiff. It was a rather curious case which was decided in this court. Briefly, the facts were that on June 17, 1946, the plaintiff was appointed by a meeting of the members of the company to be a first director of the company under a three-years contract at a specified salary. The only record of that appointment consisted of the minutes of the meeting of the members of the company. No written agreement was ever entered into. Some time later there was trouble between the plaintiff and the company, and the plaintiff was dismissed. He sued for wrongful dismissal, and he put his claim alternatively as a claim for the balance of salary alleged to be due to him or damages for wrongful dismissal. The conclusions of the court in that case, as stated in the headnote ([1951] 1 K.B. 551), were:

"(1) That the entry in the company's minute book of the plaintiff's appointment was not a sufficient note or memorandum to satisfy the Statute of Frauds; (2) that, the alleged agreement being an oral agreement, no action on it would lie, and therefore the plaintiff could not sue for wrongful dismissal; (3) that, there being an existing contract, no other contract could be implied on which the action could be based; but (4) that, as it appeared that there never was any express contract, a contract could be implied, one of its terms being that it could be terminated by reasonable notice, which, as found by the trial judge, would be three months; and (5) that the plaintiff could recover on this implied contract though it had never been pleaded or relied on in the court below."

Counsel for the plaintiff in the case now before us contended that the fourth of those findings assisted him in the present case. He says that there was here no express written contract, but a contract could be implied, one of its terms being that it could be terminated only by reasonable notice. At first sight that argument seems to assist his case, but on looking into the judgments, one finds that the decision in *James v. Thomas H. Kent & Co., Ltd.* (4) has no bearing on the effect of provisions in the articles of association of a company in regard to the tenure of the office of director or managing director. The contract on which the plaintiff, James, sought to sue was a contract appointing him a director for a period of three years at a specified salary. That being a contract not to be performed within the year, it was held that, if there was a concluded oral agreement to the effect claimed, no action on it would lie, on the ground that the minute

recording it was not a sufficient note or memorandum to satisfy the Statute of Frauds, 1677, s. 4. But it was held further that there was no concluded oral agreement inasmuch as the arrangement recorded in the minute was expressed to be "subject to a three-year contract with the company." In those circumstances, the plaintiff was treated simply as a salaried employee under a service agreement to be implied from the fact that he had been performing services at a salary, although the agreement actually sought to be enforced, if it had been a concluded agreement, would have been unenforceable for want of writing. Accordingly, it does not seem to me that *James v. Thomas H. Kent & Co., Ltd.* (4) assists the plaintiff in the present case.

In my view, on the facts of this case, the position was simply that the plaintiff was appointed to be a managing director in accordance with the Companies Act, 1929, Table "A", art. 68, with such tenure of office as was provided for by that article, and had no special right to receive any particular notice of the termination of his employment in the event of the company deciding to determine it and doing so by a resolution in general meeting. Accordingly, in my view, the learned judge came to a right conclusion on the plaintiff's second claim, and in the result the appeal fails on both points, and should be dismissed.

MORRIS, L.J.: I agree fully with the judgment which my Lord has given.
Appeal dismissed.

Solicitors: *William Foux & Co.* (for the plaintiff); *Mauby, Barrie & Lettis* (for the defendant company).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

ATTORNEY-GENERAL v. COLCHESTER CORPORATION.

[CHANCERY DIVISION (Danckwerts, J.), June 10, 11, 12, 16, 1952.]

Market—Stallage—Amount properly chargeable—No amount fixed by charter or custom—No compulsion to take stalls.

The corporation of a borough owned a market held once a week within the borough, and also the soil on which the market was held. The market was of very ancient origin and was re-granted by royal charter in 1684. For many years, stallage (i.e., payment for the right to erect a stall on a site in the market) had been charged by the corporation, but no charge was provided for in any charter, nor had the amount become fixed by statute, statutory order, or custom. In 1939 the corporation adopted for the first time a method of charging stallage according to the linear foot frontage of the sites, and in 1945 a scale of charges was adopted and published by the corporation under which persons residing within the borough were charged 1s. 3d. per linear foot, persons residing within ten miles of the borough 2s. per linear foot, and others £1 per linear foot. In 1949 the charge for the last class was reduced to 10s. per linear foot. The plaintiff claimed that the charges were unreasonable and excessive and sought an injunction restraining the corporation from charging excessively. It was not alleged that the site of the market was so covered by stalls that sellers of goods could not dispose of their wares without using stalls.

HELD: the stallholders were not compelled to take stalls, but did so for their greater convenience and as the result of voluntary agreement between them and the corporation of whose published charges they were aware, and, in those circumstances, the stallage could not be attacked on the ground that it was excessive.

AS TO STALLAGE, see *HALSBURY*, Hailsham Edn., Vol. 22, pp. 82-85, paras. 143-151; and FOR CASES, see *DIGEST*, Vol. 33, pp. 544-546, Nos. 240-269.

Cases referred to:

- (1) *A.-G. v. Horner* (No.2), [1913] 2 Ch. 140; 82 L.J.Ch. 339; 108 L.T. 609; 77 J.P. 257; 33 Digest 533, 103.
- (2) *Newport Corpn. v. Saunders*, (1832), 3 B. & Ad. 411; 1 L.J.K.B. 147; 110 E.R. 148; 33 Digest 545, 266.
- (3) *Brackenborough v. Spalding Urban District Council*, [1942] 1 All E.R. 34; [1942] A.C. 310; 111 L.J.K.B. 100; 166 L.T. 108; 106 J.P. 81; 2nd Digest Supp. A
- (4) *R. v. Burdett*, (1697), as reported in 1 Ld. Raym. 148; 91 E.R. 996; 33 Digest 545, 267.
- (5) *Northampton Corpn. v. Ward*, (1745), 2 Stra. 1238 (93 E.R. 1155); 1 Wils. 107 (95 E.R. 519); 33 Digest 544, 246.
- (6) *Bennington v. Taylor*, (1700), 2 Lut. 1517; 125 E.R. 835; 33 Digest 545, 256. B
- (7) *Bedford (Duke) v. Emmett*, (1820), 3 B. & Ald. 366; 106 E.R. 696; 33 Digest 542, 195.
- (8) *Lockwood v. Wood*, (1841), 6 Q.B. 31; 10 L.J.Q.B. 100; 5 J.P. 543; 115 E.R. 12; 33 Digest 546, 273.
- (9) *Newcastle (Duke) v. Workshop Urban Council*, [1902] 2 Ch. 145; 71 L.J.Ch. 487; 86 L.T. 405; 33 Digest 540, 176. C
- (10) *Stamford Corpn. v. Pawlett*, (1830), 1 Cr. & J. 57; 148 E.R. 1334; *affd.* Ex. Ch. *sub nom. Pawlett v. Stamford Corpn.*, (1831), 1 Cr. & J. 400; 148 E.R. 1478; 33 Digest 541, 192.
- (11) *Hungerford Market Co. v. City Steamboat Co.*, (1860), 3 E. & E. 365; 30 L.J.Q.B. 25; 3 L.T. 732; 72 J.P. 213; 121 E.R. 479; 44 Digest 99, 787. D

ACTION by the Attorney-General at the relation of one Edgar Hunt (general secretary of the National Market Traders Federation) against the corporation of the borough of Colchester, the owners of a market held in High Street, Colchester. The plaintiff claimed a declaration that the amounts demanded by the corporation by way of stallage—i.e., payment for the occupation of sites by stalls in the market—were unreasonable and excessive, and he sought an injunction restraining the corporation from charging excessively. E

Hunter-Brown for the plaintiff.

Sir Andrew Clark, Q.C., and *J. L. Arnold* for the defendants.

Cur. adv. vult.

June 16. **DANCKWERTS, J.**, read the following judgment. This is an action by Her Majesty's Attorney-General at the relation of a Mr. Edgar Hunt against the corporation of the borough of Colchester. The defendant corporation are the owners of a market held once a week on Saturdays in High Street, Colchester. The plaintiff claims that the amounts now demanded by the corporation by way of stallage—i.e., by way of rent for the occupation of sites in High Street by stalls—are unreasonable, excessive and rank, and asks for appropriate relief, including an injunction against the corporation charging excessive amounts by way of stallage. The corporation, in their defence, allege that not only are they the owners of the market, but also they are the owners of the soil of High Street, Colchester, on which the market is held and the stalls are erected, and they contend that they are entitled to charge such amounts as stallage as they think fit, or, at any rate, such amounts as they think fit in the interests of the inhabitants of the borough. The action, therefore, raises an extremely interesting question on which there is very little definite authority, viz., whether sums required by an owner of a market to be paid for the exclusive occupation of stalls in the market, by virtue of his ownership of the soil on which the market is held, must be limited to reasonable amounts. Two points must be mentioned at once in this connection. First, there is some obscurity on the question whether the corporation owned the soil of High F
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A Street otherwise than merely as highway authority. Their title is put forward as remaining vested in them by virtue of the Local Government Act, 1929, s. 32, but, if their ownership now is simply as highway authority, no argument against them has been based on this point. Secondly, there is no allegation that the site of the market is so covered by stalls that sufficient space is not left for sellers of goods to dispose of their goods in the ancient manner customary in markets without the necessity of stalls. Consequently, the case has proceeded on the footing that the corporation have not compelled the market traders to take stalls, and it must be assumed that traders who take sites for stalls do so voluntarily.

B The ownership of a market by the corporation of Colchester is very ancient. The first charter among the number which are available is a charter of King Richard I of Dec. 6, 1189 (the year to which the beginning of legal memory is commonly ascribed in the law). This charter does not grant the market and simply forbids the impeding of the market of Colchester by any extraneous market, and it is evident, therefore, that the market had an earlier origin. In 1684 the corporation surrendered the market, and by a charter of Charles II on Nov. 8, 1684, the corporation received a re-grant of their previous markets, C fairs and other franchises and privileges, as well as a number of other things. In the charter of 1684 the participation in the market of traders from outside the borough was forbidden, but this exclusion became illegal by virtue of the Municipal Corporations Act, 1835, the relevant provisions of which were repealed and re-enacted by the Municipal Corporations Act, 1882. The corporation claim the right to hold the market on several days in the week, but at present D the market is held and has been held for many years past only on Saturdays, though it appears that it is held also on an extra day near Christmas time. Payments by way of stallage have been received from traders for very many years. The charges, which are for the right to erect a stall on a site in the market as the corporation does not provide any stalls, have been published from time to time, when an alteration has been made in the amounts, and they are collected E by an officer employed by the corporation on the day of the market. The method which has been adopted for some time past in the allocation of the sites is somewhat remarkable. A certain number of the traders attend to select sites personally, but the majority employ one or other of two agents, who have their assistants, to lay down on the portion of High Street permitted to be used for the purpose the poles connected with their stalls, so as to reserve a site. As the clock strikes midnight on the night of Friday and Saturday F thus begins, the traders or their agents rush forward and place their poles on the ground. It might be supposed that this method was liable to lead to breaches of the peace, but, apparently, no serious trouble occurs.

G The maximum number of stalls permitted by the available space is about fifty, but the number depends to some extent on the length of frontage taken by individual stallholders. The depth of the stalls is limited by the corporation in the interests of traffic in the street, four feet six inches being allowed for the tables or similar structures, with a further space for the traders to move round their stalls or to attend to them. But the charges are calculated according to the length of the frontage of the stall facing the foot pavement of the street. From 1819 to 1837 the charge was 2d., irrespective of space, and was levied H only on traders who did not reside in the borough. In 1837 there was a fresh schedule of charges, but the rate remained at 2d., and the charges were levied on non-residents only till 1922. In 1922 the charges were increased to 6d. for residents and 1s. for non-residents selling goods other than fish, and for sellers of fish the charges were double in each case. In 1939 charges according to linear foot frontage of sites were introduced and the charges were 4d. per foot for residents and 6d. per foot for non-residents. By a resolution of Dec. 17, 1945, which came into effect on Jan. 12, 1946, a new scale of charge was adopted

under which persons residing within the borough were to pay 1s. 3d. per linear foot, persons residing within ten miles from the borough 2s. per linear foot, and persons residing outside that area £1 per linear foot. On July 17, 1948, a requirement of a minimum charge of £4 for the last class was imposed. On July 19, 1949, as a result of representations by members of the National Market Traders Federation, the charge was reduced (as from Aug. 6, 1949) to 10s. per linear foot for the traders resident outside the ten-miles area, and this is the charge now in force in the case of such persons. It should be noticed that the sums mentioned are the charges for each market day, so that an outside trader taking eight feet of frontage every market day would pay about £208 each year. The imposition of the higher charges for traders from outside the borough and the ten-miles area was made by the corporation in 1945-46 deliberately with the object of discouraging the taking of stalls by persons from London and other places outside Colchester because the corporation considered that many of the persons who came from such places were not desirable as traders in the market and their presence in considerable numbers reduced the amount of space available for local traders such as those who brought in their produce from market gardens and the like.

The relator is general secretary of the National Market Traders Federation. The action is by Her Majesty's Attorney-General and not in any sense a representative action on behalf of the members of the federation, but it is evident that the interest of the relator is concerned solely with market traders who come from outside the borough of Colchester. Mr. Hunt (the relator) alleged in his evidence that only outside traders who dealt in lucrative lines such as dress materials or dresses could make a reasonable profit after paying the present charges for stalls and that the market was not now a well-balanced market because the rates excluded outside traders who dealt in small manufactured commodities such as reels of cotton and toys (whom he termed "the ordinary market trader"). It appeared, however, that when he visited the market in May, 1951, there were some residents within the borough or the ten-miles area who were selling such articles.

A market is the right to hold a concourse of persons for the purpose of buying and selling, and it confers a monopoly on the owner because the setting up of a competing market can be prevented or stopped by an action for disturbance. There are modern statutory markets, but the ancient markets are generally created by royal charter and are franchises. A fair is merely a greater sort of market, usually held less frequently. Tolls are not incident of common right to a fair or market. Accordingly, there must be found some subsidiary grant of the right to take tolls by express mention. The amount of the tolls need not be specified in the grant, and, in the absence of specific mention of an amount, the right will be to take tolls of a reasonable amount. The right to take tolls may be established by prescription. At common law, tolls for goods sold in a fair or market are due from the buyers and not from the sellers, but the difficulty of collecting such tolls must be considerable. It is not surprising that attempts have been made from time to time to establish a right to take tolls from the sellers. In some cases such attempts have been successful; in other cases they have been unsuccessful: see *A.-G. v. Horner (No. 2)* (1). Payments known as stallages or pickages are of a different nature from the franchise or market tolls which were exacted from buyers, or, if custom supported the practice, from sellers, and which were only payable in respect of goods actually bought and sold in the market. The common law right of the public was to come into the market or fair to buy and sell goods, and the public had no right to erect stalls or to place their goods on the ground in the market except for a purely temporary purpose. If a seller attempted to appropriate a portion of the ground to his exclusive occupation, he committed a trespass and could be sued by the owner of the soil, unless he obtained the owner's consent and agreed

with him on the payment to be made to him for the privilege or convenience of erecting a stall. This payment was called a "stallage", and, if holes were made in the soil for poles or posts, it was called a "pickage". But it was established that, if a trader erected his stall without previous agreement with the owner of the soil, the owner of the soil might waive the tort and sue in assumpsit on an implied contract: see *Newport Corpn. v. Saunders* (2); but in that case the owner of the soil could only recover the amount fixed by custom, if there was such a sum, or a reasonable payment if there was no fixed sum.

It is settled beyond doubt that the owner of the market or of the soil was under no obligation to provide any stalls or pens or other such conveniences. His duty at common law was limited to providing a space in which buyers and sellers could meet and conduct their trading: see *Brackenborough v. Spalding Urban District Council* (3), in which the House of Lords exonerated a market authority from liability to the widow of a man killed by a steer that escaped from a pen on the ground that the provision of pens was not a duty of the owner of a market. Conversely, the owner of a market owes a duty not to prevent the public exercising their common law rights of resorting freely to the market, and so is liable if he so covers the site of the market with stalls that insufficient room is left for the market to be enjoyed by those who do not wish to take stalls: *R. v. Burdett* (4). In essence, therefore, the right to stallage payments is different from the right to take ordinary tolls from buyers of goods, being not dependent on any royal grant (or prescription amounting to the same) but created *ratione tenuræ* or by virtue of ownership of the soil (including the possession or occupation of a lessee). Stallages may, however, be based on custom, because there may be a custom in the inhabitants of a place, or a particular class of such inhabitants, to erect and occupy stalls in a market or fair, paying a reasonable sum as stallage, or some sum fixed by custom, as the case may be.

The matter is also complicated by the Statute of Westminster the First (3 Edw. I, c. 31), 1275. According to LORD COKE (2 Co. Inst. 219):

"In the troublesome and irregular raigne of Henry III outrageous tols were taken and usurped in cities, boroughs, towns, where faires and markets were kept, to the great oppression of the king's subjects, by reason whereof very many did refrain from the comming to faires and markets, to the hindrance of the common-wealth; for it hath ever been the policy and wisdom of this realm that faires and markets, and specially the markets, be well furnished and frequented."

The statute provides as follows:

"Touching them that take outrageous toll, contrary to the common custom of the realm, in market towns; it is provided, that if any do so in the king's town, which is let in fee farm, the king shall seize into his own hand the franchise of the market; and if it be another's town, and the same be done by the lord of the town, the king shall do in like manner, and if it be done by a bailiff, or any mean officer, without the commandment of his lord, he shall restore to the plaintiff as much more for the outrageous taking, as he had of him, if he had carried away his toll, and shall have forty days imprisonment . . ."

The provisions of this statute are relied on by the relator, and it is said that "toll" in the statute includes every kind of toll, including stallage. As has been indicated, the title to receive stallage is essentially different from that to franchise tolls, and it has been said that the term "toll" strictly does not include "stallage": *Northampton Corpn. v. Ward* (5). On the other hand, it may be interpreted to include stallage in Acts of Parliament, grants and pleadings: *Bennington v. Taylor* (6), *Duke of Bedford v. Emmett* (7) (3 B. & Ald.

371), *Lockwood v. Wood* (8). LORD COKE continues (*ibid.*), in the passage to which I have referred, as follows:

“Tolnet.] Toll. For the generality of the word, see Jehu Web’s Case, Lib. 8. Magna Charta, and W.2. whereof, and of the severall kinds thereof, more shall be said in the exposition of the statute of W.2. for that here it is restrained, as hereafter appeareth. Outragious.] That is, either where a reasonable toll is due and excessive toll is taken, or where no toll at all is due, and yet toll is unjustly usurped, for it is an outrage to doe such a common injury and wrong; sometime it is called superfluum, vel indebitum, vel injustum. No toll is due either on the part of the lord, when he hath a faire or market, and not any toll; or on the part of the market-man, who ought to be discharged of toll, or of the thing sold that is not tollable. En la ville merchandie.] That is, in a city, borough, or town of merchandize, where faires and open markets are kept, for merchandizing, and buying and selling. This is intended of toll to the faire or market, whereof we will only speak in this place. Toll to the faire or market is a reasonable summe of money due to the owner of the faire or market, upon sale of things tollable within the faire or market, or for stallage, picage, or the like.”

That is the end of the quotation. I have quoted the passage from LORD COKE in full because on behalf of the relator it is contended (i) that LORD COKE said that the Statute of Westminster the First applies to tolls of every kind (including stallage) and (ii) that he said that stallage must be reasonable in amount equally with franchise tolls, that is, tolls demandable on the purchase of goods. On behalf of the defendant corporation it was contended that the words used by LORD COKE were limited to tolls which were payable by grant, custom or implied contract, and had no reference to where an express contract was made between the owner of the soil and the stallholder.

In PEASE & CHITTY’S *THE LAW RELATING TO MARKETS AND FAIRS* (published in 1899), it is said at p. 64:

“The amount due for stallage may be a matter of express or implied agreement; but must in all cases be reasonable; and a market-owner who extorts an unreasonable stallage by compelling people to take stalls and running up their price may be indictable for so doing.”

The authority quoted for the statement that the amount of stallage must be reasonable is the Statute of Westminster the First. For the last statement in the passage quoted, *R. v. Burdett* (4), and RUSSELL ON CRIME, p. 425 to p. 428, are cited. This seems to be a mis-statement of the effect of *R. v. Burdett* (4), in which the question of a reasonable amount does not appear to have been discussed. Another passage in PEASE & CHITTY’S book, at p. 67, was relied on on behalf of the relator. The authors are enumerating the facts usually to be proved in an action for stallage or pickage, and these include an allegation that

“... the sum claimed is a reasonable sum, and if it be claimed by special agreement, or by custom or prescription, that the agreement was made, or the custom or prescription exists.”

But the opening words of the section, on p. 66, refer to toll or stallage being recoverable by action without proof of a special contract.

In *Lockwood v. Wood* (8), in which the question to be decided was whether a modern grant created an exemption from stallage, LORD DENMAN, C.J., quoted with approval the passage from LORD COKE on the subject of outrageous tolls and said that it had received judicial confirmation in *Bennington v. Taylor* (6) and decided that exemption from toll in the document in question would include exemption from stallage. In *Bennington v. Taylor* (6), it is important to note, the amount of the stallage seems to have been fixed by immemorial custom, and the question was whether distress could be made for it. In *Duke of Newcastle v. Worksop Urban Council* (9), the question was whether increased tolls charged

on fair days to persons who were not regular attendants on market days could be claimed by the lord of the manor who had granted a lease of the markets but had reserved the fairs. It was contended that these increased tolls must be fair tolls because they were an addition to the market tolls, but it was held that these increased payments (which were charged for stalls) were stallage payable to the lessees as owners of the soil. FARWELL, J., says ([1902] 2 Ch. 161):

A "So long as the lord does not exceed the maximum toll that he is entitled to demand—(that is, a reasonable amount when the charter specifies no sum: *Stamford Corpn. v. Pawlett* (10), and it is not suggested that 3d. is unreasonable)—he may remit all or a part of the toll to whomsoever he pleases. The reasoning in the case of *Hungerford Market Co. v. City Steamboat Co.* (11) applies, in my opinion, to the present case."

B It is plain that in this passage FARWELL, J., was talking about stallage. *Hungerford Market Co. v. City Steamboat Co.* (11) was a case of statutory charges for the use of a wharf and a bridge and a statutory maximum was imposed, and less than the maximum was charged in certain cases. *Stamford Corpn. v. Pawlett* (10) was not a case about stallage; it was the case of a grant of a market, with an express grant of toll, which, of course, implies a reasonable toll (as has been mentioned already).

C The statements which I have now reviewed are certainly capable of being construed as imposing a reasonable limit on every kind of toll connected with a market, including stallages recoverable *ratione tenurae* as the result of express contract. There are, however, statements contained in other legal works and cases which seem to be inconsistent with such a limitation in the case of stallages agreed with an owner of the soil of a market who does not attempt to force the trader to take a stall. In *Northampton Corpn. v. Ward* (5), which was an action of trespass against a butcher who claimed the right to erect a stall in a market owned by a plaintiff who was seised in fee of the close, the court said that a person resorting to the market had no right at common law to erect a stall and must acquire the right by a compensation to the owner of the soil called stallage. And the court quoted with approval a passage in SPELMAN'S GLOSSARY which says that the stallagiator (i.e., the stallholder) must make an agreement for compensation with the owner of the soil. *R. v. Burdett* (4) was the case of an information against a farmer for extortion because he had taken sums of money from "the market people" for the use of the little stalls in the market.

F The common law offence of extortion is, apparently (as distinguishable from demanding money by menaces), the taking by a public officer of money from an improper motive and under colour of office when the money is not due at the time it is taken. It was contended that the farmer's conduct was extortion, because the people had not free liberty to sell their wares in the market according to law. It was said by the court that, if the defendant erects several stalls and does not leave sufficient room for the market people to stand and sell their wares, so that for want of room they are forced to hire the stalls of the defendant, the taking of money for the use of the stalls in such case is extortion, but, if the people have room enough clear to themselves to come and sell their wares, but for their further convenience they voluntarily hire these stalls of the defendant, without any necessity compelling them, then there is no extortion, though the defendant takes a fine and rent for the use of them, and it is said that, if they will enjoy the convenience of the stalls, they must comply with the defendant's terms. The report continues (1 Ld. Raym. 149):

"Therefore this case rather resembles the case of new mills, where the miller is not restrained to any certain toll; but the persons who will have their corn ground there, must comply with the miller's demands; and whatsoever he takes, it is not extortion, because it is the voluntary agreement of the parties."

This seems quite inconsistent with a limit on such charges by reference to what is reasonable. In *GUNNING ON TOLLS*, published in 1833, the same view of the law relating to stallage seems to be taken. On p. 89 it is said:

"As to the amount to which the owner of a fair or market is entitled for stallage and pckage, there are very few authorities. In one of the old books [2 Shower, 266], it is said that stallage must be certain: but in the *Northampton* case (5) the court said that if no particular sum is fixed by the custom of the market to be paid for the privilege of having a stall there, the person placing one must agree with the owner for the sum to be paid; and if any sum be fixed by the custom of the market, that alone can be demanded and must be paid."

I was referred to a number of other interesting authorities, but those which I have mentioned seem to me to be the only cases which really bear on the point which I have to decide.

I have to choose between these statements of the law, unless there is some explanation which will make them reconcilable. Such an explanation has been put forward by counsel on behalf of the defendant corporation. He contended that a distinction should be made between the case where the owner of the soil of a market obtains payments from those who wish for their own convenience to obtain exclusive occupation of the site of a stall and the case where the payment to be made for a stall is not ascertained by a voluntary bargain between the parties, but either is settled by custom or an Act of Parliament, or, without some express terms being agreed, is to be implied from the stallholder taking the site of the stall by merely occupying it so that an action in assumpsit would be on an implied contract. It is clear that there is plenty of room for confusion in these matters. For apart from the cases where the erection of stalls and payments to the owner of the soil over a long period have given rise to the inference of a custom, there are so many cases where a maximum or limit on the charges to be made has been imposed by some special Act of Parliament or is regulated by some general Act of Parliament or orders made under an Act of that kind. The existence of a requirement of a reasonable limit in the case of franchise or market tolls and the passing of the Statute of Westminster the First might well cause misleading inferences to be drawn. It is more easily understandable that a condition of reasonableness should be applied to cases where by virtue of the existence of a monopoly the trader has no choice but to pay franchise or market tolls, or tolls can be demanded without question by virtue of some custom, where again the trader could not avoid the payment. In such cases it may well have been desirable to provide more effective remedies "to prevent extortion" (or the extraction of outrageous tolls) by the Statute of Westminster the First. But where the trader is under no obligation to incur the charges except for his greater convenience, as in the case of the voluntary taking of a stall by bargain with the owner of the soil, the same considerations do not apply. The case resembles, as was said in *R. v. Burdett* (4), that of

"new mills, where the miller is not restrained to any certain toll; but the persons who will have their corn ground there, must comply with the miller's demands . . ."

This explanation, therefore, of the apparent conflict of the authorities appeals to me and appears to me to have the merit of logic. The statements of LORD COKE are not wholly free from inconsistency, as it seems to me, if they are read in the extreme sense attributed to them by the contentions on behalf of the relator, and I think that they have been taken to be more general than they were intended to be, so as to be misleading. In the same way the general statement in *PEASE & CHITTY*'s book that the amount due for stallage "must in all cases be reasonable", in my view, requires qualification, and may be due to a misapplication

of the statements by LORD COKE. The obiter dictum of FARWELL, J., in *Duke of Newcastle v. Workson Urban Council* (9) is easily understandable as a general statement not wholly accurate in all conditions, as the cases to which he refers for support are not those of stallage demanded *ratione tenuræ*.

My conclusion is, therefore, that in cases where an agreement for stallage is reached between the owner of the soil and the stallholder at rates previously agreed, without unlawful compulsion by the exclusion of any site for common law market activities, it is a voluntary bargain which cannot be attacked by reason of the amount of the stallage. It is plain that in the present case the necessary conditions must be accepted as being operative. The charges payable to the corporation were announced beforehand and were well known to those who elected to occupy stalls, and there is no evidence that sufficient space was not available to any trader who wished to exercise his common law rights for the purpose of selling his goods in the market.

This result makes it unnecessary for me to decide the question whether the charges required by the corporation to be paid were, in fact, unreasonable. I thought it right that the parties should put in the evidence that they had available on this question in case this action should go further and it might be necessary for the court to go into the matter. It was accepted by counsel for the relator that the onus was on the relator to prove that the charges were unreasonable, though it was contended that the onus could be shifted to the corporation by evidence in regard to the profits made by the corporation from the letting of the stalls. An agreed document was put in showing the charges made by a number of market owners in other well-known towns, in some of which a maximum was limited under some statute or order, and in which in quite a number of instances the market owner provided the stalls or stalls and cover for them. These comparisons indicated that, if the charge of 10s. per linear foot frontage made by the defendant corporation in the case of traders from outside the borough and ten-miles limit be taken into consideration, the charges made by the defendant corporation in the case of traders from outside the borough were very much greater than those made by the market owners referred to in the document. Further, the evidence showed that, while the total annual expenditure of the corporation in connection with the market was estimated to be between £150 and £200, very much larger sums were taken by the collection of the stallage charges from the stallholders. For instance, in the year 1950-51 the corporation received £3,574 13s. 9d., of which £2,419 10s. came from traders outside the borough and the ten-miles limit, and £1,155 3s. 9d. came from those within those limits. It is, no doubt, true that large profits are made which inure for the benefit of inhabitants of the borough who are ratepayers. As I have already mentioned, the relator, Mr. Edgar Hunt, suggested in his evidence that the 10s. per foot charge made it impossible for outside traders, other than those operating in lines in which a high profit is obtained, to make a profit, but no trader was called to substantiate Mr. Hunt's allegations (which appear not to be first-hand) and to prove that by reason of the charges the trader was unable to make a reasonable profit. Nor was there any evidence whatever from any member of the public frequenting the market as a buyer to substantiate Mr. Hunt's allegations that the discouragement of what he called "the ordinary market trader" from outside the borough rendered the market "ill balanced", which, I suppose, means not equipped to meet the demands of the public. There is really no evidence whatever that the market does not provide the services or facilities which a local market is intended to provide for the local population. It may be inferred, perhaps, that the real grievance of the relator is that the class of trader which supports his federation is not able to make in Colchester the profits to which such persons had become accustomed in an earlier period. I have, indeed, felt some difficulty in appreciating the considerations which really ought to decide whether stallage charges

are reasonable. Both parties cited in aid the observations of HAMILTON, L.J., in *A.-G. v. Horner* (No. 2) (1), in which he says ([1913] 2 Ch. 198):

"The justification for the grant of a monopoly of market is that the existence of the market is for the benefit of the public. If the market keeper is not to get his outlay back and something more, he will give up the market, and where will the public be then?"

HAMILTON, L.J., was, of course, in that case referring to the franchise or market tolls. No doubt, the corporation in the present case recovers the amount of the expenses required to maintain the market several times over, but no one has come forward to complain from the general body of the public who frequent the market to purchase goods. It is not suggested that the charges made to local traders are unreasonable. What sort of duty does the corporation owe to traders who come from London to make profits at the expense of the local inhabitants of Colchester? All I will say is that I am not satisfied that in the circumstances of the case the charges made by the corporation are unreasonable.

Judgment for the defendants.

Solicitors: *Beveridge & Co.*, agents for *Neal, Scorah, Siddons & Co.*, Sheffield (for the plaintiff); *Sharpe, Pritchard & Co.*, agents for *N. Catchpole*, town clerk, Colchester (for the defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

GARDNER v. AKEROYD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Slade and Parker, JJ.), June 17, 27, 1952.]

Emergency Legislation—Act preparatory to the commission of offence under Defence Regulations—Liability of master for act of servant—Sale of meat at excessive price—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927), reg. 55AB, reg. 90 (1).

The respondent was a butcher in whose shop were found parcels of meat bearing tickets showing the names of the purchasers and prices exceeding the maximum prices prescribed by the Meat (Prices) (Great Britain) (No. 2) Order, 1951, art. 2 and schedule, made under reg. 55AB of the Defence (General) Regulations, 1939. The parcels had been prepared and the tickets attached by an assistant during the respondent's absence from the shop and without his knowledge. On a charge against the respondent of doing an act preparatory to the commission of an offence against reg. 55AB, contrary to reg. 90 (1) of the Defence Regulations,

HELD: although, if the parcels had been delivered to the customers named, the respondent would have been vicariously liable for breach of the absolute prohibition against sale in excess of the maximum price contained in the order of 1951, the wording of reg. 90 (1) did not rebut the presumption that no offence is committed under an enactment unless mens rea is present, and so the regulation did not import such a prohibition against doing an act preparatory to such sale, and, in the absence of mens rea, the respondent was not liable for the unlawful act of his assistant.

Dicta of ATKIN, J., in *Mousell Brothers v. London & North Western Ry.* ([1917] 2 K.B. 845) and of LORD GODDARD, C.J., in *Harding v. Price* ([1948] 1 All E.R. 284), applied.

FOR THE DEFENCE (GENERAL) REGULATIONS, 1939, reg. 55AB, and reg. 90 (1), see BUTTERWORTHS COMMERCIAL CONTROLS, Vol. 1, pp. 99 and 135.

Cases referred to:

(1) *Mousell Brothers v. London & North Western Ry.*, [1917] 2 K.B. 836; 87 L.J.K.B. 82; 118 L.T. 25; 81 J.P. 305; 14 Digest 44, 133.

- (2) *Harding v. Price*, [1948] 1 All E.R. 283; [1948] 1 K.B. 695; [1948] L.J.R. 1624; 112 J.P. 189; 2nd Digest Supp.
- (3) *Brend v. Wood*, (1946), 175 L.T. 306; 110 J.P. 317; 2nd Digest Supp.
- (4) *Reynolds v. Austin (G. H.) & Sons, Ltd.*, [1951] 1 All E.R. 606; [1951] 2 K.B. 135; 115 J.P. 192.
- (5) *Bank of New South Wales v. Piper*, [1897] A.C. 383; 66 L.J.P.C. 73; 76 L.T. 572; 61 J.P. 660; 14 Digest 33, 38.
- (6) *Johnson v. Youden*, [1950] 1 All E.R. 300; [1950] 1 K.B. 544; 114 J.P. 136; 2nd Digest Supp.
- (7) *R. v. Eagleton*, (1855), Dears. C.C. 376, 515; 24 L.J.M.C. 158; 26 L.T.O.S. 7; 19 J.P. 546; 169 E.R. 766, 826; 14 Digest 102, 750.
- (8) *R. v. Robinson*, [1915] 2 K.B. 342; 84 L.J.K.B. 1149; 113 L.T. 379; 79 J.P. 303; 14 Digest 104, 756.
- (9) *R. v. Woods*, (1930), 143 L.T. 311; Digest Supp.
- (10) *R. v. Bloxham*, (1943), 29 Cr. App. Rep. 37; 2nd Digest Supp.

CASE STATED by Morecambe and Heysham justices.

On Jan. 22, 1952, at a court of summary jurisdiction sitting at Morecambe and Heysham, informations were preferred by the appellant, an enforcement inspector of the Ministry of Food, against the respondent, Akeroyd, and one John Mugliston that they did acts preparatory to the commission of an offence against reg. 55AB of the Defence (General) Regulations, 1939, in that they entered on tickets, for the purpose of selling meat by retail, prices exceeding the maximum applicable under art. 2 of the Meat (Prices) (Great Britain) (No. 2) Order, 1951, contrary to the said order and to reg. 55AB and reg. 90 (1) of the Defence Regulations. For the appellant it was contended that the offences admittedly committed by Mugliston were committed in the performance of duties delegated by the respondent to him, and that the respondent was liable for the offences committed by his servant, whether he was himself aware of them or not. For the respondent it was contended that he took no part in the cutting, weighing, pricing, or ticketing of the meat; that he gave no directions as to those operations; that he was absent from the shop at all material times; and that he would have priced several of the orders differently. The justices, being of the opinion that the respondent did not do any act preparatory to the commission of the offences alleged, dismissed the informations.

J. P. Ashworth for the appellant.

R. J. S. Harvey for the respondent.

Cur. adv. vult.

June 27. The following judgments were read.

PARKER, J.: This is an appeal by way of Case Stated from a decision of justices for the borough of Morecambe and Heysham dismissing thirty-three informations preferred by the appellant, an enforcement inspector of the Ministry of Food, against the respondent, alleging that he did acts preparatory to the commission of an offence against reg. 55AB of the Defence (General) Regulations, 1939. This case raises again the question how far and in what circumstances a master is vicariously liable for an offence committed by his servant.

The respondent carried on business at a shop in Morecambe as a butcher, and employed one Mugliston as an assistant at the shop. On Nov. 1, 1951, two inspectors of the Ministry of Food visited the shop and found some forty-one parcels of meat made up ready for delivery to customers and bearing price and name tickets. A check of the parcels revealed that in the case of thirty-three of the parcels the ticket disclosed overcharges, the total overcharge amounting to £1 5s. 6½d. in respect of meat the maximum price of which was £9 4s. 2½d. under the Meat (Prices) (Great Britain) (No. 2) Order, 1951 (S.I., 1951, No. 1313) made under reg. 55AB of the regulations. The parcels and tickets had been prepared by Mugliston in the absence from the shop of the respondent. The

respondent had left it to Mugliston to cut up and weigh the meat, and price the parcels. Article 2 of the aforementioned order provided that:

"No person shall sell or buy by retail any meat at a price exceeding the maximum price applicable in accordance with the schedule to this order."

It is clear, therefore, that, if the parcels had been delivered, offences would have been committed. Regulation 90 (1) of the Defence (General) Regulations, 1939, makes it an offence to do any act preparatory to the commission of an offence against any of the regulations, and, accordingly, the respondent and Mugliston were charged with that offence in respect of each of the parcels. Mugliston was convicted and does not appeal, but the informations against the respondent were dismissed, the justices evidently being of opinion that he was not vicariously liable for the offence committed by his servant.

Whether or not a master is so liable depends on the true application to the facts of the case of the principle laid down by ATKIN, J., in the passage so often quoted in *Mousell Brothers v. London & North Western Ry.* (1), where he said ([1917] 2 K.B. 845):

"I think that the authorities cited by my Lord make it plain that while prima facie a principal is not to be made criminally responsible for the acts of his servants, yet the legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed."

It is, I think, clear that, if the parcels had been delivered, the respondent would have committed the full offence of selling meat at a price exceeding the maximum price contrary to art. 2 of the order above referred to. The prohibition in that article is absolute, and it would have been no answer for the respondent to show that this had been done in his absence and without his knowledge and intent. It is contended on behalf of the appellant that the words in reg. 90 (1) equally import an absolute prohibition against doing an act preparatory to such a sale.

In considering the validity of this contention, it is important to consider the general rule referred to by LORD GODDARD, C.J., in *Harding v. Price* (2), where he said ([1948] 1 All E.R. 284):

"The general rule applicable to criminal cases is *actus non facit reum nisi mens sit rea*, and I venture to repeat what I said in *Brend v. Wood* (3) (175 L.T. 307): 'It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind'. In these days when offences are multiplied by various regulations and orders to an extent which makes it difficult for the most law-abiding subjects in some way or at some time to avoid offending against the law, it is more important than ever to adhere to this principle."

Prima facie, therefore, the respondent commits no offence unless *mens rea* is present. Do the words constituting the offence expressly or impliedly rebut that presumption? They certainly do not do so expressly, nor, in my view, do they do so impliedly. Regulation 90 (1), as amended by Order in Council dated Aug. 7, 1940 (S.R. & O., 1940, No. 1441), provides as follows:

"Without prejudice to the operation of s. 5 of the Summary Jurisdiction Act, 1848, and s. 8 of the Accessories and Abettors Act, 1861, any person

who attempts to commit, conspires with any other person to commit, or does any act preparatory to the commission of, an offence against any of these regulations, shall be guilty of an offence against that regulation punishable in like manner as the said offence."

A So far as the two sections there referred to are concerned, knowledge and intent are necessary ingredients to constitute an offence. So far as an attempt is concerned, there again knowledge and intent are clearly necessary, while a conspiracy consists of an agreement to do an act which constitutes the substantive offence. In their context, therefore, it would be odd if the succeeding words imposed an absolute prohibition. Moreover, an act done immediately and not merely remotely connected with the commission of an offence constitutes an attempt, and, accordingly, the act which constitutes merely an act preparatory to the commission of an offence will be an act further back in the sequence of acts leading up to the substantive offence. If mens rea is necessary in the case of an attempt, then it would, one would have thought, have been all the more necessary in the case of the doing of an act preparatory to the commission of an offence. Further, whether or not such an act is an act preparatory to the commission of an offence must, it seems to us, depend on intent. The purchase of a box of matches
B might or might not be an act preparatory to the commission of an offence of arson according to the circumstances and the intent.
C

The matter can also be approached by considering whether from the point of view of the protection of the public it is necessary to import an absolute prohibition. As was pointed out by DEVLIN, J. ([1951] 1 All E.R. 611) in *Reynolds v. G. H. Austin & Sons, Ltd.* (4):

D "It may seem on the face of it hard that a man should be fined, and, indeed, made subject to imprisonment, for an offence which he did not know he was committing, but there is no doubt that the legislature has for certain purposes found that hard measure to be necessary in the public interest. The moral justification behind such laws is admirably expressed in the following words of DEAN ROSCOE POUND in his book, *THE SPIRIT OF THE COMMON LAW*: see L.Q.R., vol. 64, p. 176: 'Such statutes are not meant to punish the vicious will but to put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morals'. Thus, a man may be made responsible for the acts of his servants or even for defects in his business arrangements, because it can fairly be said that by such sanctions citizens are induced to keep themselves and their
E organisations up to the mark. Although in one sense the citizen is being punished for the sins of others, it can be said that, if he had been more alert to see that the law was observed the sin might not have been committed. If a man is punished because of an act done by another, whom he cannot reasonably be expected to influence or control, the law is engaged, not in
F punishing thoughtlessness or inefficiency and thereby promoting the welfare of the community, but in pouncing on the most convenient victim."

G By treating art. 2 of the order as creating an absolute prohibition, butchers, to adopt the words of DEVLIN, J., are "induced to keep themselves and their organisations up to the mark", and I see no necessity from the point of view of the protection of the public in going further and reading the doing of an act
H preparatory to the commission of an offence against art. 2 as importing an absolute obligation. Indeed to do so would lead to the absurd result that, if the respondent had arrived back in the shop before the parcels had been dispatched and had prevented their dispatch, he would nevertheless have been guilty of the offence charged. In this connection I would quote further from the judgment of DEVLIN, J. (*ibid.*, 612) in *Reynold's* case (4):

"I think it a safe general principle to follow (I state it negatively, since that is sufficient for the purposes of this case), that where the punishment

of an individual will not promote the observance of the law either by that individual or by others whose conduct he may reasonably be expected to influence, then, in the absence of clear and express words, such punishment is not intended."

Finally, it may be observed that what is made an offence is the doing of an act preparatory to the commission of any offence against the regulations, which latter offence may or may not be contrary to an absolute prohibition. The words in reg. 90 (1) cannot, as it seems to me, amount to an absolute prohibition in relation to one and not in relation to another substantive offence. To read the words as amounting to an absolute prohibition would lead to the absurd result that a master might be vicariously liable for an act done preparatory to the commission of an offence whereas he might not be so liable for the substantive offence itself.

In my opinion, the justices came to a right conclusion and this appeal should be dismissed.

LORD GODDARD, C.J.: I entirely agree with the judgment of PARKER, J., but, as this case raises, in my opinion, a question of cardinal importance regarding the doctrine of vicarious liability in criminal law, I will briefly express my own opinion. A master who is not particeps in the offence can only be liable criminally for the acts of his servant if the statute which creates the offence does so in terms which impose an absolute prohibition. Where the prohibition is absolute no question of knowledge or intent arises, the state of mind of the perpetrator is immaterial: *Bank of New South Wales v. Piper* (5). But this does not mean that whenever an Act forbids something a master is liable if his servant does the act forbidden. It has to be decided as a matter of construction whether the Act imposes a liability on the master for the act of his servant, and the relevant considerations are to be found in *Mousell's* case (1) cited by PARKER, J. If, for example, an Act forbids a sale of adulterated food, or of goods with a false trade description or at a price in excess of a statutory maximum, the master will be liable notwithstanding that the sale was effected by his servant and without his knowledge, provided only that the sale was in the course of the servant's employment. The seller was the employer, and the offence is complete as soon as the goods are sold. A person can be guilty of an offence if he does an act forbidden, if he aids and abets the commission of the offence, if he conspires with another to commit it, if he attempts to commit it, and, in the case of an offence against the regulations, if he does an act preparatory to the commission of an offence. There is no doubt that the class of offence with which we are now dealing is one for which a master can be held vicariously liable. If a sale had taken place there is no doubt that the respondent could have been and would have to be convicted. To convict a person of aiding and abetting any offence, whether against a statute, these regulations, or at common law, it has to be proved that he at least knew the essential fact or facts constituting the offence: see *Johnson v. Youden* (6).

Leaving aside what it is necessary to prove in a charge of conspiracy to commit an act absolutely prohibited, we now come to the offences of attempting and of doing an act preparatory to the commission of an offence against the regulations. I am by no means clear as to the difference between these two offences. The test as to what acts constitute an attempt was laid down by the Court for Crown Cases Reserved in *R. v. Eagleton* (7) in these words (Dears. C.C. 538):

"Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are . . ."

This has been followed as a safe guide by the Court of Criminal Appeal in numerous cases, of which *R. v. Robinson* (8), *R. v. Woods* (9), and *R. v. Bloxham* (10) are good instances. As these cases point out, it is sometimes difficult to

determine whether an act is immediately or remotely connected with the crime of which it is alleged to be an attempt, and it may, therefore, be that it is intended to meet this difficulty by using the words "an act preparatory to the commission of an offence" and so to embrace acts which are only remotely connected with the commission of an offence. This may be desirable and necessary in time of war, but I venture to express the hope that it may be considered by the appropriate authority whether this should be continued in time of peace as it is certainly extending criminal liability as regards these existing regulations beyond what exists in regard to other crimes, whether they be common law or statutory offences. One thing must, I think, be certain, and that is that these words are intended to apply to what the law would regard as something less than an attempt.

Now, applying the doctrine laid down in *R. v. Eagleton* (7), I should have no hesitation in holding that the servant in this case was guilty of, and could properly have been charged with, an attempt as the facts proved were clearly immediately connected with what would have been a substantive offence had not the enforcement officer intervened before the goods had been actually sold. Does, then, this doctrine of vicarious liability extend to an attempt, for, if it does not, it cannot apply to a mere preparatory act. That it is a necessary doctrine for the proper enforcement of much modern legislation none would deny, but it is not one to be extended. Just as in former days the term "odious" was applied to some forms of estoppel, so might it be to vicarious liability. It makes a person guilty of an offence actually committed by another when he may have no knowledge that it was being committed or may have done his best to prevent it. There is no case to be found in the books where it has been applied to an attempt, and, for my part, I refuse so to extend and apply it. Were it to be applied, the consequences might be startling and unjust in the highest degree. For, once a servant had done an act amounting to an attempt, his master would be vicariously liable though he had intervened and frustrated the commission of the substantive offence. Had the present respondent discovered before the officer arrived what his servant had done and immediately removed the price tickets and summarily discharged him, it could still be said, if the doctrine applied, that he was guilty. To meet this it is said that in such a case there would be no prosecution. That is no answer. The question, and the only question, is: Has the respondent committed an offence? If an offence is complete, the doctrine applies if the statute is one which calls for its application, but I see no ground for holding that because it will apply to a completed offence it must apply equally to an attempt and every reason for holding that it does not. Of course, if the master is a party to the attempt no question of vicarious liability arises. He is just as guilty as the servant. It is with vicarious, and not primary, liability that we are dealing, and, if the doctrine does not apply to an attempt, still less does it apply to the vague and unsatisfactory offence of doing a preparatory act. The justices were right and I agree that the appeal should be dismissed.

SLADE, J.: I entirely agree with both the judgments that have been delivered.

Appeal dismissed.

Solicitors: *Treasury Solicitor* (for the appellant); *Hiscott, Troughton & Page*, agents for *Bannister, Bates & Son*, Morecambe and Heysham (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

R. v. MIDDLESEX JUSTICES. *Ex parte* DIRECTOR OF
PUBLIC PROSECUTIONS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery, Slade, Devlin and Parker, JJ.), June 17, 27, 1952.]

Certiorari—Application to quash acquittal at quarter sessions—Acquittal before evidence given—Mistrial—Defendant properly arraigned and jury sworn—Views as to possibility of conviction expressed by chairman.

The defendant was charged at quarter sessions on an indictment alleging that he drove his motor car on a highway while under the influence of drink to such an extent as to be incapable of having proper control of the vehicle. On arraignment he pleaded Not Guilty, and was put in charge of the jury. The chairman, in the presence of the jury, then said that he had read the depositions very carefully and did not think that any jury could convict the defendant. Counsel for the prosecution, however, opened his case, but before any evidence was called the chairman referred to exhibits written by the defendant during his examination by a doctor, asked the jury to look at them, and expressed the view that they did not suggest that the defendant was under the influence of drink. The chairman then asked the foreman of the jury whether they wanted to hear the evidence, and the foreman answered: "Under your direction, I should say no, my Lord", and thereupon a verdict of "Not Guilty by direction" was recorded. On a motion for certiorari to quash the verdict of acquittal,

HELD: the court had no power to order a venire de novo unless there had been a mistrial in the sense that the proceedings had been abortive from beginning to end so that, had the record been drawn up, the error would have been apparent; in the present case the fact that the jury had acquitted without evidence would not appear on the record, the defendant had been properly arraigned and the jury had been sworn to try him so technically he had been in peril, and, although the proceedings at the trial were irregular, it was not a mistrial in the legal sense; and, therefore, certiorari would not be granted.

Per curiam: There is no case to be found in the books in which the court has ordered a re-trial after a verdict of Not Guilty.

AS TO CERTIORARI TO QUASH, see HALSBURY, Hailsham Edn., Vol. 9, p. 844, para. 1431; and FOR CASES, see DIGEST, Vol. 16, pp. 427-431, Nos. 2870-2916.

Cases referred to:

- (1) *R. v. Wandsworth JJ. Ex p. Read*, [1942] 1 All E.R. 56; [1942] 1 K.B. 281; 111 L.J.K.B. 234; 166 L.T. 118; 106 J.P. 50; 2nd Digest Supp.
- (2) *R. v. Marsham. Ex p. Pethick Lawrence*, [1912] 2 K.B. 362; 81 L.J.K.B. 957; 107 L.T. 89; 76 J.P. 284; 14 Digest 348, 3652.
- (3) *Bannister v. Clarke*, [1920] 3 K.B. 598; 90 L.J.K.B. 256; 124 L.T. 28; 85 J.P. 12; 14 Digest 348, 3650.
- (4) *R. v. Neal*, [1949] 2 All E.R. 438; [1949] 2 K.B. 590; 113 J.P. 468; 2nd Digest Supp.
- (5) *R. v. Simpson*, [1914] 1 K.B. 66; 83 L.J.K.B. 233; 110 L.T. 67; 78 J.P. 55; 16 Digest 431, 2916.

MOTION for an order of certiorari to quash the acquittal of the defendant recorded by Middlesex Quarter Sessions on May 7, 1952, on a count in an indictment for driving a motor car while under the influence of drink and an order for mandamus directing the justices to try the defendant on that count.

The Attorney-General (Sir Lionel Heald, Q.C.), Melford Stevenson, Q.C., and Buzzard for the applicant.

Hylton Foster, Q.C., and F. H. Lawton for the respondents.

J. C. G. Burge for the defendant.

Cur. adv. vult.

June 27. **LORD GODDARD, C.J.**, read the following judgment of the court. The Attorney-General moves for an order of certiorari to remove into this court and quash the purported acquittal of one Peter Edward Bromley-Martin recorded by Middlesex Quarter Sessions on May 7, 1952, and an order of the quarter sessions discharging the said Bromley-Martin on the first count of an indictment against him charging that he on Mar. 24, 1952, when driving a motor vehicle on Watford Way, Edgware, was under the influence of drink to such an extent as to be incapable of having proper control of the motor vehicle, and for an order of mandamus that the quarter sessions do try the defendant on this count. In substance the ground on which the orders were sought was that the defendant had never been tried on the indictment and that the chairman of quarter sessions, without any evidence being called or given, had directed or procured the jury to return a verdict of Not Guilty so that the purported trial was in effect a nullity.

[His LORDSHIP dealt with the facts (which are summarised in the headnote) and continued:] The court can only express its gravest disapprobation of the conduct of the chairman. He is a man to whom the lay members of the court have a right to look for guidance and on whom they are entitled to rely for the proper conduct of cases which are brought to be tried on indictment before them. The explanation which he has offered is that from his experience gained at the Bar and as chairman of various quarter sessions he was quite certain that no jury would have convicted. It was not for the chairman to try the case himself. The prosecution had a right to present their case. It is not his duty to take sides or to do all he can to secure the acquittal of a prisoner. It is his duty to hold the scales evenly and to sum up the case if there is evidence fit to be left to the jury, as on the depositions in the present case there unquestionably was, and to place before them fairly and impartially the evidence given by the prosecution and the matters submitted by the defendant. That a judge may express his own opinion on matters arising out of the evidence there is no doubt, and no one would wish to prevent his doing so, provided he does it temperately and fairly. The chairman has said in his affidavit that he did not intend to withdraw the case from the jury, nor did he intend to direct them what to do. He says that he intended that the jury should there and then consider whether they wanted to hear evidence to support the facts opened by counsel for the prosecution when such facts disclosed what he thought was a weak case. We find it difficult to accept that explanation, for what he did could only have indicated that he desired the jury to stop the case, and, indeed, that he was determined they should do so. From first to last the conduct of the chairman in this case can only be described as both unjudicial and injudicious. This was a serious case, preferred by the direction of the Commissioner of Metropolitan Police. It was in fact, never tried, because the chairman prevented it from being tried, and to pretend that there has been here the free exercise by the jury of their right to acquit on the merits need only be stated to be rejected. The answer of the foreman of the jury clearly shows that they understood that he was directing them to acquit, and that seems also to have been the opinion of the clerk of the peace, for he indorsed the indictment with regard to count No. 1: "Verdict not guilty by direction".

As I have said, the Attorney-General contends that in this case there has been no trial at all, and, therefore, he submits that the order of discharge should be quashed and this court should order that the case should be heard according to law. That it was not heard according to law in one sense is perfectly true, for the proceedings of the chairman were irregular from beginning to end and his action prevented any evidence from being given. Again, in one sense it is true to say that there has been no trial, but this court has no power to order a re-trial in any case unless there has been what in law can properly be described as a mistrial and consequently a nullity. Moreover, though there have been

cases in which the court has ordered a venire de novo because of a mistrial, we have not been referred to a single case, nor can one be found, where this has been done after a verdict of Not Guilty has been recorded. The Attorney-General relied particularly on *R. v. Wandsworth JJ. Ex p. Read* (1). The headnote, which conveniently summarises the decision, is:

"Where there has been a denial of natural justice before a court of summary jurisdiction, resulting in the conviction of a defendant, his remedy is not by Case Stated or appeal to quarter sessions, but by application to the High Court for an order of certiorari to remove and quash the conviction."

That, it will be observed, was not only a case dealing with a court of summary jurisdiction, but also was one in which there had been a conviction, and the books are full of cases where this court has interfered and quashed convictions where there has been a denial of what is for convenience called natural justice.

There is, however, no case to be found in the books in which the court has ever ordered a re-trial after a verdict of Not Guilty. Our attention was called to *R. v. Marsham. Ex p. Pethick Lawrence* (2) which was followed in *Bannister v. Clarke* (3). In the first case a person was convicted of assaulting a police constable and by inadvertence the constable gave his evidence unsworn. On discovering this fact the magistrate re-heard the case, had the witness sworn, and came to the same conclusion and convicted. It was held that, as the first proceedings were a mere nullity, no plea in the nature of autrefois convict could be set up because the applicant had never been in peril on the first hearing owing to the irregularity. Here we are unable to say that there has been anything in the nature of a mistrial. To constitute a mistrial the proceedings must have been abortive from beginning to end so that, had the record been drawn up, the error would have been apparent: *R. v. Neal* (4). The fact that the jury have acquitted without evidence would not appear on the record. This is what happens whenever counsel for the prosecution offers no evidence. The prisoner is then in charge of the jury and they are directed to return a verdict of Not Guilty, no evidence having been offered. The verdict is received and recorded, and the prisoner is discharged. Suppose counsel for the prosecution in the exercise of his discretion offered no evidence, it would not be open to the prosecutor to come to this court and ask that the case should be sent down for re-trial because he wanted evidence given and did not agree with the course that counsel had adopted. Here the defendant was properly arraigned and the jury sworn to try him, so technically he was in peril, and as they returned a verdict of Not Guilty, however improperly that verdict may have been obtained, this court cannot, as it seems to us, direct a new trial. In *R. v. Simpson* (5), SCRUTTON, J., said ([1914] 1 K.B. 75):

"... there never has been a case in which an acquittal by a court of summary jurisdiction has been quashed by certiorari, and, although in some cases judges have acted proprio vigore in making precedents, I do not myself feel disposed to do so in this case."

Nor do we. An acquittal by a jury seems to be a fortiori.

I do not think it necessary to go in detail through the large number of cases which were cited to us. None of them, in my opinion, supports the proposition that we could order a re-trial in this case. The trial was deplorably irregular, but it was not a mistrial in the legal sense. This was obviously a proper case to bring before this court, but for the reasons that I have given it is impossible for us to interfere, and the application must, therefore, be refused.

Application refused.

Solicitors: *Director of Public Prosecutions* (for the applicant); *C. W. Radcliffe*, clerk to Middlesex County Council (for the respondents); *Clifford-Turner & Co.* (for the defendant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A/S SAMEILING v. GRAIN IMPORTERS (EIRE), LTD.

[QUEEN'S BENCH DIVISION (Sellers, J.), Mar. 10, 11, 1952.]

Shipping—Charterparty—Custom of port—Term of charterparty that shipowners' stevedores be employed in discharging grain cargo—Receivers' right by custom to fill into bags or buckets before discharge—Consistency—Debit of half cost to shipowners.

A A charterparty provided: "Owners' agents and stevedores to be employed at both loading and discharging ports . . ." By a custom of the port of discharge in the case of "discharge otherwise than by suction direct into silo of bulk cargoes of grain the receiver carries out the entire work of filling the grain into his own bags or buckets", discharge following thereafter, and "debts the ship with one half of the cost." At the port of discharge agents of the charterers to receive the cargo employed stevedores to put the grain into bags which were later unloaded by the ship.

B HELD: the custom gave the receivers the right to bag the cargo on board and left the unloading to be completed by the shipowners and was of benefit to both parties, and, therefore, the custom was not out of harmony with, but was supplemental to and capable of running in conjunction with, the express term of the contract, and so was effective and the shipowners were liable to be debited under it.

C Quaere, whether the result would have been the same if the discharge had been by buckets.

D AS TO METHOD OF DISCHARGING CARGO, see HALSBURY, Hailsham Edn., Vol. 30, pp. 530-537, paras. 682-687; and FOR CASES, see DIGEST, Vol. 41, pp. 531-537, Nos. 3595-3647.

Case referred to:

(1) *British Oil & Cake Mills, Ltd. v. Moor Line, Ltd.*, (1935), 40 Com. Cas. 210; *reversd. on other grounds* C.A., 41 Com. Cas. 53; Digest Supp.

E SPECIAL CASE stated by umpire.

F The claimants were the time-chartered disponent owners of the steamship Kent County which under a charterparty was to load a part cargo of grain from the charterers, the respondents, at West St. John, New Brunswick, and proceed with it to Dublin, Cork, or Beigh Castle, as the charterers might conformably with the charter order. In accordance with the terms of the charterparty the Kent County loaded a part cargo of 7,391 tons of grain in bulk (including some grain in bags for purposes of stowage and stability) at West St. John and in compliance with orders from the charterers proceeded to Cork. There the receivers of the cargo, J. W. Green & Co. (Cork), Ltd., acting as agents for the charterers for the purpose of taking delivery of the grain, employed and paid G stevedores to put the grain into bags which were the receivers' property, after which it was unloaded by the ship otherwise than by suction direct into silo, at her expense. The discharging did not take place at the receivers' wharf or berth. The charterparty and the bills of lading, which, when signed, superseded the charterparty, both contained the same clause:

H "Owners' agents and stevedores to be employed at both loading and discharging ports except if vessel is discharged at receivers' wharf or berth, in which case receivers' stevedores to be employed at the current rate of the port. This exception applies only to ports in Eire where receivers own their discharging wharves or berths."

The charterers claimed to deduct from the freight the sum of £307 11s. 3d., being one half of the total sum paid by the receivers to the stevedores for the work of putting the charterers' grain into bags, by virtue of a custom at the port

of Cork which the umpire found existed at all material times and of which the effect was:

“ . . . that in discharge otherwise than by suction direct into silo of bulk cargoes of grain the receiver carries out the entire work of filling the grain into his own bags or buckets, and for such purpose employs and pays his own stevedoring labour, and thereafter the receiver debits the ship with one half of the cost of such work, and, upon being so debited, the ship pays the receiver such half.”

The umpire found the custom was “reasonable, certain and . . . (in Cork) universal”. The shipowners contended that the custom was inconsistent with and repugnant to the charter, and, in particular, cl. 9 thereof. Subject to the decision of the court, the umpire awarded that the charterers should pay the shipowners the sum of £307 11s. 3d., less 2½ per cent. commission, with interest. The question for the decision of the court was whether the charterers were entitled to deduct that sum from the freight.

B. S. Eckersley for the shipowners.

E. W. Roskill for the charterers.

SELLERS, J., stated the facts and continued: The matter turns on whether the custom can be regarded as not being out of harmony with, but as supplemental to and capable of running in conjunction with, the express term of the contract. What is involved in the obligation of shipowners who employ their agents and stevedores at the discharging port has been conveniently and authoritatively stated in this way by **MACKINNON, J.**, in *British Oil & Cake Mills, Ltd. v. Moor Line, Ltd.* (1), when dealing with a bulk grain cargo (40 Com. Cas. 215):

“ . . . with a cargo shipped in bulk the shipowner's obligation is only to deliver it as received by him in bulk, and there is no duty or obligation upon the shipowner to transform it from a bulk cargo to a cargo in bags. Therefore, in my view, it cannot be said there is any duty on the shipowner in the general law, and in the nature of the contract made, by which he is either under the duty of putting the cargo into bags or is under any obligation to pay for the cost of putting the cargo into bags.”

The decision of **MACKINNON, J.**, was reversed on appeal, but on quite different grounds, and I think his statement of the law met with approval by the Court of Appeal generally and **GREER, L.J.**, in particular. That is the normal task of discharging. In the absence of any express agreement or any custom in regard to the matter, the receivers would be entitled to have their grain, in bulk, discharged overside; they would not be entitled to require the shipowners to deliver it bagged or to bag it or otherwise interfere with it themselves while it was on board before discharge. In my view, this custom at Cork deals with something which is not inconsistent with the duties of the shipowners under the express term of the contract, but supplements it. It gives the receivers the right to bag the cargo on board, and leaves the unloading to be completed by the shipowners at their expense. It also divides the payment for that work equally between the receivers and the shipowners, thereby imposing an obligation on the shipowners to pay half the cost. It may well be that the custom has to be reasonable and that this work is for the receivers' benefit, but, no doubt, where there is no discharging into silo (and it is only then that this custom applies) the shipowner derives some benefit from the work which the receivers do. That seems to justify an equal apportionment of the cost of doing it, but it does not seem to me to make the work so much a part of the discharge to which cl. 9 applies in the strict sense as to make these two obligations conflict. I think that the custom can stand in conjunction with this contract of carriage. I, therefore, come to the conclusion that the argument put forward for the charterers is correct and that the decision of the umpire is incorrect in law.

The custom further incorporates filling the grain not only into the bags but also into the buckets of the receivers. I am not concerned with filling the grain into buckets, and, while that may be just the same thing as filling the grain into bags, for the moment I am not finding that, if the discharge had been by buckets, that would necessarily have had the same result. I do not think that it is inherent in the custom as found that it stands with regard to buckets in the same way as it does with regard to bags: I do not know precisely how discharge takes place with buckets, although with bags the operation is quite understandable. If the use of buckets is simply a method of skipping the grain out of the hold and putting it in bulk overside, that seems to me to run very closely with the method of discharging which the shipowners would have to employ in order to get the grain overside in bulk unless a silo was employed. Therefore, I leave that matter open, should it arise for further consideration. In the result, the question which the court is asked must be answered in favour of the charterers, who are entitled to deduct the £307 11s. 3d. from the freight.

Question answered in favour of charterers.

Solicitors: *Sinclair, Roche & Temperley* (for the shipowners); *Thomas Cooper & Co.* (for the charterers).

[Reported by F. A. AMES, Esq., Barrister-at-Law.]

BARRY v. HASSELDINE.

[CHANCERY DIVISION (Danckwerts, J.), June 20, 23, 24, 1952.]

Easement—Right of way—Way of necessity—Land not completely surrounded by grantor's land.

The defendant sold to A. the northernmost part of his land which was separated from the rest by a concrete roadway. The roadway was on land belonging to the defendant and gave access to a disused aircraft runway which was constructed on land not in the ownership of the defendant and in turn gave access to a public road to the east. Another public road ran along the southern boundary of the defendant's property. The land sold to A. could be approached from the public roads either by way of the defendant's land or over the runway, the remainder of the adjoining land being owned by persons other than the defendant, but A. had no right of way over the runway. A.'s successor in title, B., claimed to be entitled to a right of way over the defendant's land from the southern public road.

HELD: notwithstanding that the defendant's land did not enclose the land sold, but was merely adjacent to one side of it, B. was entitled by implication to a way of necessity over the defendant's land.

Gayford v. Moffatt (1868) (4 Ch. App. 133), considered.

AS TO RIGHT OF WAY ARISING BY IMPLICATION OF LAW, see HALSBURY, *Hailsham Edn.*, Vol. 11, pp. 326-329, paras. 578-582; and FOR CASES, see DIGEST, Vol. 19, pp. 43-50, Nos. 230-273.

Case referred to:

(1) *Gayford v. Moffatt*, (1868), 4 Ch. App. 133; 33 J.P. 212; 19 Digest 44, 236.

ACTION.

The plaintiff claimed a declaration that he was entitled as of necessity to a right of way over the defendant's land in order to gain access from a public highway to his own land.

H. E. Francis for the plaintiff.

J. F. Bowyer for the defendant.

DANCKWERTS, J.: In 1947 the defendant owned some land on part of which a house called "Heathfield" stood, while the southern portion fronted on a public road. There was at the back of the land, and forming part of it

then, a triangular piece of land which was divided from the rest of the defendant's land by a short concrete road. This road connected with a solid road and a circular runway on land which had been used during the war as an aerodrome, and the eastern end of the runway gave access to a public road which had been closed during the period of the war. Therefore, the triangular piece of land could be approached from the public road by passing along the runway and on to the concrete road adjoining it and separating it from the rest of the defendant's land.

The plaintiff claims that he is the owner of the triangular piece of land by virtue of two conveyances, the first of which is dated Nov. 7, 1947, and was a conveyance by the defendant to a William James Farmerey of that piece of land in consideration of the sum of £250. In addition, the defendant expressly granted to Mr. Farmerey a right of way for all purposes over the concrete road to which I have referred, and there was an exception in favour of the grantor of the right to take water from a well on the land conveyed. There were certain restrictive covenants imposed on the land, as set out in the schedule, and the first paragraph of the schedule is a covenant

"not to use the land hereby conveyed for any purpose other than the erection of one dwelling-house, together with the appropriate out-buildings, provided always that nothing in this conveyance contained shall be deemed to prohibit the user of the land as a small holding or for horticultural or nursery purposes or to prohibit the erection of buildings in connection therewith."

The second conveyance is dated Oct. 14, 1949, and is between William James Farmerey and the plaintiff, and the price paid for the land by the plaintiff was £950. He received under the conveyance the same piece of land and the benefit of the right of way over the concrete road, and he covenanted to observe the restrictive covenants.

While there was access over this circular runway, the land on which the runway stood did not belong to the defendant, but belonged to some other person or persons. The land to the north-east and north-west of the triangular strip, and the land to the west, also belonged to somebody else, that on the west belonging to a Mr. Browning. Between the triangular strip and the public road was the defendant's land. Since the road with which the circular runway was connected was re-opened, there was a means of access to the triangular strip without going over the defendant's land, but there was no access as of right over any of the adjoining land, and the access over the aerodrome could obviously be determined at any time by the persons who owned the land. In those circumstances, as it seems to me, if nothing else had occurred, the law would clearly have implied in favour of the grantee of the triangular piece of land a way of necessity, i.e., a right of way to enable the grantee to obtain access over the grantor's land in some line to be chosen by the grantor so that the triangular piece of land would be of some use to the grantee instead of being of no use to him whatever. I am satisfied that the law would have implied such a right notwithstanding that the piece of land granted by the conveyance of 1947 was not completely surrounded by the grantor's land, but on three sides abutted on to land which belonged to other persons.

The matter is not entirely clear on the authorities. In *GALE ON EASEMENTS*, 12th ed., p. 158, the following statement is to be found:

"Sect. 2. Easements of necessity. Another class of easements, acquired by implied grant or reservation are those which are usually termed 'easements of necessity', though they might with more correctness be called easements incident to some act of the owners of the dominant and servient tenements without which the intention of the parties to the severance cannot be carried into effect. . . . Easements called ways of necessity are thus described in *ROLLE'S ABRIDGEMENT*—'If I have a field enclosed by my own

land on all sides, and I alien this close to another, he shall have a way to this close over my land, as incident to the grant; for otherwise he cannot have any benefit by the grant. And the grantor shall assign the way where he can best spare it. So, too, if the close aliened be not entirely enclosed by my land, but partly by the land of strangers; for he cannot go over the land of strangers. Quaere.’”

- A Doubt is expressed whether a way of necessity is raised in the last case. In GALE ON EASEMENTS, 12th ed., p. 159, note (p) there is a reference in a note in these terms to *Gayford v. Moffatt* (1):

“For the implication, it is sufficient if the close aliened be partly enclosed by the grantor’s land, and partly by the land of strangers: see *Gayford v. Moffatt* (1).”

- B It appears to be a fact that in *Gayford v. Moffatt* (1) the grantor’s land did not wholly enclose the land granted, but the question referred to in the note in GALE ON EASEMENTS does not appear to have been discussed in that case. So there is really no very clear and express authority on the point, but it seems to me that, if the grantee has no access to the property which is sold and conveyed to him except over the grantor’s land or over the land of some other person or persons being a person or persons whom he cannot compel to give him any legal right of way, common sense demands that the grant of a way of necessity should be implied, for the purposes for which the land is conveyed, over the land of the grantor. It is no answer to say that at the time of the grant, a permissive method of approach was in fact enjoyed over the land of some other person, because that permissive method of approach may be determined the day after the grant and the grantee may thus be rendered entirely incapable of approaching the land which he has purchased. So, as I have already said, I have come to the conclusion that, if there is nothing else in this case, this is a case in which the law would imply a way of necessity in favour of the grantee, that is, Mr. Farmerey, which would inure to the benefit of the plaintiff as the ultimate grantee of the land. [HIS LORDSHIP proceeded to consider whether, on the evidence, the implied right had been abandoned and held that it had not been finally abandoned and that the plaintiff was entitled to succeed.]
- E

Judgment for the plaintiff.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Rendall, Litchfield & Co.*, Bournemouth (for the plaintiff); *Birkbeck, Julius, Edwards & Coburn* (for the defendant).

F

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

JAMES v. BOWKETT.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Slade and Parker, JJ.), June 12, 1952.]

Justices—Summary trial—Offence triable summarily or on indictment—Need of formal application by prosecutor—Criminal Justice Act, 1948 (c. 58), s. 28 (1).

A
A defendant charged before a court of summary jurisdiction with an offence punishable on summary conviction or on indictment was informed by the clerk of the court of his right to be tried by a jury under s. 17 (1) of the Summary Jurisdiction Act, 1879, but he elected to be tried summarily and pleaded Not Guilty. The prosecutor did not formally apply under s. 28 (1) of the Criminal Justice Act, 1948, for the case to be tried summarily, but he opened his case and called his evidence.

B
HELD: by opening his case after the defendant's election the prosecutor had impliedly applied for the case to be tried summarily within the meaning of s. 28 (1); the defendant also had desired that course to be taken; and, therefore, the justices were entitled to hear the case.

C
FOR THE CRIMINAL JUSTICE ACT, 1948, s. 28 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 14, p. 1011.

CASE STATED by Monmouthshire justices.

D
E
F
G
H
At a court of summary jurisdiction sitting at Chepstow a complaint was preferred by the respondent under s. 15 (1) of the Road Traffic Act, 1930, charging the appellant with having been unlawfully under the influence of drink to such an extent as to be incapable of having proper control of a Bedford motor lorry of which he was in charge on the Chepstow-Monmouth road, at Tintern, on Jan. 1, 1952. At the hearing of the complaint on Jan. 15, the following facts were proved. The appellant was seen by a police officer on the Chepstow-Monmouth road, staggering, apparently indifferent to danger from a passing motor vehicle, and smelling of drink. Shortly afterwards he was stopped by the officer when driving a lorry from the Wye Valley Hotel on to the road, he being then in the same condition. When the case was called before the justices no application was made by the respondent before the charge had been entered on that the case should be tried summarily, and the attention of the justices was not called to the provisions of s. 28 (1) of the Criminal Justice Act, 1948. The clerk of the court read the charge to the appellant, who was represented by a solicitor, and informed him of his right under s. 17 (1) of the Summary Jurisdiction Act, 1879, to be tried by a jury. The appellant elected to be tried summarily and pleaded Not Guilty. The respondent then called his witnesses and closed his case. The appellant's solicitor submitted that, by reason of the provisions of s. 28 (1) of the Criminal Justice Act, 1948, the justices had no jurisdiction to try the case summarily, but must deal with it as if it were punishable on conviction on indictment only, because no application had been made to them by the respondent before the charge had been entered upon for the case to be tried summarily. The respondent contended that, while he had omitted to make a formal application for the trial of the case summarily, the appellant had been given the opportunity of going for trial by a jury and had elected to be tried summarily. The justices held that in the circumstances the appellant was estopped from claiming that the case should not be dealt with summarily, that no injustice was done by the omission of the respondent to make a formal application, and that the appellant was not at any time under any misapprehension as to the fact that the case was being dealt with summarily. They determined, therefore, to proceed with the adjudication, and the appellant appealed against that determination.

L. Caplan for the appellant.

F. W. I. Barnes for the respondent.

LORD GODDARD, C.J.: Section 28 (1) of the Criminal Justice Act, 1948, deals with offences punishable on summary conviction or on indictment. It provides:

A “ Subject to the provisions of this section, where a person who is not less than fourteen years of age is charged before a court of summary jurisdiction with an offence which, by virtue of any enactment, is punishable either on summary conviction or on conviction on indictment, then if application in that behalf is made by the prosecutor before the charge has been entered upon, the court may then determine to try the case summarily; but if the court does not so determine it shall proceed to hear the case as if the offence were punishable on conviction on indictment only.”

B The sub-section does not apply to cases which are generally indictable and are only triable summarily with the consent of the accused under s. 11 (1) of the Summary Jurisdiction Act, 1879, or s. 24 (1) of the Criminal Justice Act, 1925. It applies to cases in which the defendant may be tried either summarily or on indictment. Here, being liable on summary conviction to four months' imprisonment, the appellant had to be given the option of trial by jury under s. 17 (1) of the Summary Jurisdiction Act, 1879, and when the case was called on the C justices' clerk asked him if he desired to be tried by a jury. He elected to be tried summarily, and the respondent opened the case for the prosecution.

D Counsel for the appellant has argued that s. 28 (1) of the Act of 1948 prevents the justices' trying the case summarily unless the prosecutor or his representative has said: “ Will you please try this case summarily ”. It would have made a very great change in the law if justices had been deprived of their statutory right to try summarily a case which the defendant wished to be tried summarily merely because some such form of words had not been used. In my opinion, this statute was not intended to alter the law in the way suggested. I think its object was only to enable it to be intimated to the justices as soon as the case came on that the prosecutor was not asking for the case to be sent for trial. That would relieve them of the need to take depositions, unless they found in the course of their E inquiry that it was a serious case, when they would have to begin again, recalling the witnesses for depositions to be taken, and sending the case for trial. I think that s. 28 is simply a procedural section. It does not confer rights; it preserves the right of the defendant to object to a summary trial and to have his case dealt with by a jury, but I do not think it does more than that. I do not think that s. 28 (1) lays down conditions precedent which have to be complied with by means of some particular form of words. It does not provide that F the prosecutor must ask for the case to be dealt with summarily before the defendant has been informed of his right to a trial by jury. It would have been open to the respondent in the present case to ask the justices to send the case for trial, but no one wanted that, and, as soon as the appellant had said he wished the case to be dealt with summarily, the respondent, by opening his case, must be G taken to have applied to the court to deal with it summarily. I am not prepared to hold that, merely because the prosecutor has not said to the justices: “ Will you please deal with the case summarily ”, when the prosecutor and the defendant have shown that that is what they require and the justices have agreed, there has not been sufficient procedural compliance with s. 28 (1) to enable the justices to hear the case.

H In the present case, although the justices did not have the point expressly brought to their attention, there was impliedly an application by the respondent to try the case summarily, there was consent by the appellant to be tried summarily, and, therefore, it was perfectly proper for the justices to hear the case. It would, perhaps, be better in such case for the clerk to ask the prosecutor: “ Are you asking for summary trial ? ”, when he could say Yes or No, but here the application was impliedly made, it was accepted as having been impliedly made, and it cannot be suggested there has been any embarrassment or injustice

done to the appellant. When the prosecutor is ready to go on and the defendant raises no objection, what else is the prosecutor doing but asking the justices to deal with the case summarily? This appeal fails, and the case will be remitted to the justices with an intimation that they came to a correct determination according to law and that they must complete the hearing by hearing any evidence the appellant may wish to give.

SLADE, J.: I agree. A

PARKER, J.: I agree.

Case remitted.

Solicitors: *Gillhams*, agents for *Leslie J. Slade*, Newent, Gloucestershire (for the appellant); *Torr & Co.*, agents for *W. K. G. Thurnall*, county prosecuting solicitor, Monmouth County Council, Newport, Monmouthshire (for the respondent). B

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re HURLL. ANGELINI v. DICK AND OTHERS. C

[CHANCERY DIVISION (Harman, J.), June 19, 20, 1952.]

Legitimation—Legitimatio per subsequens matrimonium—Father domiciled at child's birth in foreign country in which legitimation by subsequent marriage was permitted by law—Legitimacy Act, 1926 (c. 60), s. 8 (1).

By his will, dated Mar. 24, 1934, a testator, who died on Oct. 6, 1939, D
devised and bequeathed all his estate both real and personal to his trustees on trust for sale, and, subject to the usual directions for the payment of debts and expenses, gave one-third of the proceeds on trust for his daughter, Agnes, during her life and after her death "in trust for all the children or any the child of my said daughter who being male shall attain the age of twenty-one years or being female shall attain that age or previously marry and if more than one in equal shares absolutely". On Mar. 29, 1933, Agnes married A., an Italian domiciled in Italy, and on Jan. 16, 1943, her marriage was declared void by the Ecclesiastical Tribunal of the Sacred Rota, the declaration being confirmed by the competent court in Italy on Apr. 9, 1943. In 1942 Agnes formed an association with B., who was also an Italian domiciled in Italy, and as a result, on July 2, 1943, a child, E
the plaintiff, was born to her at Perugia. In October, 1949, B. married Agnes in England, and under Italian law the plaintiff was thereby legitimated. The plaintiff claimed to be an object of the trust for the children of Agnes as one of her legitimate children. F

HELD: section 8 (1) of the Act of 1926 was limited in its application to a person whose father was not at the time of the birth of such person domiciled in a country in which legitimation by subsequent marriage was permitted by law, and, therefore, the child of Agnes was not legitimated by that section, but his status was to be determined by the law obtaining apart from the Act. He, having been legitimated according to the law of his father's domicile, was legitimated under the general law of this country, and, accordingly, s. 1 (1) which limited legitimation so as to date only from the marriage of the parents did not operate to exclude the plaintiff's participation under the will. G

AS TO LEGITIMATION, see HALSBURY, Hailsham Edn., Vol. 17, p. 689, para. 1425; and FOR CASES, see DIGEST, Vol. 3, pp. 372-375, Nos. 131-153.

Cases referred to:

(1) *Re Grey's Trusts*, [1892] 3 Ch. 88; 61 L.J.Ch. 622; 3 Digest 374, 146. H

- (2) *Birtwhistle v. Vardill*, (1840), 7 Cl. & Fin. 895 (7 E.R. 1308); *sub nom. Doe d. Birtwhistle v. Vardill*, 6 Bing. N.C. 385 (133 E.R. 148); West, 500 (9 E.R. 578); 3 Digest 374, 144.
- (3) *Re Andros*, (1883), 24 Ch.D. 637; 52 L.J.Ch. 793; 49 L.T. 163; 3 Digest 373, 141.

A ADJOURNED SUMMONS to determine whether the plaintiff was entitled to share as a child of the sixth defendant, Agnes Patricia Hurll, in the one-third share of the residuary estate of Peter Hurll, deceased, settled by his will on the said Agnes Patricia Hurll for life with remainder to her children.

Cross, Q.C., and *C. G. Allen* for the plaintiff, infant son of Agnes Patricia Hurll.
J. F. Bowyer for the first defendant, interested during her life on the death of Agnes Patricia Hurll without issue.

B *Pennycuik, Q.C.*, and *W. F. Waite* for the second, third and fourth defendants, entitled to the fund absolutely subject to the interest of the first defendant.

H. A. Rose for the seventh and eighth defendants, the trustees. The fifth and sixth defendants were not represented.

C **HARMAN, J.:** This application raises the question whether the plaintiff, Patrizio Giovanni Pietro Angelini, an infant, is entitled to rank as the legitimate child of his mother, Agnes Patricia Hurll, as she was born, and Agnes Patricia Nevill as she now is, so as to be an object of the statutory power of advancement applicable to her share under the will of her father, who died on Oct. 6, 1939. The question turns entirely on the construction of the Legitimacy Act, 1926. All the facts in the case are admitted.

D When the will of the testator was made on Mar. 24, 1934, Agnes Nevill was the wife of an Italian domiciled in Italy, and the position was the same at the date of the testator's death on Oct. 6, 1939. The testator left one-third of his residuary estate on trust for his daughter Agnes during her life and after her death

E "in trust for all the children or any the child of my said daughter who being male shall attain the age of twenty-one years or being female shall attain that age or previously marry and if more than one in equal shares absolutely."

There is nothing in the will to exclude the statutory power of advancement. The mother's marriage to her first husband on Mar. 29, 1933, was declared void by the Ecclesiastical Tribunal of the Sacred Rota on Jan. 16, 1943, and that

F declaration was confirmed by an order of the competent court in Florence on Apr. 9, 1943. The parties at that time had separated. The mother, apparently, retained her English nationality, and, notwithstanding her marriage to an Italian, was interned in Italy. During that time she formed an irregular association with one Giovanni Angelini, the father of the plaintiff, and as a result of that association the plaintiff was born at Perugia on July 2, 1943, his birth being duly registered with the appropriate official at Perugia.

G In October, 1949, Giovanni Angelini came to England and married the plaintiff's mother. As a result, it is agreed that by Italian law the plaintiff, having been recognised by both his father and his mother as their child, was legitimated. The marriage of the mother with the father was annulled in December, 1950. Since that decree she has married one Nevill and there is no issue of that marriage.

H If, therefore, the infant plaintiff be a legitimate child of his mother, he is entitled to be considered as an object of the trusts and as having a contingent interest in remainder in his mother's settled share. It is desired, if he be in that position, that the trustees, who are the last two defendants, should be in a position to consider whether to exercise their power of advancement in his favour. It is further admitted that, if the Legitimacy Act, 1926, had never been passed, the plaintiff would have been entitled to be considered for this purpose as the legitimate son of his parents. That is the result of the authorities which preceded

the Act of 1926, and notably of *Re Grey's Trusts* (1). In that case the testator died in 1860. The marriage which legitimated the boy in question was in 1880 and the boy was born in 1877, that is to say, long after the testator's death. He became legitimate, if at all, in 1880 when the testator had been dead for twenty years. The question there was whether the child could participate in real estate, it being admitted that he would have a right to share in the personality, and I cite the case to show that it does not matter that the child should be born subsequently to the coming into operation of the relevant instrument. Dealing with the earlier case of *Re Andros* (3), and citing from the judgment of KAY, J. (24 Ch.D. 642), STIRLING, J., said ([1892] 3 Ch. 92):

"The law, as I understand it, is that a bequest of personalty in an English will to the children of a foreigner means to his legitimate children, and that by international law, as recognised in this country, those children are legitimate whose legitimacy is established by the law of the father's domicile. Thus ante nati whose father was domiciled in Guernsey at their birth, and subsequently married the mother so as to make the ante nati legitimate by the law of Guernsey, are recognised as legitimate by the law of this country, and can take under such a gift."

The father of the plaintiff in the present case was at all material times a domiciled Italian, and, therefore, at the date of the plaintiff's birth and at that of his parents' marriage, was domiciled in a country where legitimation by subsequent marriage was recognised in circumstances which exist in this case, and before 1926 the plaintiff would have been entitled under this will. A person whose parents at the time of their marriage were domiciled in a country which recognised legitimation per subsequens matrimonium, but whose father at his (the child's) birth was not so domiciled, would not have been so entitled. It was always necessary, under the old regime, for the father to have been domiciled in such country at both dates.

It is with those circumstances in mind that one turns to the Legitimacy Act, 1926, which introduces legitimation per subsequens matrimonium for the first time into the law of England as affecting domiciled Englishmen. Section 1 (1) provides:

"... where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in England or Wales, render that person, if living, legitimate from the commencement of this Act, or from the date of the marriage, whichever last happens."

That does not apply to the present case because the father was not domiciled in England or Wales. Section 1 (3) provides:

"The legitimation of a person under this Act does not enable him or his spouse, children or remoter issue to take any interest in real or personal property save as is hereinafter in this Act expressly provided."

So legitimated persons can only take such interests in property as the Act expressly confers on them. That is done by s. 3 (1) which provides:

"Subject to the provisions of this Act, a legitimated person and his spouse, children or more remote issue shall be entitled to take any interest ... (b) under any disposition coming into operation after the date of legitimation."

Therefore, his rights are limited to dispositions coming into operation either after the marriage of his parents or after the date of the Act whichever is later. In the present case the testator's will came into operation before the relevant date, i.e., the marriage of the parents. Section 10 (2) provides:

"Nothing in this Act shall affect the operation or construction of any disposition coming into operation before the commencement of this Act, or

affect any rights under the intestacy of a person dying before the commencement of this Act."

So that, if the will had been dated before 1927, the plaintiff would have continued to be entitled to the rights which the law gave him before that date, but this will came into operation after the Act so that section does not save his rights. A legitimated person is defined in s. 11 as "a person legitimated by this Act", but, when one looks at s. 8, it will be seen that, by sub-s. (2), although s. 8 deals with a number of persons who are not legitimated by this Act,

"... this Act shall have effect as if references therein to a legitimated person included a person so recognised as having been legitimated."

The Act, so far as I have recited it, is confined to persons having a father domiciled in England and it is recognised that there might be another class who, if special provision were not made for them, would be left out, viz., persons whom the Act did not legitimate by reason of the fact that the father was domiciled in some other country which did not recognise *legitimatio per subsequens matrimonium*. It is that class of person that one finds provided for under s. 8 (1) which provides:

"Where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, and the father of the illegitimate person was or is, at the time of the marriage, domiciled in a country, other than England or Wales, by the law of which the illegitimate person became legitimated by virtue of such subsequent marriage, that person, if living, shall in England and Wales be recognised as having been so legitimated from the commencement of this Act or from the date of the marriage, whichever last happens . . ."

So far, all that seems to apply to the plaintiff. Then s. 8 (1) goes on:

"... notwithstanding that his father was not at the time of the birth of such person domiciled in a country in which legitimation by subsequent marriage was permitted by law."

If those last words cut down the category of people to persons whose father was not domiciled in such a country, then it has no application to the plaintiff because his father was a domiciled Italian at all times. If, however, it applies, not only to that class, but also to the wider class of people whom before the Act the law of this country recognised as legitimate, it may be said that the plaintiff, although he would have been regarded here as legitimate before 1927, must now rank with those who are legitimated by the Act of 1926.

Prima facie I should have expected this Act to be one conferring legitimacy on certain persons who would not have been regarded as legitimate before the Act. It does confer legitimacy on such persons domiciled in England and Wales without doubt, and it also does so for a person whose father, though domiciled in England when he was born, was domiciled in Italy when married. It is said that it confers the kind of legitimacy which the Act provides for on the further class of persons, and, as it were, recognises them again as legitimate. Whether that was effected *per incuriam* or not does not matter, says counsel for the ultimate remaindermen. His submission is that it was done in order that there should not be an anomalous class of people—better off, as it were, than their opposite numbers. Whether the legislature envisaged all possibilities, or whether, indeed, they have all been envisaged by anybody arguing this case, or by myself, I do not know. In this complicated kind of legislation, the only thing to do is to adhere to the language of the Act.

It seems to me that the class of people to be affected by s. 8 (1) must be drawn from a consideration of the whole of the section, and one of the qualifications is that the father of the person was not domiciled in a country which at his birth recognised *legitimatio per subsequens matrimonium*. That being so, the subsection does not seem to me to apply to the plaintiff. The other view is that the

clause introduced by the word "notwithstanding" means "whether his father was or was not at the time of his birth domiciled in a country in which legitimisation by subsequent marriage was permitted by law." That seems to me to be based on a slight perversion of the meaning of the language used. It also involves using the word "recognised" in a very odd sense because, if a person is already recognised by law as legitimate, it is curious that one should find him recognised as legitimate under the section. The difference, of course, is that if the plaintiff ought to be regarded as legitimated under the Legitimacy Act, 1926, he could not be entitled under the will because the instrument came into force before his legitimisation, but, if he has rights apart from the Act, he is under no compulsion to have recourse to the enabling Act and can stand on what PROFESSOR DICEY, in his CONFLICT OF LAWS, calls his common law rights. He having been regarded by this law as legitimate before 1927, s. 8 (1) of the Act of 1926 does not have the effect of depriving him of that status and including him in a new category having slightly less privilege than the old. It may be that that produces some anomaly, but I do not think that can be helped and I regard the language on the whole as having a narrower construction, which would exclude the plaintiff and those in his position as not being in need of the safeguard which the section was intended to bring to a narrower class. I, therefore, hold that the plaintiff is entitled to be regarded as a child of the marriage of his parents.

Order accordingly.

Solicitors: *Cardew-Smith & Ross* (for the plaintiff); *Piesse & Sons* (for all defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

NORTH-EASTERN GAS BOARD *v.* LEEDS CORPORATION.

[CHANCERY DIVISION (Wynn-Parry, J.), May 27, 1952.]

Gas—Nationalisation—Undertaking formerly maintained by local authority—Expenses and receipts of undertaking to be paid out of and into general rate fund—Authority directed "to show under a separate heading or division" accounts of their undertakings—Power to provide reserve fund in respect of undertaking—Deficit in undertaking's account on date of property vesting in gas board under Gas Act, 1948—Liability of authority to account to gas board for surplus revenue of undertaking transferred in 1947 to general rate fund—Leeds Corporation (Consolidation) Act, 1905 (c. i), s. 54, s. 337, s. 338.

By the Leeds Corporation (Consolidation) Act, 1905, s. 54, all the receipts of the corporation's gas undertaking were to be paid into the general rate fund, all expenses in respect of the undertaking were to be paid out of that fund, and the corporation were to "keep as part of their accounts a separate account as in this Act hereinafter provided." The Act contained similar provisions in regard to other undertakings of the corporation. By s. 337 the corporation were required to "keep their accounts so as to show under a separate heading or division in respect of each of" five named undertakings, including the gas undertaking, certain specified matters, e.g., (a) the expenses and cost of the undertaking, and (b) the interest on moneys borrowed by the corporation and applied for the purposes of the undertaking. Section 338 authorised the creation of a reserve fund in respect of each of the undertakings. For the year ending Mar. 31, 1946, the surplus revenue of the gas undertaking was £93,639 5s., and between that date and Mar. 31, 1947, the corporation transferred that sum, in their accounts, to the credit of their general rate fund. In May, 1947, they transferred to the general rate fund sums amounting to £29,487 18s. 6d., which, between 1941 and 1946, they had set aside in their accounts, from moneys received in respect of their gas undertaking, to meet contributions which might have

become due from them under the War Damage Acts, 1941 and 1943, in respect of that undertaking. On May 1, 1949, when the corporation's gas undertaking vested in the plaintiff gas board under the Gas Act, 1948, the corporation's account in respect of the undertaking showed a deficit. The gas board claimed the sums of £93,639 5s. and £29,487 18s. 6d., on the ground that the corporation were not entitled to transfer those sums to their general rate fund.

A HELD: the object of the direction in s. 337 of the Act of 1905 that the corporation were to show in their accounts under separate headings or divisions the receipts and expenses of their various undertakings was merely to enable the corporation to ascertain the financial position of the undertakings; there was nothing in s. 54, s. 337, or s. 338, to indicate that the gas undertaking was to be regarded as a creditor or debtor of the general rate fund, according to whether the undertaking was at the time in credit or in debit with the fund; and, therefore, the corporation were entitled to transfer the sums of £93,639 5s. and £29,487 18s. 6d. to their general rate fund, and they were not accountable for them to the gas board.

B Observations of LORD GREENE, M.R., in *Allchin v. Coulthard* ([1942] 2 All E.R. 43), applied.

C FOR THE GAS ACT, 1948, Part II (Acquisition of Gas Undertakings), see HALSBURY'S STATUTES, Second Edn., Vol. 10, p. 876 et seq.

Case referred to:

- D** (1) *Allchin v. Coulthard*, [1942] 2 All E.R. 39; [1942] 2 K.B. 228; *affd.* H.L., [1943] 2 All E.R. 352; [1943] A.C. 607; 112 L.J.K.B. 539; 107 J.P. 191; *sub nom.* *Allchin v. South Shields County Borough*, 169 L.T. 238; 25 Tax Cas. 445; 2nd Digest Supp.

E ACTION by the North-Eastern Gas Board for (a) a declaration that on Apr. 30, 1949 (i.e., the day immediately preceding the vesting date for the purposes of the Gas Act, 1948), part of the general rate fund of the defendants, the Leeds Corporation, viz., the sums of £93,639 5s. and £29,487 18s. 6d., was held by the defendants for the purposes of their gas undertaking or in their capacity as gas undertakers, and (b) payment of the sums as money had and received by the corporation to the use of the gas board, or, in the alternative, as money due to the gas board under the Gas Act, 1948.

F The sums represented, respectively, surplus revenue in respect of the gas undertaking for the year 1945-46 and a reserve fund set aside in the corporation's accounts between 1941 and 1946, out of receipts from the undertaking, to meet contributions which might become due from the corporation under the War Damage Acts, 1941 and 1943, in respect of the undertaking. In 1947 the corporation transferred the sums to their general rate fund. On the vesting date under the Gas Act, 1948, the corporation's account in respect of the

G undertaking showed a deficit.

The gas board contended that, under s. 54, s. 337, and s. 338 of the Leeds Corporation (Consolidation) Act, 1905, the gas undertaking was to be regarded as a creditor or a debtor of the general rate fund, according to whether the undertaking was in credit or in debit with the fund for the time being, and, therefore, the corporation were not entitled to transfer the above sums and were

H *Russell, Q.C.*, and *J. P. Ashworth* for the gas board.

Sir Andrew Clark, Q.C., and *Denys B. Buckley* for the corporation.

WYNN-PARRY, J.: For many years prior to 1948 the Leeds Corporation carried on a gas undertaking among other municipal undertakings, and by virtue of the Gas Act, 1948, all property, rights, liabilities and obligations of or relating to that undertaking fell to vest under that Act on the vesting date, which was

appointed to be May 1, 1949, by the Gas (Vesting Date) Order, 1949 (S.I., 1949, No. 392).

[HIS LORDSHIP stated the facts and continued:] It is clear that, to succeed in this action, the gas board cannot rely merely on the provisions of the Gas Act, 1948. They have to demonstrate that the corporation had no power to perform these operations at the time when they did so. To consider this aspect of the matter I have to advert to a few sections of the Leeds Corporation (Consolidation) Act, 1905, the special Act which governs the corporation. In relation to their gas undertaking s. 54 of that Act provides:

"All the interest on any principal moneys borrowed by the corporation and applied by them for the purposes of the gasworks undertaking and all other the costs charges and expenses of and incidental thereto on revenue account shall be paid and satisfied out of the city fund and all the rates charges damages penalties and other moneys received by or for the benefit of the corporation on account of revenue in respect of their gasworks undertaking shall be paid and carried to the credit of that fund and the corporation shall keep as part of their accounts a separate account as in this Act hereinafter provided."

Reference is made in that section to "the city fund". As a result of subsequent legislation that fund is now to be described as "the general rate fund", but, as the case has been argued throughout using the phrase "city fund", it is convenient that I should use it for the purposes of this judgment. Section 337 of the Act of 1905 provides:

"The corporation shall keep their accounts so as to show under a separate heading or division in respect of each of the following undertakings (that is to say) The waterworks the gasworks the tramways the electricity and the markets undertakings respectively on the one side all receipts in respect of the particular undertaking and on the other all expenses in respect of the same undertaking such expenses being divided so as to also show in each case the amounts expended in respect of each of the following purposes (that is to say):—(A) The working and establishment expenses and cost of the undertaking: (B) The interest on principal moneys borrowed by the corporation and applied by them for the purposes of the undertaking: (C) The requisite appropriations instalments or redemption fund payments in respect of such principal moneys as last aforesaid: (D) The extension and improvement (if any) of the undertaking."

Lastly, s. 338 provides:

"(1) Whenever in any year it shall appear from the said accounts that the receipts in respect of any one of the said undertakings exceed in amount the expenses in respect of the same undertaking the corporation may if they think fit set aside in respect of that undertaking such an amount of money as they think reasonable not exceeding the amount of the difference between the said receipts and expenditure for the purpose of providing a reserve fund and such moneys and the resulting income thereof shall be invested in statutory securities and accumulated at compound interest until the fund so formed amounts to the maximum reserve fund for the time being prescribed by the corporation in respect of the undertaking in question but such maximum shall in no case exceed at any one time a sum equal to one-fifth of the aggregate capital expenditure for the time being by the corporation. (2) Such reserve fund shall be applicable to answer any deficiency at any time happening in the income of the undertaking in respect of which the reserve fund is created and the expenses in respect of that undertaking in any year exceeding the receipts in respect thereof for that year or to meet any extraordinary claim or demand at any time arising against the corporation in respect of the said undertaking and

so that if the fund is at any time reduced it may thereafter be again restored to the prescribed limits and so on as often as the reduction happens. (3) Whenever the amount in the reserve fund shall reach the maximum so prescribed as aforesaid the annual proceeds thereof shall be treated as receipts arising from the undertaking in respect of which the reserve fund is created and shall be dealt with accordingly."

A In regard to the corporation's other undertakings, the Act contains sections which, to all intents and purposes, are the same as s. 54. The result is that all receipts and payments of the various undertakings are paid into and paid out of the one fund, the city fund.

B The question which I have to determine lies in the narrowest compass. It is simply whether, on the true construction of those sections, and, particularly, of s. 337, the corporation had the right to perform the operations which they performed, or whether, as counsel for the gas board contends, they were not entitled to do so because the effect of the sections, particularly s. 54 and s. 337, is that each undertaking is to be regarded as a creditor or a debtor of the general fund, according to whether for the time being that undertaking is in credit or in debit with the general fund. Counsel for the corporation submitted that on
C the true construction of s. 337 there is no obligation on the corporation to keep separate accounts. Their only obligation is to keep their accounts so as to show under separate headings or divisions what is specified in the section. On the other hand, it is to be remembered that in the closing words of s. 54 it is provided that

D " . . . the corporation shall keep as part of their accounts a separate account as in this Act hereinafter provided."

I do not feel that anything substantial turns one way or the other on the question whether or not s. 337 is to be construed as requiring the corporation to keep separate accounts of the undertakings. From the documentary evidence before me I observe that, in respect of the gas undertaking, they appear to have kept something which might accurately be described as a separate account.
E I should regret to decide this question on such a point, and I proceed on the assumption that the true meaning of s. 337 is that the corporation are required to keep separate accounts of the activities of the various undertakings. In the next place, I do not feel that the corporation can derive any real help from the circumstance that they are a corporation incorporated by royal charter. As I understand the legislation, they are entitled to do what they have done unless,
F on the true construction of the relevant sections of the Act of 1905, they are forbidden to do so, and that is the sole question in this action.

Looking at the matter apart from any authority, I should have been inclined to arrive at the conclusion that there is nothing in the Act of 1905 which operates to prevent the corporation from doing what they have done. I can find, on the language of s. 337, nothing which is strong enough to support the submission of
G counsel for the gas board, on which he based his case, that each undertaking is to be regarded as a creditor or debtor of the city fund. All that the corporation are directed to do is to show in their accounts under a separate heading or division—and I treat that as being separate accounts—the activities of the named undertakings. At once there springs to one's mind an adequate and common-sense reason for that, viz., that, if no such provision were included, it would be
H impossible to keep track of the financial fortunes of the respective undertakings. Counsel for both parties relied strongly on s. 338, the section authorising the creation of reserve funds as regards the respective undertakings. I agree with counsel for the gas board to the extent that that section can be used with equal force by either side in support of its argument, and, therefore, I do not derive any help from it.

Is there any authority which either helps me or embarrasses me? In a question which is, as this is, one of construction, it is seldom, indeed, that one obtains

real help from a decided case, but I must advert to *Allchin v. Coulthard* (1), which was a decision on a question in regard to income tax, because there is a passage in the judgment of LORD GREENE, M.R., which is not merely of the greatest help to me, but which, I think, covers the case which is now before me, unless, as counsel for the gas board submits, the passage is not of general application but is confined to income tax cases. In *Allchin v. Coulthard* (1) the South Shields Corporation paid out of their general rate fund, which consisted partly of untaxed income (viz., the rates collected) and partly of profits from its undertakings duly assessed to income tax, interest on a loan raised for the purposes of their electricity and transport undertakings and general purposes, deducting income tax in the usual way. The corporation claimed, under the provisions of the South Shields Corporation Act, 1935, to treat the assessed profits of the electricity and transport undertakings as part of the assessed profits out of which the interest was paid and to retain the amount of tax paid on those profits. It was held by the Court of Appeal that, by the provisions of the Act of 1935, the profits of the undertakings could lawfully be applied to the payment of the interest on the whole of the loan, and, consequently, those profits as assessed to income tax formed part of the profits brought into charge out of which the interest was paid or deemed to be paid, notwithstanding that it appeared from the accounts of those undertakings, kept separately as required by the Act, that the surplus revenues of those undertakings had been treated as applied to certain specified purposes of those undertakings.

It is a perfectly justifiable comment that the question raised in *Allchin v. Coulthard* (1) related to income tax, but it is important to see the way in which the matter was approached by LORD GREENE, M.R. He first set out to construe the South Shields Corporation Act, 1935, and said ([1942] 2 All E.R. 43):

"The effect of the relevant sections of the Act of 1935 may, I think, be summarised as follows. All receipts and expenditure must be paid into and out of the general rate fund; but for the purpose of the internal accounts of the borough separate accounts showing the specified particulars must be kept in respect of each undertaking. This was obviously necessary, since, if the only account kept had been that of the general rate fund, it would have been impossible to ascertain the financial position of the undertakings. However, the obligation to keep these accounts imposes no sort of restriction on the [corporation] as to the way in which they are to deal with the profits of the undertakings, any more than would be the case with an ordinary trading company which, for purposes of convenience, treated different branches of its undertaking as separate entities for accountancy purposes. Section 114 has as its marginal note the words 'application of revenue of undertakings', and the same phrase appears in the preamble to the Act. I cannot attach to this phrase the importance which counsel for the Crown suggest that it bears. It is, in fact, a misdescription of the contents of the section. The section gives no directions as to the application of revenue as such. It merely empowers the [corporation], when there is a surplus, to apply sums out of the general rate fund for specified purposes of the undertaking which shows the surplus. It is impossible to say of sums so applied that they are the profits of the undertaking. They are no more the profits of the undertaking than they are the proceeds of the rates. The actual money represented by the surplus revenue of the undertaking does, of course, go to swell the amount standing in the general rate fund; but its identity is lost and it cannot for any relevant purpose be identified with sums which, under s. 114, the [corporation] elect to apply out of the general rate fund for the purpose of the undertaking. Moreover, there is nothing compulsory about the application and it is not true to say that there is anything in the section which makes it illegal for the [corporation] to apply the profits of their undertakings for any purpose, including the payment of interest, to which

their moneys can otherwise lawfully be applied. There is no need to deal specially with s. 115, which carries the matter no further."

It is conceded that for all material purposes s. 112 of the South Shields Corporation Act, 1935, corresponds to s. 54 of the Leeds Corporation (Consolidation) Act, 1905, and s. 113 of the Act of 1935 corresponds to s. 337 of the Act of 1905. It appears to me that the sole remaining question is: Is the passage from the judgment of LORD GREENE, M.R., to be regarded as of general application, or is it a passage the application of which is in some way to be limited to a question involving income tax considerations? In my view, it cannot be so limited, and it must be regarded as a passage of general application. In the first place, I would point out that the reason which LORD GREENE, M.R., gives for the keeping of separate accounts is that it

"was . . . necessary, since, if the only account kept had been that of the general rate fund, it would have been impossible to ascertain the financial position of the undertakings."

He says later:

"The actual money represented by the surplus revenue of the undertaking does, of course, go to swell the amount standing in the general rate fund; but its identity is lost and it cannot for any relevant purpose be identified . . ."

Those appear to me to be the reasons given by LORD GREENE, M.R., to lead up to the consideration of the impact on the income tax aspect of the matter of the conclusions formed on the construction of the relevant sections of the special Act. It appears to me that this case is for all material purposes on all fours with that case, and, although I am not prepared to say that I am, strictly speaking, bound by that case, I cannot find any justifiable reason for not applying that reasoning. Further, it will be appreciated, in view of what I have said earlier, that it coincides with the view to which I would myself have come apart from any authority. For these reasons I am of opinion that the corporation were entitled to do what they did do, and that the action fails.

Judgment for the corporation.

Solicitors: *Sherwood & Co.* (for the gas board); *Sharpe, Pritchard & Co.*, agents for *O. A. Radley*, town clerk, Leeds (for the corporation).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

GREEN AND ANOTHER v. THAMES LAUNCHES, LTD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), June 25, 27, 1952.]

Licensing—Passenger vessel—Sale not restricted to permitted hours—Finance (1909-10) Act, 1910 (c. 8), sched. I, Part D—Licensing Act, 1921 (c. 42), s. 1 (1), s. 18.

The sale of intoxicating liquor to a passenger on board a passenger vessel in respect of which a passenger vessel licence for the sale of such liquor has been granted by the Commissioners of Customs and Excise under the Finance (1909-10) Act, 1910, s. 43, and sched. I, Part D, is not restricted to the hours during which intoxicating liquor may be sold on licensed premises under the Licensing Act, 1921, s. 1 (1).

Gallagher v. Rudd ([1898] 1 Q.B. 114), distinguished.

AS TO SALE OF INTOXICATING LIQUORS IN PASSENGER VESSELS, see HALSBURY, Hailsham Edn., Vol. 19, p. 121, paras. 285-287.

Case referred to:

- (1) *Gallagher v. Rudd*, [1898] 1 Q.B. 114; 67 L.J.Q.B. 65; 77 L.T. 367; 61 J.P. 789; 30 Digest, Replacement, 78, 603.

ACTION for a declaration and injunctions.

The plaintiffs were shareholders in the defendant company which owned a fleet of seventeen passenger vessels in respect of twelve of which the company or their servants held excise licences for the sale of intoxicating liquor and tobacco to passengers on board the vessels. The plaintiffs contended that since 1945, contrary to the provisions of the Licensing Act, 1921, the defendants had habitually sold, and that they intended to continue to sell, intoxicating liquor by retail in each of the twelve vessels to passengers for consumption in the vessels at times other than those prescribed in the Act as the permitted hours. In particular, they said that on May 25, 1952, the defendants' motor vessel, Queen Elizabeth, left Westminster at 11.30 a.m. carrying passengers, and, after calling at Putney, Kew, Richmond and Kingston, arrived at Hampton Court at 3.45 p.m., and that the vessel left Hampton Court at 4.30 p.m. carrying passengers, and, after calling at Kingston, arrived at Richmond at 5.30 p.m. Except between 3.45 and 4.30 p.m., and when the vessel was alongside piers or embarking or disembarking passengers, the defendants throughout sold intoxicating liquor to passengers and permitted passengers to consume them in the vessel.

The plaintiffs sought a declaration that it was illegal for the defendants to sell by retail, or permit the consumption of, intoxicating liquor in the vessels while engaged in carrying passengers except during the permitted hours under the Licensing Act, 1921. They also claimed injunctions restraining the defendants from selling by retail, and from permitting passengers to consume, intoxicating liquor in the vessels while engaged in carrying passengers except during such permitted hours. The defendants denied that the facts alleged, which they admitted, disclosed any breach of the Licensing Act, 1921, and contended that they were authorised by their excise licences to sell by retail intoxicating liquor in the vessels while carrying passengers for passengers to consume it on board, and that the provisions of the Licensing Act, 1921, relating to permitted hours did not apply to the sale and consumption of intoxicating liquor in the vessels while engaged in carrying passengers.

Wingate-Saul for the plaintiffs.

Percy Lamb, Q.C., and *Gordon Hardy* for the defendants.

Cur. adv. vult.

June 27. LORD GODDARD, C.J., read the following judgment: The defendants are a company owning a fleet of passenger vessels plying on the river

Thames for the conveyance of passengers between Westminster and Hampton Court. The master of each of these vessels or some other person belonging thereto holds a passenger vessel licence granted by the Commissioners of Customs and Excise under the Finance (1909-10) Act, 1910, s. 43 and sched. I, enabling him to sell intoxicating liquor to passengers on board the vessel, and the plaintiffs, who are shareholders in the company, bring this action claiming certain declarations and injunctions with the object of obtaining a decision whether intoxicating liquor can be lawfully sold on board these vessels at hours other than those permitted by the Licensing Act, 1921.

Section 43 of the Finance (1909-10) Act, 1910, provides that:

"There shall be charged, levied, and paid on the licences for the manufacture or sale of intoxicating liquor specified in sched. I to this Act, the duties of excise specified in that schedule, and the provisions expressed in that schedule to be applicable to any such licences shall have effect with respect to those licences."

Part D of the schedule (under the heading "Passenger Vessel Licences") provides for a duty of £10 to be paid in respect of an annual licence taken out by the master or other person belonging to the vessel nominated by the owner, and a duty of £2 if it is to be in force for one day only. The provisions applicable to these licences are that a passenger vessel licence granted in respect of any vessel authorises the sale by retail while the vessel is engaged in carrying passengers of any intoxicating liquor on board the vessel to passengers for consumption on board the vessel, and authorises the sale of tobacco as well as of intoxicating liquor. A passenger vessel is defined in s. 52 and means:

"... a vessel of any description employed for the carriage and conveyance of passengers which goes from any place in the United Kingdom to any other place in the United Kingdom, or goes from and returns to the same place in the United Kingdom on the same day."

The Licensing Act, 1921, ss. 1, 2, and 20, substituted hours during which liquor may be sold on licensed premises for provisions in the Licensing (Consolidation) Act, 1910 (ss. 54, 56, and sched. VI) which prescribed the hours during which premises had to be closed, so that any offence dealing with this subject-matter now is for the sale otherwise than during permitted hours whereas formerly it was for the sale during closing hours.

The contention of the plaintiffs briefly is that the matter is governed by s. 18 of the Act of 1921 which provides that the provisions of the Act with respect to licensed premises apply to any premises or place where intoxicating liquors are sold by retail under a licence, so it is said that the sale in a passenger vessel can only take place within the same hours as liquor can be sold at licensed premises on shore. By s. 22 (2) of the Act of 1921 that Act is to be construed as one with the Licensing (Consolidation) Act, 1910, and by s. 111 (2) of the latter Act it is provided:

"Nothing in this Act shall affect or apply to ... (f) the sale of intoxicating liquor in passenger vessels in pursuance of the Acts in that behalf."

Fully to appreciate the contentions on either side it will be convenient to deal as briefly as may be in chronological order with the Acts which have dealt with the sale of liquor on board passenger vessels.

By the Excise Licences Act, 1825, s. 13, it was provided that no excise licence should be granted for the sale of any beer or cyder or perry by retail to be drunk or consumed on the house or premises of the person applying for such licence unless a justices' licence permitting the applicant to sell it had been first granted. I can find nothing to suggest that it was ever thought that a house or premises in this section included a vessel of any description. By the Passage Vessel Licences Act, 1828, it was recited in the preamble that it would greatly tend to the convenience and accommodation of passengers in vessels if the master or

commander or other person of or belonging to such vessels were by law authorised to provide for and to retail and sell to such passengers carried in packet boats and other vessels from one part of the United Kingdom to another part not only the liquors referred to in s. 13 of the Act of 1825, but also foreign wine, spirituous liquors and tobacco. The Act, by s. 1, authorised the commander or some other person to be licensed to retail such liquors, but only to passengers on board such vessels and to be consumed by them in and on board thereof during the voyage. The section concluded with the words:

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“anything in any Act or Acts in force immediately before the passing of this Act to the contrary notwithstanding.”

On the same day as this Act received the royal assent the well-known Alehouse Act, 1828, also became law. That Act dealt generally with the grant by justices to fit and proper persons of licences authorising them to keep inns and alehouses and to sell excisable liquors of all sorts, but as it came into force contemporaneously with the Passage Vessel Licences Act, 1828, it was not in force immediately before the passing of the latter Act. By s. 42 of the Metropolitan Police Act, 1839, it was enacted that no licensed victualler or other person should open his house within the metropolitan police district for the sale of liquor on Sundays, Christmas Day and Good Friday before the hour of one in the afternoon except for refreshment for travellers. It seems to have been recognised that that section did not apply to the sale of liquor on board a ship that was moored in the Thames, and, no doubt, sellers of liquor took full advantage of that situation. So, by the Licensing Act, 1842 (an Act for the transfer of licences and regulation of public houses), s. 5, which is still in force, it was expressly provided that:

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“No wines, spirits, or other excisable liquors shall be sold by retail on board of any boat, steamboat or other vessel which shall be moored or lying at anchor within the metropolitan police district, during the hours and times on Sundays, Good Friday, and Christmas Day on which licensed victuallers are by law obliged to keep their houses closed . . . ”

This, it will be noticed, has no application when the boat or vessel is on a voyage on the river. There the matter rested until the Licensing Act, 1872. By s. 72 of that Act it was provided that nothing in the Act should affect or apply to, inter alia, the sale of intoxicating liquor by proprietors of theatres in pursuance of the Acts in that behalf and the sale of intoxicating liquor in packet boats in pursuance of the Acts in that behalf. I mention here the provision with regard to theatres because of a decision on which the plaintiffs rely and with which I shall deal hereafter. The Finance (1909-10) Act, 1910, to which I have already referred, received the royal assent on Apr. 29, 1910, and on Aug. 3 the Licensing (Consolidation) Act, 1910, became law. In the latter Act the expression “licensed premises” is defined in s. 110 as meaning

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“premises in respect of which a justices’ licence has been granted and is in force.”

By s. 111 (2) (e) and (f), the same exemption regarding theatres and passenger vessels is found as in the Act of 1872, and in the same words, except that the words “passenger vessels” are used instead of “packet boats”. The only other statutory provision to which I think it is necessary here to refer is s. 18 of the Licensing Act, 1921, the effect of which I stated earlier, but, as the Act of 1921, by s. 22 (2), is to be read together with the Licensing (Consolidation) Act, 1910, it follows that the exemption contained in that Act applies also to the Act of 1921, and, therefore, the provisions of s. 18 applying the provisions of the Act with respect to licensed premises to any premises or places where intoxicating liquors are sold under a licence do not apply to the sale of intoxicating liquor in passenger vessels in pursuance of the Acts in that behalf. It is, therefore, clear that from 1828 onwards the sale of intoxicating liquor in passenger vessels, provided an excise licence has been granted, has always been kept free from the provisions of

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general licensing Acts provided only that the sale has been in pursuance of the Acts relating to sales in these vessels, and it is to be observed that the Act of 1828 was not repealed till the Finance (1909-10) Act, 1910.

A The Finance (1909-10) Act, 1910, which deals with the duty and the provisions applicable to such licences, contains in sched. I, Part D, under the heading Passenger Vessel Licences, in substance the same provisions as the Passage Vessel Licences Act, 1828. The sale must be on board a passenger vessel as defined in the Act, and liquor can only be supplied to passengers for consumption on board the vessel and during the voyage. So the place, the time, and the customers are all designated by the Acts, and, in my opinion, it would be perfectly clear that the permitted hours which apply to sales on land do not apply to sales on passenger vessels were it not for a difficulty apparently caused by the decision in *Gallagher v. Rudd* (1). That was a case dealing with a sale at a theatre, and it will be remembered that the Act of 1872 excluded the sale of intoxicating liquor by proprietors of theatres in pursuance of the Acts in that behalf as it did the sale of intoxicating liquor in packet boats. The Divisional Court held that that exemption did not apply to exempt the proprietor of a theatre from the statutory provisions relating to selling intoxicating liquor during closing hours. The court held that the effect of the exemption was only to allow the proprietor of a theatre to obtain an excise licence without obtaining a justices' licence. WRIGHT, J., having rejected two possible constructions, said ([1898] 1 Q.B. 118):

D "There remains a third possible meaning—namely, that although the exemption is not absolute, and is not limited to the mere sale, yet it is an exemption limited to the express statutory provisions with respect to theatres. One of those is that proprietors of theatres may sell intoxicating liquors by retail under an excise licence; they are not required to have a justices' licence. I think that the words in sub-s. (4) 'in pursuance of the Acts in that behalf', intend to limit the exemption to the particular rights which are given to proprietors by the Acts in that behalf. One effect of that is that some of the other exemptions contained in s. 72 will not be affected—at any rate the eighth exemption will not. I think that the same principle of construction would apply to the sale of intoxicating liquors in packet-boats and canteens."

F It is, therefore, said that that decision should be followed in deciding the present case. Admittedly, the opinion expressed by the learned judge is only obiter, but great weight attaches to any opinion of his, more especially on the construction of statutes. I am, however, by no means certain that he meant to say that, so far as the sale of intoxicating liquor in packet boats was concerned, it was clear, in his opinion, that the exemption only excused the licensees from getting a justices' licence. What he was holding was that the words in s. 72 (4) of the Act of 1872 were intended to limit the exemption to the particular rights which are given to proprietors by the Acts in that behalf. The enactment which applied to theatres was the Excise Act, 1835, s. 7, which provided that it should be lawful for the commissioners and officers of excise to grant retail licences to any person in any theatre licensed by the Lord Chamberlain or by justices of the peace without the production by the person applying for such licence of any certificate or authority for such person to keep a common inn, alehouse or victualling house. In view of those words, I understand the court to have meant that the only privilege conferred on a theatre owner was to obtain an excise licence without first obtaining a justices' licence, but it seems to me that the provisions of the Acts dealing with sales on board passenger vessels are much wider. I have already pointed out that the Acts themselves lay down where liquor may be sold, to whom it may be sold, and when it may be sold, the latter being during the voyage and only during the voyage. When the Act of 1882

was passed it was clear, I think, that no one could have contended that the master of a passenger vessel either ought to or could have obtained a justices' licence. Justices only granted licences in respect of alehouses, and, no doubt, did so before the Alehouse Act, 1828, came into force. It does not seem to me, therefore, that the reasoning which was applied by this court to theatres applies to passenger vessels.

The provisions of the Finance (1909-10) Act, 1910, apply to railway refreshment cars (sched. I, Part E (Railway Restaurant Car Licences)), and have now been applied to aircraft (sched. I, Part CC (Passenger Aircraft Licences) (as added by Finance Act, 1946, s. 9 (1)) and it seems to me to be impossible to hold that provisions with regard to permitted hours can apply to the sale of liquor in aircraft nor has it ever been suggested that they apply to restaurant cars. The extraordinary difficulties which would arise with regard to passenger vessels, restaurant cars, or aircraft, can easily be appreciated when it is remembered that nowadays permitted hours vary, not only from county to county, but often from one licensing district to another. Justices under s. 1 (1) of the Licensing Act, 1921, have a considerable discretion as to permitted hours. In the provinces they can fix any eight hours beginning not earlier than 11 a.m. and ending not later than 10 p.m. with a break of at least two hours after 12 noon. In the metropolis, nine hours are substituted for eight and 11 p.m. for 10 p.m. Outside the metropolis justices can substitute eight and a half hours for eight and 10.30 for 10 o'clock at night, and can substitute some hour earlier than 11 a.m. but not earlier than 9 a.m. for 11 a.m. Thus it will be seen that it would be quite impracticable to apply the provisions of permitted hours to sales taking place during journeys which must pass through different districts where no uniformity may prevail. It is also a remarkable fact that it has never yet been suggested in this court that the provisions with regard either to closing hours or to permitted hours apply to these vessels although the Act of 1872 which first imposed closing hours has been in force now for eighty years. For these reasons, in my opinion, this action fails, as I decide that the provisions with regard to permitted hours do not apply to passenger vessels.

Judgment for defendants.

Solicitors: *B. Hoddinott & Son* (for the plaintiffs); *Lovell, White & King* (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

COLIN & SHIELDS v. W. WEDDEL & CO., LTD.

[COURT OF APPEAL (Singleton, Denning and Romer, L.J.J.), June 25, 26, 27, 1952.]

Shipping—"Ship's delivery order"—*Request to ship to deliver goods to buyers—Order addressed by shipowner to dock master porter—Shipment of goods to named port—Shipment to different port and transshipment to named port—Buyers' right to reject.*

A A contract for the sale of goods and for their shipment to Liverpool provided that the buyers were to make payment for the goods against documents consisting of invoice, full set of bills of lading, and/or ship's delivery order (to be countersigned by banker, shipbroker, captain, or mate, if so required by the buyers), and a policy or certificate of insurance. B If a bill of lading and/or insurance policy were not supplied, the buyers were to be put in the same position as if they had been in possession of such documents. The goods were shipped by ss. *Devis* to Manchester instead of to Liverpool, and on Aug. 27, 1951, four days before their arrival there, the bill of lading was tendered to the buyers, who rejected it on the ground that it was made out for delivery to Manchester. Between Sept. 1 and 7 the goods were discharged at Manchester. On Oct. 13 they were loaded in a dumb barge and carried to Liverpool where they were discharged on Oct. 17. On C Oct. 15, while the goods were in transit, the sellers made a second tender of documents, not including a bill of lading, but including a document which they claimed to be a ship's delivery order, made out on the shipowner's notepaper and signed by the shipowners in the following form: "Oct. 11, 1951. Rio Grande Bill of Lading No. 7. To the master porter of the hide berth in the North Carriers Dock, Liverpool. Deliver to [the buyers] the following goods", followed by a description of the goods, "ex ss. *Devis*". The buyers D refused to accept the documents or make payment against them.

HELD: (i) under the contract of sale the sellers were bound to procure a contract of affreightment under which the goods would be delivered at the destination contemplated by the contract of sale; no bill of lading E had ever existed for the carriage of the goods to Liverpool; and, therefore, the sellers had failed to perform their contractual obligation and the buyers were entitled to refuse to take up and pay against the documents tendered.

(ii) the contract of sale contemplated a delivery order by the sellers to the ship requesting the ship to deliver to the buyers the goods shipped F under the bill of lading, and, as the document dated Oct. 11 did not comply with that requirement, it was not a ship's delivery order within the meaning of the contract and the buyers were entitled to refuse payment against it.

Decision of SELLERS, J. ([1952] 1 All E.R. 1021), affirmed.

AS TO DELIVERY BY BILL OF LADING AND OTHER DOCUMENTS, see HALSBURY, Hailsham Edn., Vol. 29, pp. 142-145, paras. 178-182; and FOR G CASES, see DIGEST, Vol. 39, pp. 575-581, Nos. 1801-1839.

Cases referred to:

- (1) *Johnson v. Taylor Brothers & Co., Ltd.*, [1920] A.C. 144; 89 L.J.K.B. 227; 122 L.T. 130; 39 Digest 660, 2515.
- (2) *Ireland v. Livingston*, (1872), L.R. 5 H.L. 395; 41 L.J.Q.B. 201; 27 L.T. 79; 39 Digest 560, 1677.
- H (3) *E. Clemens Horst Co. v. Biddell Brothers*, [1912] A.C. 18; 81 L.J.K.B. 42; 105 L.T. 563; *revsq. s.c. sub nom. Biddell Brothers v. Clemens (E.) Horst Co.*, [1911] 1 K.B. 934; 39 Digest 575, 1801.
- (4) *Sharpe (C.) & Co. v. Nosawa & Co.*, [1917] 2 K.B. 814; 87 L.J.K.B. 33; 118 L.T. 91; 39 Digest 576, 1803.
- (5) *Comptoir D'Achat et de Vente du Boerenbond Belge S/A v. Luis de Ridder, Limitada (The Julia)*, [1949] 1 All E.R. 269; [1949] A.C. 293; [1949] L.J.R. 513; 2nd Digest Supp.

(6) *Re Denbigh Cowan & Co. & Atcherley (R.) & Co.*, (1921), 90 L.J.K.B. 836; 125 L.T. 388; 39 Digest 580, 1834.

(7) *Heilbut, Symons & Co., Ltd. v. Harvey, Christie Miller & Co.*, (1922), 12 Lloyd, L.R. 455.

APPEAL by sellers from an order of SELLERS, J., made on Apr. 1, 1952, reported [1952] 1 All E.R. 1021, answering in favour of the buyers questions of law in an arbitrators' award in the form of a Special Case. The sellers under a c.i.f. contract in modified form tendered to the buyers a bill of lading made out for Manchester instead of for Liverpool as required by the contract. The buyers rejected the goods and claimed arbitration, and the arbitrators found that the documents tendered were not in accordance with the contract. Following that award the sellers made a fresh tender of documents including a "shipping company's release" relating to the further carriage of the goods from Manchester to Liverpool. The arbitrators found that the second tender was as called for by the contract, and that the buyers were not entitled to reject the documents. From this finding the buyers appealed to the arbitration tribunal of the trade, in accordance with the contract, and the tribunal upheld the award of the arbitrators, but at the request of the buyers stated their award in the form of a Special Case for the opinion of the court. On that Case SELLERS, J., found in favour of the buyers, and from his order the sellers appealed.

Roskill, Q.C., and *Leech* for the sellers.

Mocatta, Q.C., and *H. A. P. Fisher* for the buyers.

SINGLETON, L.J.: This is an appeal from a judgment of SELLERS, J., given on an award in the form of a Special Case stated by the appeal tribunal of the Hide and Skin Shippers' and Agents Association, Incorporated.

On June 12, 1951, the sellers entered into a contract with the buyers for the sale of ox-hides which were in South America. The contract incorporated the official contract form drawn up by the International Council of Hide and Skin Sellers' Associations and the International Council of Tanners, and there was used what is headed "C.i.f. Contract for Hides", Form "11 International." Clause 1, which is the typewritten part of the contract, is signed by the sellers and addressed to the buyers, who signed at the foot in acknowledgment, and is in these terms:

"We have this day sold to you, the following. 1,000 (one thousand) w/s Anglo Pelotas frigorifico ox-hides estimated shipping average 26/28 kilos at 34d. per lb. c. & f. Liverpool shipping weights. Any export charges, duties and/or exchange taxes imposed after and including date of contract to be for buyers' account. Shipment: by steamer and/or steamers within three months subject freight and export licence obtainable. Freight: basis 163s. per ton of 2,240 lb. Any variation for buyers' account. Payment: by cash upon presentation of the shipping documents in London on or before arrival of the steamer, at buyers' option. Insurance: marine and war risk insurance to be covered by sellers for buyers' account. Arbitration: Liverpool."

The first thing I would point out is that the contract is a contract c. & f. Liverpool. Thus, shipment by steamer or steamers should be shipment to Liverpool, and by a ship which was to sail to Liverpool. Freight basis 163s., I should assume, is freight for the voyage to Liverpool. The same applies to insurance. Difficulties arise on the printed form, cl. 2 and 3 of which read:

"2. Shipment. With all conditions as per bill of lading by steamer and/or steamers direct and/or indirect, with liberty to tranship. The words steamer and/or steamers are intended to include any full-powered primarily engine-driven vessel. The bill of lading to be considered proof of date of shipment in the absence of conclusive evidence to the contrary. Declaration

of shipment to be made with reasonable dispatch, and by cable at sellers' expense if required. 3. Payment (Supplementary). Should vessel be officially reported lost payment becomes due on first presentation of documents in accordance with the terms of payment set forth in this contract. Documents to consist of invoice, and, where usual, weight certificate and/or scale weights to be attached, full set of bills of lading or satisfactory guarantee for missing copies, and/or ship's delivery order (the latter to be countersigned by banker, shipbroker, captain, or mate, if so required) and policy or certificate of insurance. Should bill of lading and/or insurance policy not be supplied, buyers to be put in the same position as if they had been in possession of such documents. Sellers to be responsible for any extra expenses incurred through late tender of documents."

When the goods were shipped in ss. Devis at Rio Grande, they were shipped in a ship bound for Manchester instead of in a ship bound for Liverpool, and the bill of lading dated July 22, 1951, engages the ship to carry those goods, "to be delivered from the ship's tackle where the ship's responsibility shall cease" at the port of Manchester. Devis made the journey to Manchester. On July 30 the sellers made a declaration of shipment. On Aug. 24 the sellers told the buyers verbally that the bill of lading had been wrongly made out by the shipping company, Lamport & Holt, Ltd., for delivery to Manchester. Some time between Aug. 24 and 27 the sellers told the buyers that they had succeeded in getting the owners of the Devis to clause the bill of lading in transit to Liverpool, and there appear on the bill of lading the words: "In transit to Liverpool" initialled by someone on behalf of the ship. On Aug. 27 the sellers tendered to the buyers documents which included the bill of lading, an invoice, and a certificate of insurance for the voyage from Brazil to a United Kingdom port. The buyers rejected the goods and claimed arbitration. On Aug. 28 the Devis arrived in the Mersey, and she proceeded up the Ship Canal to Manchester, arriving at Manchester on Aug. 31. She commenced discharging on Sept. 1 and finished discharging on Sept. 7, and she then sailed for Glasgow. While she was at Manchester she discharged the one thousand hides which had been carried in her from Rio Grande.

The arbitration called for by the buyers took place, and the arbitrators awarded that the documents tendered were not documents as called for by the contract, and that the buyers were entitled to reject them. There was no appeal from that award. On Oct. 13 the one thousand hides were loaded at Manchester on a dumb barge, which left Manchester on Oct. 15 for Liverpool, and that barge discharged its cargo of hides on Oct. 17. On Oct. 15 the sellers wrote to the buyers regarding these goods:

"Referring to our conversation over the telephone this morning, we understand from the shipping company that the above hides are now due at their final destination—Hide Berth, North Carriers Dock, Liverpool. We, therefore, now have pleasure in presenting the documents comprising shipping company's release, insurance certificate, specification, invoice, and shall be pleased to receive your cheque for £8,690 6s. 1d. in exchange for same."

The most important of those documents is that which is referred to in the letter as the shipping company's release. It has been spoken of throughout the hearing of this appeal as a delivery order, and it is the contention of one side that it is properly within the description of the words "ship's delivery order" in the printed form of contract. It is a document which is headed with the name of the shipowners, Lamport & Holt, Ltd. It has "Rio Grande" on the left-hand side, it has a reference to bill of lading no. 7, which is the number of the bill of lading in this case, and on its right-hand side it has at the head: "Royal Liver

Building, Liverpool, Oct. 11, 1951." It is addressed to the master porter of the hide berth in the North Carriers Dock, Liverpool, and it reads:

"Deliver to Messrs. Colin & Shields [the buyers], the following goods
1,000 (One thousand) wetsalted ox-hides ex ss. Devis. Lamport & Holt
Line, Ltd."

with a signature below. One of the questions of importance is whether or not that document can properly be described as a ship's delivery order. At the date of that document, Oct. 11, 1951, the hides were still in Manchester. The master porter at the hide berth in the North Carriers Dock, Liverpool had never seen them. I do not know whether he had heard of them, or how that document came about other than as appears in the Case. It is expressly found in the Case that no communication in writing passed between the sellers and the Lamport & Holt line from the date of the award on Sept. 12 to the date of the document which is described in the Case as the shipping company's release. The buyers replied to that letter returning the documents and saying:

"It is our opinion that you are not entitled to tender a delivery order which has been exchanged by the shipping company for a bill of lading which has already been held at arbitration to be not in accordance with the contract."

The sellers wrote again calling for an arbitration. Arbitrators were appointed, and on Nov. 12 the arbitrators published their award in these terms:

"That the documents tendered on Nov. 15, 1951, are as called for by the contract, and the buyers were not entitled to reject them."

It is not said that it was not open to the sellers to make a second tender, but a question was raised by counsel for the buyers whether the second tender was in time, having regard to the terms and conditions of the contract between the parties. The buyers appealed to the arbitration tribunal of the trade. That tribunal supported the award of the arbitrators, and held that the documents were as called for by the contract, and that the buyers were not entitled to reject them, but at the request of the buyers they stated their award in the form of the Special Case which came before SELLERS, J. The question which they propounded was whether, on the facts as found and on the true construction of the contract, the buyers were in breach of the contract in refusing to make payment against the documents tendered by the sellers on Oct. 15, 1951.

Much has been said as to the form of the contract. It is headed "C.i.f. Contract for Hides." It contains terms both in the typewritten part and in the printed part which are not in accordance with that which one finds in an ordinary contract on c.i.f. terms. None the less, the contract is on a form which the parties describe as a c.i.f. contract. That is a matter for consideration, but one must look at the whole of the contract and its terms to discover what the obligations are of the sellers, on the one hand, and of the buyers, on the other. It is not easy to state the position accurately because of the terms which appear sometimes to contradict one another.

Counsel for the sellers submitted that the sellers had done all that they were called on to do. He directed our attention in particular to cl. 3 of the printed form of contract, which I have read, and submitted that the document which was described as the shipping company's release was a ship's delivery order within the meaning of cl. 3; that the insurance certificate, specification, and invoices were all in order; and that, therefore, the second tender of Oct. 15 was a good one. I have grave doubt as to the certificate of insurance, which was one of the documents included, but I do not propose to express any concluded view on that document. More importance is to be attached to that which has been called a delivery order, which counsel for the sellers contends is properly described as a ship's delivery order, and which he claims it was open to the sellers to tender in place of a bill of lading. Counsel for the buyers submitted

that, even though you may have a ship's delivery order in place of a bill of lading under cl. 3, still that clause, as the very existence of a ship's delivery order pre-supposes, pre-supposes a bill of lading and a proper bill of lading, and he submitted, in the first place, that the documents tendered were a bad tender because the goods were never shipped to Liverpool as provided for in the contract. The second submission which counsel for the buyers made was that the shipping company's release could not be properly regarded as a ship's delivery order within cl. 3.

SELLERS, J., who reversed the finding of the appeal tribunal on questions of law, held that the view that was put forward in this court by counsel for the buyers was right on both those grounds. The learned judge quoted a passage from the speech of LORD ATKINSON in *Johnson v. Taylor Brothers & Co., Ltd.* (1) ([1920] A.C. 155):

"My Lords, the authorities I shall presently cite establish clearly, I think, that when a vendor and purchaser of goods situated as they were in this case enter into a c.i.f. contract, such as that entered into in the present case, the vendor in the absence of any special provision to the contrary is bound by his contract to do six things. First, to make out an invoice of the goods sold. Second, to ship at the port of shipment goods of the description contained in the contract. Third, to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract. Fourth, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer. Fifthly, with all reasonable despatch to send forward and tender to the buyer these shipping documents, namely, the invoice, bill of lading and policy of assurance, delivery of which to the buyer is symbolical of delivery of the goods purchased, placing the same at the buyer's risk and entitling the seller to payment of their price. These authorities are *Ireland v. Livingston* (2) per BLACKBURN, J.; *Biddell Bros. v. E. Clemens Horst Co.* (3), on appeal *E. Clemens Horst Co. v. Biddell Bros.* (3); and *C. Sharpe & Co. v. Nosawa & Co.* (4). These cases also establish that if no place be named in the c.i.f. contract for the tender of the shipping documents they must prima facie be tendered at the residence or place of business of the buyer."

Having read that passage, SELLERS, J., said ([1952] 1 All E.R. 1023):

"... the vendor is bound, [LORD ATKINSON] says ([1920] A.C. 156) '... to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract'."

The learned judge pointed out (*ibid.*) that the contract permitted transshipment, and provided, by cl. 3 (b) of the International Hide Booklet which appears on the back of the form of contract:

"that, if transshipment meant the drawing up of fresh bills of lading, payment should be made against presentation of the fresh documents which had been drawn up."

He continued:

"No bill of lading, original or fresh, ever existed for the carriage of the goods to Liverpool, and, in my opinion, the sellers failed fundamentally to perform their contractual obligation by never having such a document."

That is the view of the judge on the first submission raised by counsel for the buyers in this court, and, with respect, I agree with it. This contract is not in all its provisions a c.i.f. contract or a contract on c.i.f. terms, but I think that under it there was clearly a duty on the sellers to arrange a proper contract of affreightment—i.e., a contract under which the goods would be carried from South America to Liverpool. There was no such contract of affreightment. I think that is fatal to the sellers' case.

The second point arises on the document which has been called the ship's delivery order. As counsel for the sellers said, a ship's delivery order has never been defined with precision. I will not attempt any general definition, but for the purposes of this contract I take it to mean an order on the ship to deliver goods she was carrying given by a person who had a right to give it. It might be, it is said, an order given by the ship. At least, it must have, in my view, some connection with the ship, or else it is not a ship's delivery order. The order to which I have referred is given by the Lamport & Holt line to the master porter of the hide berth in the North Carriers Dock at Liverpool while the goods are still in Manchester. It is an order to deliver one thousand wetsalted ox-hides ex the ss. Devis. In that sense it mentions the name of the ship and it bears the name of the shipowners, but otherwise there is no connection with the ship. The use of a delivery order within cl. 3 of the printed form of contract normally would be in case the goods comprised in a bill of lading had been split up into different consignments and sold to different persons. In such a case delivery orders would be a convenient method of dealing with the goods, and if in any such case the delivery order was countersigned by bank, shipbroker, captain, or mate, if so required (particularly if by the captain or mate), the one who had the delivery order would be virtually in the same position as if he had had a bill of lading. That clause of the contract contains the words "... buyers to be put in the same position as if they had been in possession of such documents . . . " I wholly fail to see that the handing to the buyer, or the tendering to the buyer, of the document called "ship's release" could have any such result, and, again, I think the judgment of SELLERS, J., on this point was right. The learned judge said ([1952] 1 All E.R. 1023, 1024):

"A ship's delivery order must mean either a delivery order by the ship or to the ship. As provision is made for it to be countersigned, if required by the buyers, not only by a banker and the shipbroker, but also by the captain or mate, the contract would appear to contemplate a delivery order by the sellers to the ship requesting the ship to deliver to the buyers the goods shipped under the bill of lading. Such an order would entitle the buyers to receive the goods from the ship in the same way as would a bill of lading, and it would have to be given and presented while the goods were in the ship's possession."

I think that view is supported by that which was said by LORD PORTER in *The Julia* (5) ([1949] 1 All E.R. 276). SELLERS, J., came to the conclusion that this was not a proper tender. He said that the sellers sought to rectify the position to enable them to make a second tender, and on Aug. 28, 1951, the shipowners wrote to the sellers with regard to the Devis:

"We regret to find that bills of lading nos. 6 and 7 from Rio Grande do Sul covering hides have been issued by our office in Rio Grande on the basis of delivery Manchester. The two bills of lading ought to read 'delivery Liverpool—with transshipment Manchester'. The vessel is discharging in Manchester, but to put the matter in order, we are prepared to pay the cost of transit of these hides from Manchester to Liverpool, and we feel sure that this will meet with your requirements."

I do not think that that, nor anything which was done, had the result of putting the matter in order, nor do I think that there was a good tender of documents on Oct. 15. [HIS LORDSHIP then referred to the question whether the documents had been presented within the time required by the contract, and found it unnecessary to express a final opinion.] In my opinion, this appeal should be dismissed and the judgment of SELLERS, J., upheld by this court.

DENNING, L.J.: The contract of sale was a c.i.f. contract—modified, no doubt, in some respects, but, nevertheless, a c.i.f. contract which carried with it an obligation on the sellers to provide a proper contract of affreightment in

the form of a bill of lading which could be transferred to or held on trust for the buyers. The most important modification is contained in condition 3 of the official contract form of the Hide and Skin Sellers' Associations. It enables the sellers to supply a ship's delivery order instead of a bill of lading. This modification is made so as to enable a seller to split up a bulk consignment into smaller parcels and to sell them to different buyers while the goods are still at sea. A seller often only has one bill of lading for the whole consignment, and he cannot deliver that one bill of lading to each of the buyers because it contains more goods than the particular contract of sale, so in each of his contracts of sale the seller stipulates for the right to give a ship's delivery order. The bulk consignment can then be split up into small parcels each covered by a ship's delivery order instead of a bill of lading. Such being the commercial object of this clause, I agree with my Lord as to the meaning of "ship's delivery order" in this contract. It means, I think, an order given by the seller directed to the ship, whereby the seller orders the ship to deliver the contract goods to the buyer or his order. The ship's delivery order is not as good a protection for the buyer as a separate bill of lading would be, because it gives no cause of action against the ship unless the master attorns to the buyer, and then it gives a different cause of action which may not be as favourable as a bill of lading. To overcome these drawbacks so far as possible, the contract provides for the ship's delivery order "to be countersigned by a banker, shipbroker, captain, or mate, if so required". It also provides that the buyers are to be "put in the same position as they would have been if they had been in possession of a bill of lading". This can, I think, only be done by the sellers becoming themselves trustees for the buyers of the rights contained in the bill of lading so far as the contract goods are concerned. The contract, in effect, constitutes them trustees, and it requires as its basis the existence of the appropriate bill of lading. In support of what I have said I would only refer, in addition to *The Julia* (5), to *Re Denbigh Cowan & Co. & R. Atcherley & Co.* (6), and to *Heilbut, Symons & Co., Ltd. v. Harvey, Christie Miller & Co.* (7). Once the contract is understood in the way I have stated, this case must be decided in favour of the buyers for two reasons: (i) the sellers did not provide a proper contract of affreightment, for the bill of lading did not provide for carriage to Liverpool, but only to Manchester, and the belated clause "in transit to Liverpool" did not remedy the position, because it did not extend the contract of carriage to Liverpool; (ii) the sellers did not provide a proper ship's delivery order. The document which they presented was not an order on the ship, but an order to a porter at the docks at Liverpool who had nothing to do with the ship. I am inclined to think also the documents were not in law tendered in time, but I need not elaborate my reasons for so thinking. I entirely agree with the judgment which my Lord has delivered, and I agree that the appeal should be dismissed.

ROMER, L.J.: I also agree.

Appeal dismissed.

Solicitors: *Wilfred Ellis*, agent for *Weightman, Pedder & Co.*, Liverpool (for the sellers); *Coward, Chance & Co.* (for the buyers).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

THOMPSON v. MILK MARKETING BOARD.

[COURT OF APPEAL (Somervell, Birkett and Hodson, L.JJ.), June 10, July 4, 1952.]

Rates—Agricultural buildings—Bull pens, stores, laboratory, offices—Artificial insemination of cattle—Collection of semen from bulls—Rating and Valuation (Apportionment) Act, 1928 (c. 44), s. 2 (2)—Local Government Act, 1929 (c. 17), s. 67 (1).

A cattle breeding centre established to assist in the breeding of cattle by artificial insemination consisted of twenty-nine acres of agricultural land, of which eight acres were arable and twenty-one acres were grass, and also of buildings consisting of bull pens, an office block, a laboratory, isolation boxes, and fodder stores. The bulls were normally housed in the bull pens, but on occasion they were let out on the grass land for exercise. The animals consumed the produce of the arable land and the whole twenty-nine acres supplied twenty to twenty-five per cent. of the food required. A charge was made for the insemination of cows which was carried out on the farms of subscribers to the centre.

HELD: the buildings were occupied together with agricultural land and were used solely in connection with agricultural operations thereon, within s. 2 (2) of the Rating and Valuation (Apportionment) Act, 1928, and, therefore, under s. 67 (1) of the Local Government Act, 1929, the occupiers of the centre were not liable to pay rates in respect of the buildings.

FOR THE RATING AND VALUATION (APPORTIONMENT) ACT, 1928, s. 2 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 20, p. 174.

Cases referred to:

- (1) *Parry v. Anglesey Assessment Committee*, [1948] 2 All E.R. 1060; [1949] 1 K.B. 246; [1949] L.J.R. 384; 113 J.P. 57; 2nd Digest Supp.
- (2) *Malcolm v. Lockhart*, [1919] A.C. 463; 88 L.J.P.C. 46; 120 L.T. 449; 7 Tax Cas. 99; 28 Digest 22, 118.
- (3) *Glanely (Lord) v. Wightman*, [1933] A.C. 618; 102 L.J.K.B. 456; 149 L.T. 121; 17 Tax Cas. 634; Digest Supp.

CASE STATED by the Lands Tribunal under the Lands Tribunal Act, 1949, s. 3 (4), and R.S.C., Ord. 58B, r. 2.

The Milk Marketing Board were the occupiers of a hereditament described as the Cattle Breeding Centre, Ringsfield, Beccles, which was operated by the board for the benefit of farmers by breeding cattle by artificial insemination. It consisted of about twenty-nine acres of arable and grass land producing about twenty to twenty-five per cent. of the food required by the animals, with buildings in which the animals were normally kept and which occupied an area of 10,704 square feet.

The board contended that the buildings were agricultural buildings within the meaning of s. 2 (2) of the Rating and Valuation (Apportionment) Act, 1928, and as such should be excluded from the valuation list, and the local valuation court upheld this contention. On appeal by the valuation officer, the Lands Tribunal, while finding that the buildings were occupied together with the agricultural land and that the operations carried out on the land were agricultural operations, were of the opinion that none of the buildings was being used solely in connection with those operations and that the land was merely auxiliary to the buildings for the purposes of the activities of the centre, and they restored the hereditament to the valuation list. The board appealed.

Rowe, Q.C., and L. A. Blundell for the Milk Marketing Board.

Sir Arthur Comyns Carr, Q.C., and Maurice Lyell for the valuation officer.

Cur. adv. vult.

July 4. The following judgments were read.

SOMERVELL, L.J.: This is an appeal by way of a Case Stated from a decision of the Lands Tribunal. The question is whether a hereditament occupied by the Milk Marketing Board, hereinafter called the board, is an agricultural hereditament within the Rating and Valuation (Apportionment) Act, 1928. The definition is contained in s. 2, which is headed "Provisions as to Agricultural

A Hereditaments," and reads as follows:

"(1) In this Act the expression 'agricultural hereditament' means any hereditament being agricultural land or agricultural buildings. (2) In this Act the following expressions have the meanings hereby respectively assigned to them—'Agricultural land' means any land used as arable meadow or pasture ground only . . . 'Agricultural buildings' means buildings (other than dwelling-houses) occupied together with agricultural land or being or forming part of a market garden, and in either case used solely in connection with agricultural operations thereon."

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If it is an agricultural hereditament it falls to be excluded from the valuation list in accordance with the provisions of s. 67 (1) of the Local Government Act, 1929. The board contend that this is an agricultural hereditament and the local valuation court so decided. On appeal by the valuation officer the Lands Tribunal decided that the buildings in question were not an agricultural hereditament and the board asked for a Case to be stated.

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The buildings in question are part of what is described as a "cattle breeding centre" at Beccles. The centre contains in addition twenty-nine acres of agricultural land of which about eight acres are arable and twenty-one acres grass land and two cottages. No question as to the rating of these arises. The centre is one of a number established by the board for the purpose of the collection of semen from bulls to be used for breeding dairy cattle by the method known as artificial insemination. Any farmer can become a member by paying £1. There are 4,029 members. Thirty-six bulls and two "teaser" cows are kept at the centre. There is an average of 360 collections of semen a month. The insemination of the cows is not done at the centre. There were some twenty-six thousand inseminations in 1949 and some thirty-four thousand in 1950. A fee of 25s. is charged. The centre is in charge of a qualified veterinary surgeon. The staff consists of four clerks, three stockmen, and nine inseminators. When a farmer wishes to have a cow inseminated, one of the inseminators takes the semen to the farm and inseminates the cow. The main part of the buildings consists of bull pens. There is also an office block, a laboratory block, isolation boxes, and fodder stores. Except on rare occasions the collections of semen take place in the building. The grass land is essential to the centre for exercising the bulls. The animals graze the land and consume the produce of the eight acres of arable. These twenty-nine acres supply about twenty to twenty-five per cent. of the total food required.

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I will now read the conclusions of the tribunal:

"(11) Although we found that all the said buildings were occupied together with the said agricultural land, and although we regarded all the operations carried out on the said land, that is to say the raising and harvesting of animal food crops and the pasturing and exercising of the animals kept at the centre, as being agricultural operations, we were of opinion that none of the buildings satisfied the test of being used *solely* in connection with those operations. We felt that we ought not to regard the bull pens block (No. 3), with accommodation for thirty-two bulls, as used solely in connection with agricultural operations on so small an area of land as twenty-nine acres; in this connection we regarded the land as merely auxiliary to the buildings for the purposes of the activities of the centre. In our opinion, it was a question of degree and we had in mind that the land

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produced only twenty to twenty-five per cent. of the food required for the animals housed. It followed that we had to take a similar view of the ancillary buildings (Nos. 4 to 7). In reference to the office block (No. 1) and the laboratory block (No. 2), we reached the conclusion that they also were not used solely in connection with agricultural operations on the said land. (12) Accordingly, we decided that none of the said buildings was an 'agricultural building' within the meaning of s. 2 of the Rating and Valuation (Apportionment) Act, 1928, and ordered that the appeal be allowed and that the hereditament be restored to the valuation list at a gross value of £120 and a rateable value of £97."

In the first place I agree that the operations carried out on the twenty-nine acres were agricultural operations. I also agree that the word "thereon" at the end of the definition means on the agricultural land, which, under the definition, includes pasture. In considering the effect of the word "solely" it is necessary to bear in mind that the agricultural operation in buildings, though in connection with, will frequently, perhaps normally, be an operation different from, that on the land. Cows are put out to pasture on the land and milked in a building. No one, I think, would dispute that such a building was within the definition. The cows are pastured in order that milk may be obtained from them and distributed. It is a combined agricultural operation carried on in part on the land and in part in the building. So, here, the keeping, feeding, and exercising of bulls for the collection and distribution of semen is the object of the centre, carried on in part on the land, in part in the building. The products of a farm, of the combined operations carried on on land and in buildings are normally disposed of in the market. Beasts are sent to be sold in markets or slaughtered for food, corn is sold to be milled, or dairy products are sold to dealers or members of the public. Counsel for the valuation officer submitted that the semen was not sold as a commodity. The insemination of the cows was, he submitted, a service. I accept this, but I do not think it affords an answer to the problem. A building does not, in my opinion, cease to be an agricultural building because what is there done leads up to sales or services.

In *Parry v. Anglesey Assessment Committee* (1) the application of the definition was considered in relation to a shed on a farm in which a car used both for agricultural and private purposes was stored. Quarter sessions had decided that the use for private purposes was substantial and could not be disregarded under the de minimis principle. The shed was, therefore, held not to be an agricultural building. This was upheld by the Divisional Court. The other purpose there was clearly not in connection with any agricultural operations. Such purposes are clearly excluded by the word "solely".

Coming back to the conclusion of the tribunal, it is clear that it is not based on the de minimis principle. The question is whether, apart from such principle, the definition poses the question, as the tribunal have held, whether the operations in the building are auxiliary to those on the land or vice versa. There is no evidence in the Case of the average amount of feeding stuffs purchased on, for example, dairy farms. It may well in the case of a particular farm vary from year to year. I will assume the average amount is very much below seventy-five per cent. Nevertheless such a test would lead to difficult border-line cases. The wording of the definition is not, I think, very easy to construe, and I appreciate, if I may say so, the arguments for the construction adopted by the tribunal, but I have come to the conclusion that it is wrong. Where, as here, the land is substantial and is used in the way stated as a part of the agricultural purpose to which both land and buildings are solely put, I think the words of the definition are satisfied. One does not have to consider which plays the major part.

We were referred to *Malcolm v. Lockhart* (2) and *Lord Glanely v. Wightman* (3). Those cases dealt with the circumstances in which fees earned by stallions were or were not covered by sched. B assessments. On the view which I have formed

as to the construction of the definition with which we are concerned they do not I think assist. I would allow the appeal.

BIRKETT, L.J.: The question for determination in this appeal is whether the buildings of the Milk Marketing Board at their centre in Beccles come within the provisions of s. 2 (2) of the Rating and Valuation (Apportionment) Act, 1928, so as to be treated as an agricultural hereditament. The local valuation court thought the buildings were an agricultural hereditament and should be excluded from the valuation list. The Lands Tribunal reversed this decision, and the board appeal to this court. I can quite understand this divergence of view for the decision turns on points of some nicety on which different views can quite easily be taken. The material words of s. 2 are "agricultural land" means arable, pasture or meadow land, and "agricultural buildings" means buildings occupied together with agricultural land and used solely in connection with agricultural operations thereon. The purpose of the centre at Beccles is to provide for the collection of semen from bulls in order to inseminate cows by artificial means. The larger purpose is to breed dairy cattle for the supply of milk. Over four thousand farmers within a radius of fifteen miles from the board's centre have become members and have thus qualified to have their cows inseminated artificially when they so desire. Inseminators are sent out from the centre to the farms for this purpose with the requisite semen collected and prepared at the centre. The buildings (for the purpose of this appeal) are the buildings at the centre in which the bulls are usually kept, and include pens, stores and rooms for the actual collection of the semen.

The land consists of twenty-one acres of grass land and eight acres of arable land. There is no question that this is agricultural land within the meaning of the section. The purpose of s. 2 seems reasonably plain. A simple example would be the use of buildings for milking the cows that graze on the grass land of the farm, or buildings used to store the produce from the land. These would clearly be buildings occupied together with agricultural land and used solely in connection with agricultural operations thereon. In the facts of the present appeal, the land is, undoubtedly, agricultural land, and the tribunal has found that the buildings in question are occupied together with that agricultural land. The crucial question is: Are the buildings occupied together with agricultural land and used *solely* in connection with agricultural operations thereon? It is quite clear that they are not used for any other purpose than the professed purpose of the centre, so the kind of question that arose in *Parry v. Anglesey Assessment Committee* (1) does not arise here. The ultimate question, therefore, would appear to be: Is the professed purpose of the centre, as set out in the earlier part of this judgment, an agricultural purpose on the land? If buildings where cows are milked, for example, are buildings used solely in connection with agricultural operations on the land, it is difficult to see why buildings which are used for the purpose of collecting the semen from the bulls and for no other purpose are not to be treated similarly. The fact that the arable land does not produce all the food for the bulls or that the grass land is used only for tethering the bulls or exercising them cannot alter the fact that the buildings are used solely in connection with agricultural operations on the land. The definition of "agricultural operations on the land" must be wide enough, I think, to include the work at the centre. It would be much too narrow a view to hold that the agricultural operations are to be confined to the growing of food and the use of the grass land and to exclude the work carried on in the buildings. The work of the centre must be considered as a whole when answering the question whether the buildings are used solely in connection with agricultural operations on the land. Nor do I think that because the insemination of the cows takes place away from the centre, the buildings where the semen is collected are thereby taken outside the scope of s. 2. The produce of a farm is commonly sold away from the farm itself, and the fact that the insemination of the cows takes place on neighbouring farms

does not seem to me to be an objection to the centre qualifying for exclusion from the valuation list. For these reasons I think that the decision of the Lands Tribunal cannot be supported on the facts of this case, and that the appeal of the Milk Marketing Board should be allowed.

HODSON, L.J., stated the facts and continued: In my judgment, the conclusion of the Lands Tribunal as expressed in para. 11 of the Case is erroneous in point of law. The land is being used for agricultural purposes and is agricultural land, and its extent is not so insignificant that it can be excluded by the application of the *de minimis* rule. It is, in my judgment, immaterial that the percentage of food provided for the animals from the land is relatively low. The buildings are occupied together with the agricultural land and are being used in connection with agricultural operations thereon, since the land is used for the growing of food for the animals.

The remaining question is: Are the buildings *solely* used in connection with agricultural operations thereon? This question was, I think, wrongly answered by the tribunal in the negative. The only case to which our attention was drawn in which the section was considered is the decision of the Divisional Court in *Parry v. Anglesey Assessment Committee* (1). That was a case concerning a shed in which a farmer kept his car, and the question was, the car being a private car sometimes used for agricultural purposes and sometimes for private purposes, whether the shed was used solely in connection with agricultural operations on the land. The Divisional Court affirmed the decision of quarter sessions who had held that the private user of the car was not so slight as to bring into play the *de minimis* principle. **LORD GODDARD, C.J.**, said ([1948] 2 All E.R. 1061):

"This . . . Case . . . raises a very short point. The ratepayer, who is a farmer, keeps a motor car, which he uses for a variety of purposes. He uses it for the purposes of his farm and to take his produce to market, and he also uses it for a variety of domestic and social purposes . . . Therefore, the car is not merely a farm waggon or implement, but partly that and partly a private car . . . and s. 2 (2) [of the Act of 1928] defines 'agricultural buildings' as ' . . . buildings . . . occupied together with agricultural land or being or forming part of a market garden, and in either case used solely in connection with agricultural operations thereon' . . . The justices would seem to have come to the conclusion that the car is both a private car and a farmer's car. It was for them to decide as a question of fact whether the use as a private car was so slight and so occasional that the doctrine of *de minimis* might fairly be applied. It is a matter of degree."

That case is not directly in point, but it illustrates the effect of the word "*solely*" contained in the definition. The decision is based on the finding that the car was sometimes used in connection with something quite distinct from the agricultural operations on the land, namely, the private purposes of the farmer, so that the shed in which the car was housed could not be said to be used solely in connection with any agricultural operation.

Our attention has also been drawn to the speeches in the House of Lords in two cases in which sched. B. and sched. D. of the Income Tax Acts were considered—*Malcolm v. Lockhart* (2), and *Lord Glanely v. Wightman* (3). These cases deal with the occupation of land and do not, I think, give much assistance although the language of **LORD WRIGHT** in the later case ([1933] A.C. 639 and 640) does, I think, lend some support to the view contended for by the board. He said (*ibid.*, 640), in speaking of a stallion:

" . . . I think that the service of the stallion is appurtenant to the soil and a profit of the occupation in every case, so that in this regard it is immaterial whether the service is to the appellant's own mares or whether it is sold to strangers; in the latter case the service is sold from the land and as a product of the land, just as much as bullocks, potatoes, fruit or eggs

are sold from the land. Without the appellant's stud farm or some other such stud farm the stallions could not live or exercise their generating functions. The value of these functions is inseparably connected with the occupation of land."

Similarly, the function of the bulls here can properly be said to be inseparably connected with the occupation of the land, and I see no difficulty in regarding the buildings where the bulls are housed as being used solely in connection with the agricultural operations performed on the land. They cannot be said to be used in connection with anything else unless the functions of the centre can be regarded as something separate from the agricultural operations on the land. With all respect to the view taken by the Lands Tribunal, I do not think they can be so regarded, nor do I think that the question is one of degree. The fact that the semen is removed from the bulls on the premises and taken away for injection into the females on other premises does not, to my mind, indicate an activity on the part of the centre separate from the agricultural operation on the land. Farming operations are often not completed on the farm. The thrashing of grain may take place elsewhere, but the barn in which sheaves are stored does not cease to be an agricultural building. The milk parlour remains an agricultural building although the milk is taken away and sold.

The question whether the buildings are auxiliary to the land or the land to the buildings is, in my opinion, irrelevant (subject to the *de minimis* rule) since the section says, not that the buildings must be wholly dependent on the land or vice versa, but that they are to be used solely in connection with the agricultural activities thereon in order to fall within the definition. In my judgment, these buildings do fall within the definition of an agricultural hereditament contained in the section and I would allow the appeal.

Appeal allowed.

Solicitors: *Ellis & Fairbairn* (for the board); *Solicitor of Inland Revenue* (for the valuation officer).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

WESTWOOD v. CANN.

[COURT OF APPEAL (Singleton, Denning and Romer, L.J.J.), June 16, 17, July 4, 1952.]

Plate—Gold plate—Wedding ring—Need to bear hall-mark—Gold Plate (Standard) Act, 1798 (c. 69), s. 6.

A jeweller exposed to sale as "solid gold" twenty-one wedding rings which were slightly below the minimum standard of nine carats prescribed by the Gold Wares (Standard of Fineness) Order, 1932, and bore no hall-mark. The plaintiff claimed penalties for exposing to sale gold rings which did not bear a hall-mark.

HELD: (ROMER, L.J., dissentiente): in view of the amount of gold contained in the rings and their description as gold, the rings were "manufactures of gold" within the meaning of s. 6 of the Gold Plate (Standard) Act, 1798, notwithstanding that they were below the standard of fineness entitling them to a hall-mark, and, accordingly, an offence had been committed under that section by exposing them to sale without a hall-mark.

Observations as to the meaning of "carat".

Decision of PRITCHARD, J. ([1950] 2 All E.R. 805), reversed.

FOR THE GOLD PLATE (STANDARD) ACT, 1798, s. 6, see HALSBURY'S STATUTES, Second Edn., Vol. 25, p. 1091.

Cases referred to:

- (1) *A.-G. v. Canter*, [1939] 1 All E.R. 13; [1939] 1 K.B. 318; 108 L.J.K.B. 260; 160 L.T. 89; Digest Supp.
- (2) *Buckley v. Alexander*, (1889), Mar. 26, unrep.

APPEAL by the plaintiff and CROSS-APPEAL by defendant from an order of PRITCHARD, J., dated Oct. 3, 1950, and reported [1950] 2 All E.R. 805.

The plaintiff sued for penalties in respect of twenty-seven rings on the ground that they had been exposed to sale without bearing a hall-mark. As to six of the rings, which were above the minimum standard of fineness, PRITCHARD, J., held that they were manufactures of gold and that an offence had been committed, and from that decision the defendant cross-appealed. As to the remaining twenty-one rings, which were below the said minimum standard, PRITCHARD, J., held that they were mere base metal and so no offence had been committed by exposing them to sale unmarked. From this decision the plaintiff appealed.

Nelson, Q.C., and *Wingate-Saul* for the plaintiff.

Blackledge, Q.C., and *Jackson Bovell* for the defendant.

Cur. adv. vult.

July 4. The following judgments were read:

SINGLETON, L.J.: This appeal arises out of a claim to penalties made by the assayer of the Guardians of the Standard of Wrought Plate in Birmingham against Mr. Samuel Cann, who was a jeweller in Manchester. The claim was heard by PRITCHARD, J., at Manchester in July, 1950, and on Oct. 3, 1950, he gave judgment for the plaintiff for a part of the penalties claimed. The plaintiff gave notice of appeal, and a cross-notice of appeal was served by the defendant. Soon after the hearing Mr. Cann died, and the hearing of the appeal was postponed until his personal representatives were constituted as parties to the action.

I propose, first, to refer to various statutes affecting the position. There was passed in the year 1576 an Act, 18 Eliz. c. 15, of which the title is: "An Act for reformation of abuses in goldsmiths", and it was enacted thereby that no goldsmith should work or sell goldsmiths' wares of gold less in fineness than of twenty-two carats, nor were such wares to be put to sale before he

"has set his own mark to so much thereof as conveniently may bear the same . . . upon pain to forfeit the value of the thing so sold or exchanged."

The preamble to the Plate (Offences) Act, 1738, is instructive. It recites various Acts of Parliament, one of King Edward I, another of King Henry VI, and the one of Queen Elizabeth to which I have referred, and it refers to some of the difficulties which had existed, and the last few lines of the preamble read:

"but notwithstanding the aforesaid several Acts of Parliament and charters, great frauds are daily committed in the manufacturing of gold and silver wares for want of sufficient power effectually to prevent the same."

Section 1 of the Act of 1738 repeats in effect the provisions of the statute of Elizabeth that

" . . . no goldsmith, silversmith, or other person whatsoever making . . . or dealing in gold or silver wares within . . . England, shall work or make or cause or procure to be wrought or made any gold vessel, plate, or manufacture of gold whatsoever less in fineness than twenty-two carraets of fine gold in every pound weight troy . . . "

The word "carraets" is spelt differently, and there are introduced the words "of fine gold in every pound weight troy." There was a penalty for breach of that of £10. Section 5 provided that

" . . . no goldsmith, silversmith, or other person whatsoever, making or selling, trading or dealing in gold or silver wares, shall sell, exchange, or expose to sale within . . . England, any gold . . . vessel, plate, or manufacture of gold . . . until such time as such vessel, plate, or manu-

facture of gold (being of the standard of twenty-two carraets of fine gold per pound troy) . . . shall be marked . . . ”

as set out. A breach of this entailed a penalty of £10. This was a strengthening of the provisions of the statute of Elizabeth, and it, undoubtedly, was intended to ensure, as far as possible, that the maker of every manufacture of gold should have it marked according to the statutory requirements before he sold it or exposed it to sale. From the year 1576 it had been contrary to law to manufacture any plate or other goldsmiths' wares of gold less in fineness than twenty-two carats. From 1738 onwards, without the incurring of a penalty, no manufacture of gold could be exposed to sale by any goldsmith or person making, selling, or trading in gold until it had been duly marked.

The Gold Plate (Standard) Act, 1798, made it lawful for any goldsmith or other person making, trading or dealing in gold wares to work or make any manufacture of gold of the standard of eighteen carats of fine gold in every pound weight troy. Section 2 provided that no person should sell, or expose to sale, any manufacture of gold made after Oct. 1, 1798, until such manufacture was marked with the new mark. There was a £10 penalty. This, again, was intended to ensure marking before any sale or dealing with the article took place, though on the wording of the section everyone who sold or exposed to sale a manufacture of the fineness of eighteen carats before it was marked was liable to the penalty. Section 6 is the section which gives rise to difficulty. It imposes a penalty of £50

“ if any person . . . work or make . . . or shall sell . . . or expose to sale . . .

any . . . manufacture of gold, not being duly marked with one of the marks by law required to denote one of the respective standards of twenty-

two or eighteen carats of fine gold in every pound weight troy . . . ”

It is submitted that, as nothing less than eighteen carats could lawfully be made, the section could not apply to any manufacture of gold of less fineness than eighteen carats. I do not take that view. I regard the section as an omnibus section which could be applied generally. The penalty under it is larger than that under s. 2, and I cannot see why that should be so if it is only intended to cover cases which would fall under s. 2. In other words, there would then be no need for both sections. It appears to me that the object of s. 6 is to prevent any unmarked manufactures of gold getting on the market. It is not always easy to get things assayed, and thus the statute, by s. 6, provides a penalty of £50 for exposing to sale any manufacture of gold not marked in the way that any manufacture authorised by law must be marked. In such a case all that need be proved is that the article was a manufacture of gold and that it was exposed to sale unmarked. No doubt, if the article was twenty-two carat or eighteen carat, a penalty of £10 under the relevant sections of the Acts of 1738 and 1798 would be accepted. I see no reason why someone who sells, or exposes to sale, a manufacture of gold below the legal standard without a mark should escape s. 6.

In 1854 there was passed the Gold and Silver Wares Act of that year, which, by s. 1, enabled Her Majesty in Council to order that any gold vessel, plate, or manufacture of gold might be wrought of any standard not being less than one-third part in the whole of fine gold, to be declared in any such order, and also to approve thereby of the instrument with which they should be marked or stamped, setting forth in figures the actual fineness thereof according to the standard so declared. Section 4 preserved the statutes in force relating to standard of gold wares and the marks for marking the same. The penalties were to remain in force, and the statutes were to be read and construed as forming part of the Act of 1854.

Two orders have been made under that Act, the first in 1854, and the second (which repealed the first) in 1932 (Gold Wares (Standard of Fineness) Order, 1932 (S.R. & O., 1932, No. 654)). This provides that any gold vessel, plate, or manufacture of gold may be wrought of either of the following standards, that

is to say: (i) The standard of 585 parts of fine gold in every one thousand parts by weight (hereinafter referred to as the standard of fourteen carats); (ii) the standard of 375 parts of fine gold in every one thousand parts by weight (hereinafter referred to as the standard of nine carats). Paragraph 4 of the order gave approval to the instruments for marking described and delineated in the schedule. As from the date the order came into force it has been lawful for any manufacture of gold to be wrought of the standard of twenty-two, eighteen, fourteen or nine carats, but not of less fineness, though it is conceivable that an Order in Council might be made enabling any manufacture of gold to be wrought of the standard of eight carats.

In Mr. Cann's shop window there were twenty-three rings by the side of a display card bearing the words "solid gold engraved and faceted wedding rings from £2 10s." Seventeen of them did not bear the hall-mark of the British Assay Office. There were another ten rings in a small cardboard box which did not bear any such mark. It was in respect of these twenty-seven rings that the plaintiff claimed penalties under s. 6 of the Act of 1798.

The claim is put quite simply in paras. 1 to 5 of the statement of claim:

"(1) The plaintiff sues in this action as well for our Lord the King as for himself. (2) The plaintiff is the assayer of the Guardians of the Standard of Wrought Plate in Birmingham and the defendant is a dealer in gold and silver wares. (3) On or about Sept. 9, 1948, the defendant exposed to sale at 26 Moseley Street in the city of Manchester twenty-seven gold wedding rings. (4) At the said time none of the said gold wedding rings was marked with one of the marks by law required to denote one of the standards of fine gold, contrary to s. 6 of the Gold Plate (Standard) Act, 1798. (5) By reason of the premises and by virtue of the said statute the defendant has forfeited and become liable to pay for every gold wedding ring so exposed to sale by him the sum of £50, amounting in the whole to the sum of £1,350."

PRITCHARD, J., found that the rings were exposed to sale. He awarded a penalty of £50 each in respect of each of six rings, but held that no penalties were recoverable in respect of the other twenty-one rings which, he said, were legally base metal. The plaintiff appeals, contending that he is entitled to a penalty under s. 6 of the Act of 1798 in respect of each of the twenty-seven rings. In my opinion, the appeal should be allowed. I do not think it can be right to describe the twenty-one rings as "legally mere base metal". The results of the assay show that they were slightly below the nine carat standard. Two of them were a shade below what would have been an eight carat standard if there had been one calculated in the same way.

The sole question for consideration is: Was each of them a manufacture of gold? There can, I think, be only one answer to that. They were advertised as "solid gold engraved and faceted wedding rings." They were (except as to two) of a fineness within the words "not being less than one-third part in the whole of fine gold", so that under s. 1 of the Act of 1854 an Order in Council might have been made which would have allowed them to be manufactured in accordance with the law. The other two contained respectively 323.8 and 328.5 parts of fine gold in one thousand parts. I do not see any reason why they should not be regarded in each case as a manufacture of gold. Indeed, they would be so treated for the purposes of the penalties under s. 1 of the Act of 1738. I do not think that there is any dispute as to that.

There was also before the court of first instance a claim to penalties in respect of the seventeen rings which were below the nine carat standard. That is set out in para. 10 of the statement of claim. This claim was dropped for two reasons. One was that the notice of counsel who settled the statement of claim had not been drawn to the order of 1932 and he had claimed under the repealed order of 1854. An application to amend was made, but the terms as to costs on which it would have been allowed were not accepted by counsel for the plaintiff. It

seems to me that the amendment would have been largely formal, for the provision as to the standard of nine carat is the same in each case, except for the introduction of the words "in every pound weight troy" in the order of 1854, and the instrument for marking the standard of nine carat is the same in each: "A die for stamping the figure 9 and the decimal mark .375." The other reason for the dropping of this part of the claim was the inability of the witnesses to explain the expression used in the Acts of 1738 and 1798, and in the order of 1854, "in every pound weight troy."

In his judgment PRITCHARD, J., said that Dr. Watson [the senior assayer to the Royal Mint] and the plaintiff confessed that they did not understand the word "carat". I do not know the reason for the introduction into s. 1 of the Act of 1738 of the words "in every pound weight troy." The learned judge said ([1950] 2 All E.R. 809):

" . . . in view of the evidence of Dr. Watson and the plaintiff it seems possible that between 1854 and 1932 there has been a change in the methods used and the terminology employed by those who carry on the profession of assayers of gold, which has been reflected in the order of 1932 and, for the sake of uniformity and simplicity, the language used to describe the standards of twenty-two and eighteen carat might well be amended."

I am not sure that this is a complete picture. The words "in every pound weight troy" did not appear in the statute of Elizabeth, the material part of which is recited in the preamble to the Act of 1738. Examination of the various Acts and orders satisfies me that this is the position:—Fine gold is twenty-four carats; twenty-two carats permitted by s. 1 of the Act of 1738 is a manufacture of gold in which the proportion of gold is twenty-two parts of twenty-four, and the eighteen carats allowed by s. 1 of the Act of 1798 is a manufacture of gold in which the proportion of gold is eighteen parts of twenty-four. This becomes abundantly clear when reference is made to the schedule of the now repealed order of 1854 under which the instruments for marking are approved as follows: fifteen carats .625; twelve carats .5; nine carats .375; and to the schedule under the order of 1932, which is still in force: fourteen carats .585; nine carats .375. In each case the basis is that of fine gold twenty-four carats, and the word "carat" is used throughout from the time of Elizabeth as denoting a proportion of fine gold in the manufactured article; and if an order should be made allowing manufacture down to one-third fineness, as is permissible under s. 1 of the Act of 1854, the decimal mark would be .333. I have no doubt that the duties of those who have to deal with these matters would be simplified if the Acts and orders were made the subject of a consolidating Act. At the same time I cannot help feeling that the task of the judge would have been made lighter if those who conduct the affairs of the assay had gone more fully into the matter. In my judgment, the appeal should be allowed as to the twenty-one rings, and the amount of the judgment in favour of the plaintiff should be increased accordingly. It is unnecessary for me to say anything as to the cross-appeal except that it must be dismissed.

DENNING, L.J.: On Sept. 9, 1948, Mr. Cann, a jeweller in Manchester, offered for sale twenty-seven wedding rings which he described as solid gold. They were nearly all marked with a numbered fineness such as "18 ct.", or "14 ct.", or "9 ct.", but none of them was hall-marked. None had a leopard's head, or an anchor, or other proper hall-mark, showing that they had been passed by an assay office. They were taken from the shop by customs officers and sent to be assayed. Six of them were found to be up to standard fineness, but twenty-one of them were not. For instance, seventeen of those marked "9 ct." were not in fact nine carat, but somewhere between eight and nine, and one was just under eight. As a result the assay master of Birmingham brought this action for penalties on the grounds: (i) that none of the twenty-seven was hall-marked; (ii) that seventeen were below the minimum fineness of nine carat.

The charge that the seventeen rings were below standard fineness failed. The reason was because the experts did not understand the meaning of the standard of fineness laid down in an Order in Council in 1854. That order said that the minimum standard of fineness was "nine carats of fine gold in every pound weight troy". The experts could not explain that phrase. They said that a carat was not a weight, but a proportion, and that there was no such thing as a pound weight troy. It is a pity that the learning on this subject should have so quickly been forgotten. With only a little research I have discovered that the troy pound was the "original and genuine standard measure of weight" in this country, and a brass weight made in 1758 was kept at Westminster to denote that standard until it was damaged in the fire of 1834. The troy pound was a recognised standard until 1878 when it gave place to the pound avoirdupois. The experts were right in saying that a carat is, properly speaking, a proportional measure; it is one twenty-fourth part of a whole. Whatever the whole is, a carat is one twenty-fourth of it. This word "carat" is of very ancient origin and came to us from lands over the seas. It is derived from the Arabic "kirat" and is still much used in the Sudan to denote one twenty-fourth. Nowadays in England, in connection with gold, it is used in its proper sense to denote only a proportion—for example, when an article (of any weight) out of every twenty-four parts contains twenty-two parts of fine gold and two of alloy, it is said to be gold of twenty-two carats. But two or three hundred years ago the word "carat" was often used in England to denote a definite weight, namely, one twenty-fourth of a pound troy of gold. Thus the OXFORD DICTIONARY quotes a work of 1667 as saying:

"The pound weight of twelve ounces troy of gold is divided into twenty-four parts which are called carrats, so that each carrat is ten pennyweight troy or half an ounce."

It is in that sense that the word "carat" is used in the Acts of 1738 and 1798 and the Order in Council of 1854. Once this is understood the standard laid down in those Acts and in the order becomes perfectly clear. The old standard of "nine carats of fine gold in every pound weight troy" is the same as the modern standard of "nine carats", the only difference being that in the old phrase "carat" is used to denote a weight, and in the modern one a proportion. The standard of nine carats means that, in every twenty-four parts, nine parts are of fine gold and fifteen parts of other metal.

I need say no more about the charge of lack of fineness. It was dropped because the experts did not know the history of their subject; and it has not been revived before us. We are only concerned with the charge of exposing the twenty-seven wedding rings to sale without a hall-mark. On this subject I do not propose to go through the sections of the Acts in detail, but only to state their effect in the simplest terms in relation to articles made in modern times. Every article which is a "manufacture of gold" and is made in England must, in order to be lawful, be one of the specified standards, that is, it must contain at least twenty-two carats, eighteen carats, fourteen carats, or nine carats of fine gold. As soon as the article is made, it must be taken to the assay office to be assayed and marked. It is usually taken to the office while it is still in the rough before being polished and finished. If it is found to be up to standard, it will then be marked with the appropriate hall-mark to show it has been assayed, such as a leopard's head for the London office and an anchor for the Birmingham office, and also with a mark to denote its fineness, that is, a crown on twenty-two carat and eighteen carat, and special numbering on fourteen and nine carat, but if it is not up to standard it is cut and battered and sent back defaced to the maker. So also with articles that are imported into England. If they are made of gold and are intended to be sold, they must be up to our standard and assayed and marked with a hall-mark before they are sold. Such being the duty laid on the maker or importer, it is plain that every article which is made of gold

should have on it a hall-mark. If it has no hall-mark, there must be something wrong with it; either it has not been taken to the assay office to be marked, as it should have been, or it has been taken there and rejected as not being up to standard. In any case, if it is not hall-marked, the probability is that it is below standard, because no maker or importer is likely to omit to get it marked if it is up to standard. The hall-mark is for the ordinary man at once the test and the proof that it is up to standard. So it should be also for the jeweller. He cannot be expected himself to assay every gold article in his shop to see that it is up to standard, but he can at least see that it has a proper hall-mark. If it is properly hall-marked, he can safely sell it as being made of gold, but if it has no hall-mark, or no proper hall-mark, he cannot do so.

The Acts bear out what I have said. They show that, so far as the retailer is concerned, the critical question is whether he is exposing to sale an article which is a "manufacture of gold" without a hall-mark on it. If it is a manufacture of gold and has no hall-mark, he is guilty of an offence under s. 6 of the Act of 1798 as amended by s. 4 of the Act of 1854. It is no defence for him to say that it is up to standard. A fortiori, it is no defence for him to say it is below standard. The fact that it is below standard is an offence under s. 1 of the Act of 1738 as amended by the Act of 1854, but that does not mean that the absence of a hall-mark is not also an offence. I find no difficulty about s. 2 of the Act of 1798. That covers cases where a maker or importer sells or exposes to sale a gold article before it is marked. The fact that such cases might also be brought under s. 6 does not mean that s. 6 is to be read in a restricted sense. If this interpretation of the Acts is correct, the only question in this case is whether the twenty-seven wedding rings were "manufactures of gold", for, if they were so, they ought to have been hall-marked. The judge has held that, if they were up to standard fineness, they were manufactures of gold, but, if they were below standard, they were legally mere base metal. The result was that, in regard to each of the six rings which were up to standard, he imposed a penalty on the jeweller of £50, but in regard to the twenty-one which were a little below standard, he imposed no penalty at all. I cannot agree with an interpretation which leads to such an odd result. The oddity is not to be explained by saying that the jeweller should have been found guilty of lack of fineness in those twenty-one. Lack of fineness would have only carried a penalty of £10. We should, therefore, still get the odd result that the wedding rings which were up to standard but not hall-marked would carry a penalty of £50 each, whereas those which were below standard and not hall-marked—a much more serious offence—would only carry a penalty of £10 each. I prefer to give the Acts an interpretation which avoids such a result.

The true position is, I think, this. An article is a "manufacture of gold" within the Acts if fine gold has been used in the manufacture of it, even though the proportion of fine gold is considerably less than the minimum standard of nine carats. Even if there is only a small proportion of fine gold, say six, seven or eight carats, nevertheless it is a "manufacture of gold", and anyone who exposes it for sale is guilty of offences against the Acts. He is guilty of selling a gold article below the minimum fineness, and also of selling it without a hall-mark. The two offences are not alternative. They are concurrent. Before the Common Informers Act, 1951, the offender would be liable in an action to a penalty of £10 on the one and £50 on the other. In future he will be liable on each on summary conviction to a penalty not exceeding £100.

A question was raised before us whether rolled gold is a "manufacture of gold". It is made by means of a very thin film of nine carat gold being rolled on top of a base metal. It is not treated by the assay offices as being a manufacture of gold. The reason is, I expect, because the amount of fine gold in the finished article is so negligible that it cannot be considered to be a "manufacture of gold". Whatever be the correct position of "rolled gold", however, I am clearly of opinion that these wedding rings (which were described as solid gold) were in

fact "manufactures of gold" and should have been hall-marked. It is no answer to say they had so little gold in them that they could not be hall-marked. If they had less than nine carats, they ought not to have been made at all and ought not to have been described as gold. I realise, of course, that the material question is not whether they were described as gold, but whether they were in fact "manufactures of gold", but, if a retailer describes them as gold, it is strong evidence against him that they contained sufficient fine gold to be "manufactures of gold". So long as they contained an amount which was not merely negligible, they were "manufactures of gold" and ought to have been hall-marked. The amount in these twenty-seven rings was not negligible. It was at least seven or eight carats. They were, therefore, "manufactures of gold", and the jeweller who exposed them to sale is, in my opinion, liable to a penalty of £50 on each of the twenty-seven rings because they were not hall-marked. He has since died, but the liability survives against his executors: see *A.-G. v. Canter* (1).

In parting with this case I would observe that in 1856 and 1879 select committees said that the law as to hall-marking was uncertain owing to the number of statutes in which it was to be found, and they expressed the opinion that the consolidation and amendment of the law should be carried out without further delay. Now, seventy-three years later, in 1952, I may, perhaps, be permitted to express the same opinion. I agree with my Lord that the appeal should be allowed.

ROMER, L.J.: It is with regret that I find myself unable to share the view which my brethren have expressed to the effect that the plaintiff is entitled to penalties in respect of each of the twenty-seven rings which are the subject of these proceedings. In the court below the plaintiff was awarded penalties on only six of the rings and failed with regard to the other twenty-one. In my judgment, PRITCHARD, J., was right in so deciding, and this appeal should, accordingly, be dismissed.

The essential question for determination, as it seems to me, is whether the twenty-one wedding rings in question fell within the description of "manufacture of gold" as that phrase is used in s. 6 of the Gold Plate (Standard) Act, 1798. If they did, then the appeal must succeed because the rings were admittedly "exposed to sale" by Mr. Cann and were not marked with either of the hall-marks referred to in that section. If, on the other hand, none of the rings constituted a "manufacture of gold" for the purposes of the section, then the appeal must necessarily fail. To arrive at a conclusion on this question it is necessary, I think, first to consider the effect of the Plate (Offences) Act, 1738. As appears from the preamble to that statute, Parliament had been concerned as far back as the reign of Edward I with the problem of preserving the purity of gold and silver wares made and sold in this country. In spite of the various legislative efforts which had been made to achieve this object the position remained unsatisfactory, as appears from the recital in the Act of 1738 that

"... notwithstanding the aforesaid several Acts of Parliament and charters, great frauds are daily committed in the manufacturing of gold and silver wares for want of sufficient power effectually to prevent the same."

So far as the manufacture and sale of gold wares were concerned, the object of the Act of 1738 was, first, to ensure the fineness of the gold from which such articles should be wrought, and, secondly, to insist on such articles being subjected to a compulsory assay before they were sold or offered for sale. Section 1 of the Act was directed to the first of these objects. By a statute of Elizabeth (18 Eliz. c. 15) it had been enacted

"that no goldsmith from Apr. 20 next coming shall work, sell, exchange or cause to be wrought, sold or exchanged, any plate or other goldsmiths wares of gold, less in fineness than that of two and twenty carrects . . .",

and s. 1 of the Act of 1738 appears to have preserved this standard, although it did so in language which is now obsolete and perplexed the experts who gave evidence before the learned judge. Having laid down the requisite standard of fineness which was to be observed ("twenty-two carats of fine gold in every pound weight troy") the section then proceeded to impose penalties on persons who disregarded it. Section 3 conditionally mitigated these penalties in the case of persons who innocently sold or exposed for sale gold wares which fell below the prescribed standard of fineness.

The legislature then turned its attention to the second of the objects which I have mentioned and made hall-marks (as they are called nowadays) compulsory. There was nothing new in this, for the marking of gold wares had already been provided for by earlier statutes, but the system then current was, I suppose, regarded by the legislature as insufficient or inadequate. The matter was, accordingly, dealt with in some detail by s. 5 of the Act, which, so far as material for present purposes, enacted as follows:

"And . . . from and after . . . May 28, 1739, no goldsmith, silversmith, or other person whatsoever, making or selling, trading or dealing in gold . . . wares, shall sell, exchange, or expose to sale within . . . England, any gold . . . vessel, plate, or manufacture of gold . . . whatsoever, made after . . . May 28, 1739 . . . until such time as such vessel, plate, or manufacture of gold (being of the standard of twenty-two carats of fine gold per pound troy) . . . shall be marked as followeth . . .";

details of some complexity are then prescribed for the marking of these wares and, at the end of the section, the same penalties are imposed for breaches of its provisions as those imposed for breach of s. 1. Now, on the language which I have quoted it seems reasonably clear, as I think, that this compulsory marking was confined to such articles of gold as conformed, in their material, to the standard of fineness which had been laid down by s. 1 of the Act. It was suggested in argument before us by the plaintiff that this is not the proper interpretation of s. 5, and that the section was prohibiting the sale of unmarked gold wares even if they were below the requisite standard of fineness. I cannot, however, accept that contention if only for the reason that it in effect strikes out of the section the parenthesis "being of the standard of twenty-two carats of fine gold per pound troy". It does not appear to me that any effect is given to those words if the operation of s. 5 is extended to gold articles which were of twenty-one carats or less.

The Act of 1738 remained in force until the Act of 1798 was passed, and during the intervening sixty years the position would appear to have been as follows. Any person who made or sold gold wares of twenty-one carats or less committed an offence under s. 1 of the Act of 1738; if he sold such wares, or offered them for sale, unmarked, he committed an offence under s. 5 of the Act, of whatever other offence (if any) he might have been guilty in so doing. On the other hand, if a person made or sold a twenty-two carat article there was no infringement of s. 1, but he could be proceeded against under s. 5 if he sold it or offered it for sale without first having it marked with the appropriate device. That being the position, it is next necessary to consider some of the provisions of the Act of 1798. This statute, by s. 1, reduced the permissible standard of fineness for gold wares from twenty-two carats of fine gold in every pound weight troy to eighteen, and by s. 2 provided that no person should sell or offer for sale any gold vessel, plate, or manufacture of gold made after Oct. 1, 1798, of the new standard until it should be marked with the new mark therein designated, and a penalty of £10 was imposed for breach of this requirement. Some importance was attached to s. 2, and I will return to it later. Sections 4 and 5 preserved the previously existing right to manufacture and sell gold of twenty-two carats and also the mark which, under the Act of 1738, had been prescribed

for gold of that standard. Then comes the important s. 6 which provided that, if any person should make, sell, etc.,

“any gold vessel, plate or manufacture of gold, not being duly marked with one of the marks by law required to denote one of the respective standards of twenty-two or eighteen carats of fine gold in every pound weight troy, every such person shall for every such offence forfeit and pay the sum of £50.”

It is clear that, after the passing of this Act, anyone who made or sold an article of gold of seventeen carats or less would be committing an offence against s. 1 of the Act of 1738, and would incur the penalty of £10 thereby imposed. The question is whether, if he sold such an article which did not bear either the twenty-two carat or the eighteen carat hall-mark, he would also incur the £50 penalty imposed by s. 6 of the Act of 1798. This is the real issue in the present appeal, but before considering it further it would be convenient to notice briefly some of the subsequent legislation. By s. 7 of the Gold and Silver Wares Act, 1844, penalties were imposed on assayers employed by the companies therein mentioned who should

“mark . . . any ware of base metal with any die or other instrument used or to be used by any such company for marking gold or silver wares to denote that the same is of the standard allowed and required by law . . .”

and by s. 14 it was provided that the term “base metal” in the Act should mean any metal whatsoever other than gold or silver of the respective standards required by law and the term “ware” should mean and include any plate, vessel, article or manufacture whatsoever. The Gold and Silver Wares Act, 1854, empowered Her Majesty by Order in Council to order that any gold vessel, plate or manufacture of gold might be wrought of any standard not being less than one-third part in the whole of fine gold, to be declared in such order, and to approve (in effect) new hall-marks as therein mentioned for the same. Section 4 of the Act in substance preserved the existing statutory provisions relating to standards of gold wares, and the marks for denoting the same, and to prohibitions, penalties and forfeitures. By Order in Council, made under the powers conferred by the Act of 1854, Her Majesty authorised three further standards of fineness, that is, fifteen carats, twelve carats and nine carats, and approved a hall-mark for each of such standards respectively. This order was revoked by the Gold Wares (Standard of Fineness) Order, 1932, which authorised instead standards of fineness of fourteen carats and nine carats, respectively, and devices to be used on gold wares made in conformity with those standards.

Returning now to the Act of 1798, considerable discussion took place during the argument with regard to s. 2. For myself I do not think that it has any real relevance to the present problem. Neither goldsmiths nor the British public generally had, when the Act was passed, any acquaintance with or experience of gold wares in this country conforming to any standard of fineness other than that of twenty-two carats, and it was obviously of the highest importance that articles made in accordance with the new standard of eighteen carats should be plainly and readily distinguishable from the old. The leading characteristic of the twenty-two carat hall-mark was a lion passant, and s. 2 provided that, instead of that device, the mark of a crown and the figures “18” should be stamped on all gold wares of the new standard authorised by the Act. A reference to s. 5 of the Act of 1738 shows that the hall-marks therein provided for include indications as to the origin and maker of the wares as well as the lion passant device. No mention is made of these in s. 2 of the Act of 1798, and, as I have said, in my opinion, the object, and the sole object, of that section was to ensure that the principal feature of articles made to the new and lower standard of fineness should be readily distinguishable from that to which the English people had become accustomed. As the result of s. 2, anyone who thereafter sold or offered

for sale any article of gold of eighteen carats which did not bear on it the mark of a crown and the figures "18" would be subject to the same penalty as a person who sold or offered for sale a twenty-two carat article which had not on it the imprint of a lion passant. Section 6 of the Act of 1798 was, in my judgment, again directed to the question of hall-marking, but from a wider aspect. Whether or not gold wares of seventeen carats or less came within its scope, it is quite clear that the section operated on articles both of twenty-two carats and of eighteen carats, and also, I think, on any articles that might fall within those two standards. What, then, was the effect of the section on gold wares of twenty-two carats? It was already an offence (under s. 5 of the Act of 1738) to sell such wares unless they bore the marks therein laid down. The penalty imposed by that section, however, was only £10, and the only reasonable effect that can be attributed to s. 6 of the later Act, in my opinion, in relation to articles of twenty-two carats, was to increase that penalty to £50. The requirements of s. 5 of the Act of 1738 continued in force and were not diminished, increased or altered in any way, but the penalty for disregarding them was made more severe. As to articles of the new eighteen carat standard, s. 2, which I have already considered, altered the principal feature of the 1738 hall-mark, but was not dealing with, and made no reference to, the subsidiary characteristics of such mark (for example, indications of origin). The comprehensive object of s. 6, as I think, was to compel the use of the complete hall-mark (including these minor features) on articles of eighteen carat and, indeed, on articles of a greater fineness up to and including those of the twenty-two carat standard. In other words, it was the object of the legislature to ensure the continuance of a requirement which had existed for centuries, namely, the due marking of authorised manufactures of gold, and (because, presumably, a disregard of the requirement had become too prevalent) to increase beyond any previous level the penalties for its non-observance.

Although, in the ways which I have indicated, it would seem that full effect is given to s. 6, it is contended by the plaintiff that the operation of the section is not exhausted by applying its provisions to wares of authorised standards of fineness, but that any article made or sold after the passing of the Act of 1798 which contained any gold ingredient, however minute, came within its scope. This argument is primarily founded on the suggestion that the phrase "manufacture of gold" may properly include, and does in s. 6 include, wares of unauthorised as well as of authorised fineness. Then, following on this contention, it is suggested that it would be absurd to suppose that a person who sold an unmarked and unauthorised article should escape the penalty imposed by s. 6 while a person who sold an unmarked article of a legitimate standard of fineness should be penalised under the section. I will deal first with this latter suggestion to which, in my opinion, there is more than one sufficient answer. In the first place, a person who sold unmarked an article which was below the requisite standard of fineness would not escape unscathed, for he would be committing an offence against s. 1 of the Act of 1738. It is true that the penalty under that section is lighter than that under s. 6 of the later Act, but it is not difficult to think of an explanation of that—for example, the difficulty of assessing the degree of fineness in articles which a goldsmith sold might well result in his infringing s. 1 without knowing that he was doing so, but the fact that an article which he was offering for sale had no hall-mark on it was plain for him to see. In the second place, the absurdity suggested had, undoubtedly, existed for sixty years if I am right in my view that s. 5 of the Act of 1738 was confined in its operation to gold wares which conformed to the authorised standard. And, further on this aspect of the matter, if it had been the intention of the legislature, in enacting s. 6 of the Act of 1798, to render illegal that which, so far as I am aware, had never been illegal before, one would have expected it to do so in language that was reasonably precise. Then, as to the phrase "manufacture of

gold " in s. 6, it is true that in the various Acts the legislature recognised that articles might be described or regarded as gold wares even if they did not conform to the requisite standard of fineness: see, for example, s. 3 of the Act of 1738. But I venture to think that the phrase, *prima facie*, is referable only to gold of legal fineness and does not also include that which was defined in the Gold and Silver Wares Act, 1844, as "base metal". This *prima facie* impression is strongly enforced by other considerations arising from s. 6 itself. The object of the section was to prohibit the sale of unmarked gold. I myself should have thought that the legislature had in mind gold that it was lawful to sell and not gold it was unlawful to sell, and that it would be unlikely to comprehend legal and illegal goods in this connection in one and the same phrase.

The matter, however, does not rest there. It is unlikely that the legislature would impose a heavy penalty on a person for failing to do that which it was illegal for him to do. It is unlikely that the legislature intended that a man who was already liable to a penalty under s. 1 of the Act of 1738 should incur further liability under s. 6 of the later Act if he sold an illegal object unmarked, but should escape such liability if he fraudulently had the article marked—which could, presumably, only be done with the connivance of some assayer. Then, again, if "manufacture of gold" includes gold wares of less than the authorised standard of fineness, does it include all articles which contain any element of gold, however minute in proportion that element may be? The plaintiff answers, and logically, as it seems to me, must answer: "Yes." If this be right, it seems probable that every shopkeeper in England who deals in the cheaper kind of jewellery is innocently breaking the law. Every such shopkeeper, for instance, who sells "rolled gold" articles (which we were told consist of metal overlaid with a very thin covering or skin of gold) is committing an offence in selling them without a hall-mark—though he could not by any legitimate means get an assayer to mark them. We were informed that, in fact, no proceedings have ever been taken in such cases, but, if the plaintiff is right, there would be no defence if such proceedings were brought. It was suggested alternatively that, even if "rolled gold" or other metal containing some small proportion of gold could not properly be regarded as "manufacture of gold", nevertheless the rings here in question should be so regarded because they are all of eight carats or thereabouts, which is a standard of fineness envisaged by the Gold and Silver Wares Act, 1854. I cannot agree to this suggestion. Although this Act enabled the Sovereign, by Order in Council, to authorise this standard of fineness, no order to this effect has ever been made with the result that an article of eight carats, if made or sold, would be just as illegal under s. 1 of the Act of 1738 as an article of seven or less. For my part, unless the phrase "manufacture of gold" is to be confined to wares of the authorised standard (which furnishes a clear and definite criterion) I do not know at what point between that and the lowest possible standard it is permissible to stop. It has been pointed out that the defendant described the rings in question as "solid gold." So he did, but I venture to think that the description under which the rings were sold is not germane to the issues which are now before the court—however relevant it would have been if an action had been brought by a purchaser and founded on misrepresentation.

For the reasons which I have indicated I am unable to accept either of the plaintiff's arguments, based respectively on the meaning of the phrase "manufacture of gold" and on the absurdity of the results deriving from upholding the decision of the court below. In my judgment, the legislation on this subject has resulted in the following code: (i) A person who sells a gold article of less fineness than the minimum authorised standard (at present nine carats) offends against s. 1 of the Act of 1738; (ii) a person who sells such an article without a hall-mark does not offend against s. 6 of the Act of 1798—whatever other offence (if any) he might commit by so doing; (iii) a person who sells an article which,

while conforming to an authorised standard of fineness, does not bear the hall-mark appropriate thereto commits an offence against s. 6 of the Act of 1798, but does not, of course, infringe s. 1 of the Act of 1738. An example of this kind of case was *Buckley v. Alexander* (2). This, in my opinion, is the effect of the various statutes and orders which were brought to our attention, and, for the reasons which I have expressed, the decision of the learned judge on the point now before us was, in my judgment, right, and this appeal should be dismissed.

A As, however, my brethren take a different view, the appeal will be allowed.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Ryland, Martineau & Co.*, Birmingham (for the plaintiff); *J. H. Milner & Son*, agents for *Leslie M. Lever & Co.*, Manchester (for the defendant).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

B

D. C. THOMSON & CO., LTD. v. DEAKIN AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.J.J.), June 16, 17, 18, 19, 20, 23, 24, 25, 26, 1952.]

C *Trade Union—Procuring breach of contract—No procurement of wrongful act—No evidence of knowledge of contract.*

The plaintiffs, a firm of printers and publishers, required all their employees to sign an undertaking not to become members of any trade union, but, in disregard of their undertaking, some of the employees joined the N. union. In 1952 the plaintiffs determined the employment of one such employee. He appealed to the N. union, and on Apr. 19 the union called out on strike those of its members who were in the plaintiffs' employ and also sought help from other unions concerned in the supply of raw materials to the plaintiffs. The plaintiffs were supplied with paper by the B. company. On Apr. 25 it came to the notice of the managers of the B. company that their drivers had expressed reluctance to deliver paper to the plaintiffs' premises, and three days later the loaders expressed reluctance to load paper for delivery to the plaintiffs. The company thereupon resolved that they would not call on their employees to load or deliver paper for or to the plaintiffs, and as from Apr. 28 no further supplies were taken from the B. company to the plaintiffs, the B. company in consequence being in breach of its contract with the plaintiffs. On May 6 the B. company wrote to the plaintiffs: "We are prevented from performing our contract by the action of the trade unions which has put a stop to any of your paper being loaded at and delivered from Bowaters' Mersey Paper Mills, Ellesmere Port. We anticipate that this pressure will continue and may increase, and until withdrawn we shall be unable to make deliveries under the contract." The plaintiffs sought an injunction against the appropriate officials of the N. union and the unions to which the loaders and drivers belonged, restraining them from causing or procuring a breach or breaches of the contract between the plaintiffs and the B. company and for damages, and applied for interlocutory relief by way of injunction pending trial of the action. The officials of the N. union asserted in affidavits sworn by them that they had merely asked for help from other unions and nothing more, and the remaining defendants denied that they had given instructions to the members of their unions that they were not to handle or move paper intended for delivery to the plaintiffs.

Held: while an action would have lain against the defendants if, with actual knowledge of the contract between the plaintiffs and the B. company and intending to damage the plaintiffs, they had persuaded or procured the loaders and drivers by means of a wrongful act to render it impossible for the B. company to perform its contract with the plaintiffs, no such action

lay if the act of the loaders and drivers were lawful, notwithstanding that its consequence was to prevent the performance of the said contract; in view of the evidence filed by the defendants and the decision of the B. company not to require their employees to handle paper for the plaintiffs, no procurement by any of the defendants of any wrongful act by any of the B. company's employees, nor any breach of contract by any of those employees of their contracts with the B. company, had been proved, nor was there any evidence of knowledge by the defendants of any contract between the B. company and the plaintiffs; and, therefore, the injunction sought would be refused.

A

Dicta of LORD MACNAGHTEN and LORD LINDLEY in *Quinn v. Leatham* ([1901] A.C. 510, 535), explained.

AS TO TORTS ARISING OUT OF THE OPERATIONS OF TRADE UNIONS, see HALSBURY, Hailsham Edn., Vol. 32, pp. 516-524, paras. 813-822; and FOR CASES, see DIGEST, Vol. 43, pp. 112-120, Nos. 1171-1236.

B

Cases referred to:

(1) *Quinn v. Leatham*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 42 Digest 971, 30.

(2) *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch*, [1942] 1 All E.R. 142; [1942] A.C. 435; 111 L.J.P.C. 17; 166 L.T. 172; 2nd Digest Supp.

C

(3) *Lumley v. Gye*, (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 118 E.R. 749; 42 Digest 987, 169.

(4) *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A.C. 239; 74 L.J.K.B. 525; 92 L.T. 710; *affg. s.c. sub nom. Glamorgan Coal Co. v. South Wales Miners' Federation*, [1903] 2 K.B. 545; 42 Digest 989, 180.

D

(5) *British Motor Trade Asscn. v. Salvadori*, [1949] 1 All E.R. 208; [1949] Ch. 556; [1949] L.J.R. 1304; 2nd Digest Supp.

(6) *G.W.K., Ltd. v. Dunlop Rubber Co., Ltd.*, (1926), 42 T.L.R. 376, 593; 42 Digest 989, 183.

E

(7) *Jasperson v. Dominion Tobacco Co.*, [1923] A.C. 709; 92 L.J.P.C. 190; 129 L.T. 771; 42 Digest 989, 182.

(8) *National Phonograph Co., Ltd. v. Edison-Bell Consolidated Phonograph Co., Ltd.*, [1908] 1 Ch. 335; 77 L.J.Ch. 218; 98 L.T. 291; 42 Digest 988, 177.

(9) *Said v. Butt*, [1920] 3 K.B. 497; 90 L.J.K.B. 239; 124 L.T. 413; 42 Digest 986, 167.

F

(10) *Scammell G. & Nephew, Ltd. v. Hurley*, [1929] 1 K.B. 419; 98 L.J.K.B. 98; 140 L.T. 236; 93 J.P. 99; Digest Supp.

(11) *Allen v. Flood*, [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717; 62 J.P. 595; 43 Digest 111, 1164.

(12) *Ware & De Freville, Ltd. v. Motor Trade Asscn.*, [1921] 3 K.B. 40; 90 L.J.K.B. 949; 125 L.T. 265; 43 Digest 124, 1264.

G

(13) *Sorrell v. Smith*, [1925] A.C. 700; 94 L.J.Ch. 347; 133 L.T. 370; 43 Digest 113, 1183.

(14) *Camden Nominees, Ltd. v. Slack*, [1940] 2 All E.R. 1; *sub nom. Camden Nominees, Ltd. v. Forcey*, [1940] Ch. 352; 109 L.J.Ch. 231; 163 L.T. 88; 2nd Digest Supp.

H

(15) *Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland*, [1903] 2 K.B. 600; 72 L.J.K.B. 907; 89 L.T. 386; 43 Digest 118, 1226.

(16) *Conway v. Wade*, [1909] A.C. 506; 78 L.J.K.B. 1025; 101 L.T. 248; 43 Digest 120, 1237.

(17) *Brimelow v. Casson*, [1924] 1 Ch. 302; 93 L.J.Ch. 256; 130 L.T. 725; 43 Digest 115, 1194.

(18) *Riordan v. Butler*, [1940] I.R. 347; 2nd Digest Supp.

(19) *De Jellay Marks v. Greenwood (Lord)*, [1936] 1 All E.R. 863; Digest Supp.

(20) *British Industrial Plastics, Ltd. v. Ferguson*, [1938] 4 All E.R. 504; 160 L.T. 95; *affd.* H.L., [1940] 1 All E.R. 479; 162 L.T. 313; 2nd Digest Supp.

(21) *De Francesco v. Barnum*, (1890), 45 Ch.D. 430; 60 L.J.Ch. 63; 63 L.T. 438; 42 Digest 435, 68.

A APPEAL by plaintiffs from an order of UPJOHN, J., dated May 26, 1952, refusing an interlocutory injunction to restrain the defendants and each of them from doing (whether by themselves or by their servants, agents, workmen, or any of them, or otherwise howsoever) any act with a view to causing or procuring a breach or breaches by Bowaters Sales, Ltd. or any other company, firm, or person, of any contract between the plaintiffs and Bowaters or such other company, firm, or person, for the supply of newsprint or any other goods whatsoever to the plaintiffs.

B UPJOHN, J., held that there never was any direct action by the defendants or agents on their behalf with the object of persuading or causing Bowaters to break their existing contracts with the plaintiffs. The defendants Briginshaw and Moncrieff, officials of the National Society of Operative Printers and Assistants, and the defendant, Morrison, an official of the National Union of Printing, Bookbinding and Paper Workers, by circulars and speeches addressed through trade union channels to the employees of Bowaters caused the latter to take the course of breaking their contracts of employment with Bowaters to the extent that they refused to handle supplies intended for the plaintiffs, but such breach of contract was made lawful by the Trade Disputes Act, 1906, s. 3, and the fact that the natural and probable consequence of that act was that Bowaters might be compelled to break their contract with the plaintiffs was not sufficient to constitute the tort alleged. The defendants Deakin, Intin, and Wood, officials of the Transport and General Workers' Union, did no more than advise the employees not to carry loads for the plaintiffs.

E *Beyfus, Q.C.*, *Van Oss* and *P. Bennett* for the plaintiffs.
Gardiner, Q.C., and *M. R. Nicholas* for the first three defendants, Deakin, Intin and Wood.

Lindner for the fourth and fifth defendants Briginshaw and Moncrieff.

Sir Frank Soskice, Q.C., *John Thompson* and *C. Fawcett* for the sixth defendant, Morrison.

F SIR RAYMOND EVERSLED, M.R.: The appeal in this case from an order of UPJOHN, J., has involved a consideration of many important, novel and difficult questions. The courts have long exercised beneficial powers of granting interlocutory relief by way of injunction pending the trial of an action and in proper cases they have thereby prevented, undoubtedly, what otherwise might have been grave injury to the plaintiff—injury which could not have been put right or effectively remedied by any order made on the trial. So, indeed, the learned judge in the present case has formed the view that the acts of which the plaintiffs complain, if allowed to continue, will cause what he called irreparable injury to the plaintiffs in their business. That is not to say that on that ground alone the court will grant injunctions, nor has counsel for the plaintiffs so argued. He must, indeed, as he concedes, at least show that he has got a *prima facie* case, or, if you will, a strong *prima facie* case, that the plaintiffs are entitled to the remedy they seek. If they go so far, then I have no doubt that the courts will, where necessary, grant an injunction in mandatory form.

H The question then is: Have the plaintiffs established on the facts proved in the case a *prima facie* right (at least) to the injunctions which they seek? In ordinary cases it may not be a difficult matter for the courts to determine whether injunctions of this character should be granted, for the court in ordinary cases will not investigate at length and fully all the matters of law which may be

involved. If it appears that the plaintiffs have a real and serious case to argue and that they have a prima facie right to some relief, then the court will not investigate the matter further on the motion, but in the present instance we have heard long arguments on these difficult questions, and I would like to express my appreciation to the learned counsel in the case for the great assistance which the court has received. In those circumstances, I think that I must now express my view on the matters of law involved, stating what I conceive the law to be, and then decide the matter now before us on that basis of the law. A
The result may, perhaps, be in some degree unsatisfactory, because of necessity the facts have not yet been fully investigated. The questions of fact are raised on affidavit evidence. In answer to the affidavits made on the plaintiffs' behalf, sworn testimony by affidavit has been put in by the defendants, to which in the nature of things, perhaps, it has not been practicable to reply, and it is the fact that the plaintiffs have made no reply. In those circumstances, the court cannot, as the learned judge pointed out, disregard the sworn assertions of the defendants unless they are shown from other material in the case clearly to be wrong. B
On the other hand, the court will not, I conceive, decline to draw from the whole material before it the natural and reasonable inferences which should be drawn. It will plainly be necessary for me at a later stage to examine closely the facts as they relate to each of the individual defendants. For my immediate purposes, C
however, the narrative may be stated thus.

It appears that since 1926, during which year occurred the so-called general strike, the plaintiffs have maintained the view that they would conduct their business on the basis that none of those they employed should belong in any circumstances to any union. Thus, all their employees were required to sign, and, as I understand, did in fact sign, an undertaking in this form: "I undertake not to become a member of any union as long as I am in your employment." D
But during recent years it seems that many of the plaintiffs' employees, no doubt in disregard of this written undertaking, had become members of a union known as the National Society of Operative Printers and Assistants, commonly referred to as "Natsopa", of which the fourth and fifth defendants are officers, the fourth being its general secretary. E
Early in 1952, the plaintiffs determined the employment of one of their employees, one McKay, who had been in their service for a great many years, but who had for some time, as I gather, been a member of Natsopa. It is said on the part of the defendants and others concerned in this matter that the contract of employment was determined in fact for that reason, viz., that he belonged to the union, and for that reason alone. F
McKay accordingly sought help from Natsopa. His appeals were not in vain. Natsopa, through its officers, rallied strongly to his support. On Apr. 19, 1952, they called out on strike those members of their union who were in the service of the plaintiffs. G
It is said—and this is a matter to which I must later refer—that the works of the plaintiffs at Glasgow and Manchester were picketed by members of the union out on strike. Moreover, the officers of the union, Natsopa, particularly Mr. Briginshaw, sent out cries and exhortations for support from union labour all over the country. As will appear, he called for support in the way of cutting off the supplies of raw material to the plaintiffs, and he also called on persons capable of doing so to take steps to prevent the distribution of the papers which the plaintiffs' business it is to publish and distribute. We are not in these proceedings concerned with the latter question of distribution. H
We are concerned with the supply of the raw material, particularly paper and ink, to the plaintiffs and to their premises which I have mentioned at Glasgow and Manchester. It is specially in regard to Manchester that we have to concentrate our attention. The supplies of paper, so far as is relevant to this case, came from one or more companies associated with the name Bowater. I put it in that way, for it appears that there is more than one limited liability company forming part of what has been called the Bowater organisation. That fact is, however, immaterial, and for the purposes of this judgment I shall use the name

"Bowaters" as indicating the actual suppliers of the paper to the plaintiffs and as also constituting the employers of the loaders and drivers who would in the ordinary course have loaded the paper and driven it to the plaintiffs' premises.

On Apr. 22, three days after the start of the strike, there was a meeting in London of the executive council of another body, known as the Printing and Kindred Trades Federation, that being a body constituted by a number of trade unions, including Natsopa and also another union, which has been called for short in this case the Paperworkers Union, of which the full name is the National Union of Printing, Bookbinding and Paper Workers. Of that latter union the last defendant, Mr. Morrison, is the general secretary. For present purposes, and adhering deliberately to imprecise language, the executive council, on the morning of Apr. 22, resolved to support the dispute which had arisen between Natsopa and the plaintiffs. The next matter of fact in this short, but somewhat turbulent, history occurs on Apr. 25, which was a Friday. On that day, according to the evidence—I again adhere for the moment to imprecise terminology—it came to the attention of the management of Bowaters that Bowaters' drivers had expressed reluctance in regard to driving paper to the plaintiffs' premises in Manchester. Those drivers were members of a third union, the Transport and General Workers' Union, of which the first three defendants are officers. In the ordinary course the lorries would have been loaded on the Friday and the Saturday and would have set forth on Monday, Apr. 28, but on the Monday it also became known to the management that the loaders, who were members of the Paperworkers Union, had likewise expressed unwillingness or reluctance to load the paper destined for the plaintiffs. The result of those intimations was that the management came to the conclusion, no doubt to preserve the best interests of Bowaters and so that they should not themselves be involved in this matter any more than they could help, that they would not call on any of their employees either to load or to drive paper to the plaintiffs. The result was that, from that date, Apr. 28, no further supplies of paper have been taken from Bowaters to the plaintiffs.

On the evidence the failure to supply paper has involved a breach of contract which continues. On May 6 Bowaters wrote to the plaintiffs a letter, signed by their director, Mr. Fitt, in which they referred to a letter they had received, but which we have not seen, and continued:

"We are prevented from performing our contract by the action of the trade unions which has put a stop to any of your paper being loaded at and delivered from Bowaters' Mersey Paper Mills, Ellesmere Port. We anticipate that this pressure will continue and may increase, and until withdrawn we shall be unable to make deliveries under the contract."

The case for the plaintiffs is that this non-delivery, this breach or non-fulfilment of the contract referred to in that letter which I have read between Bowaters and the plaintiffs, has been knowingly and deliberately brought about by the acts of the several defendants, and brought about by their persuading and inducing men in the service of Bowaters and belonging to the respective unions concerned to refuse to load or drive paper required for the plaintiffs. In the course of his opening speech, counsel for the plaintiffs formulated his case, and it will I think be convenient to read that formulation, to which throughout and without variation, he has adhered. He says that the acts complained of in this case, viz., the acts of persuading and inducing to which I have already referred, were acts done knowingly, that is, with the deliberate aim and object of causing breaches of contract for the supply of paper on the part of Bowaters to the plaintiffs, as they in fact did, and, therefore, notwithstanding anything in the Trade Disputes Act, 1906, were wrongful.

On May 7, the writ in the action was issued. The plaintiffs' claim is against all the defendants, first, for an injunction

“restraining the defendants and each of them from doing (whether by themselves or by their servants, agents, or workmen, or any of them or otherwise howsoever) any act with a view to causing or procuring a breach or breaches by Bowaters or any other company, firm, or person, of any contract between the plaintiffs and Bowaters or such other company, firm, or person, for the supply of newsprint or any other goods whatsoever to the plaintiffs.”

There is then a further injunction asked for, carrying the ambit of the first a little further. Paragraph 3 of the writ asks for damages “for conspiracy to procure the said breach or breaches of contract”, and para. 4 asks for damages “for procuring a breach or breaches of contract as aforesaid”.

I need hardly say, as the learned judge observed, that we are not in this case concerned with the propriety on ethical or social grounds of anything that any of the parties to the action have done. It is plain, I should imagine, that the action which the plaintiffs have taken since 1926 is one that is likely, and must have been known by them to be likely, to cause the utmost anger and resentment among trade unionists. On the other hand, it is said by counsel for the plaintiffs that it is a strong, harsh—nay, even tyrannical—thing if the great forces which the trades unions have at their command can be mobilised to intervene so as to starve or destroy the business of any firm or company which may have taken any step of which the trade union movement disapproves. These are matters of social conduct, with which we are not concerned. The question with which we are concerned is whether there has been shown to be here such an unlawful act on the part of the defendants or any of them as entitles the plaintiffs to relief.

[HIS LORDSHIP stated that in his judgment there was no such material before the court as would entitle them to hold that there was here a conspiracy of the kind alleged for the purposes of this motion between any of the defendants to the action. HIS LORDSHIP continued:] It will, I think, be convenient now for me to go immediately to the principal matters of law with which we are concerned and to ask, and attempt an answer to, the question whether, apart for the moment from anything in the Trade Disputes Act, 1906, there has been any wrongful act by any defendant according to the common law. It is admitted by the plaintiffs that a trade dispute is in existence for the purposes of s. 3 of the Act of 1906.

The formulation of the case on which counsel for the plaintiffs has based himself is founded on the language of LORD MACNAGHTEN in the well-known case of *Quinn v. Leatham* (1), to the effect that any violation of legal rights, including rights under contract, committed knowingly and without justification, is a tortious act. In raising the matter in the way in which it has been raised in this case (so far as the very considerable, and, I am quite ready to assume, exhaustive, researches of counsel have gone), the plaintiffs have put forward an argument never formerly put to or decided by the courts, at any rate in this form. In one case, *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch* (2), in 1942, the question appears to have been raised when the case was proceeding to the House of Lords. Counsel for the first three defendants produced for us the appellants' Case in the House of Lords, from which it appears that the present point in all essentials was put as part of the appellants' Case. Counsel for the plaintiffs found for us the respondents' Case, from which it appears that the answer there suggested was that there was no evidence whatever that the appellants had any knowledge of the existence of any contract or acted knowingly with the intention of breaking any contract which existed. Whether in the light of that answer or for other reasons, the appellants, so far as the report of the case in the House of Lords goes, do not appear to have proceeded with or pressed that point at all. It will be convenient, I think, if I make at this stage some reference to the *Crofters* case (2), which concerned the manufacture of cloth in the island of Lewis. The charge made against the officials and members of the Transport and General Workers' Union was to the effect that in the interests of one body

of manufacturers in the island, whose yarn was spun in the island, they instructed and procured their members to refuse to handle yarn made outside the island and imported into the island, at a less price than the island's spinners charged, for other mills in the island. It is, however, clear that, though an embargo (I use the word used in the case) to that effect was imposed, it involved no breach of contract on the part of the dockers concerned. It is stated in terms in the headnote that the dockers without any breach of contract acted in accordance with those instructions. I have mentioned that the point now raised found its place in the appellants' Case, and there is one sentence in the speech of VISCOUNT SIMON, L.C., which seems to reflect its existence ([1942] 1 All E.R. 149):

"In the present case, the evidence did not support an allegation that the defendants, or either of them, had procured a breach of contract, and, if one of them, acting alone, had, without employing unlawful means, induced the dockers to refuse to handle the appellants' goods, I cannot see that any action would have lain against him."

I think, however, that counsel for the plaintiffs is entitled to say that that sentence is not to be regarded as a concluded and deliberate rejection of the argument which has been the main burden of his case before us.

I have made reference to the formulation by LORD MACNAGHTEN in *Quinn v. Leathem* (1) of the tort, which counsel for the plaintiffs alleges: "... a violation of legal right committed knowingly and without justification is a tort". On the face of it that is a broad statement which might appear to cover a case such as the present, and cover it whether or not the employees of Bowaters were induced to commit or did commit any breach of their contracts of service with Bowaters. The question on this part of the case then is: What is the extent of this tort, commonly known as the tort of procuring breaches of contract? Is LORD MACNAGHTEN's formulation to be given its prima facie wide effect or must it be treated as subject to some, and, if so, what, limitations? It is not, I think, in doubt that there is a well-established principle of our law, established long before *Quinn v. Leathem* (1), that, if a man, acting lawfully and in all respects within his rights, causes as a result of what he does loss to another, that other has no remedy, though the loss he suffers is the necessary and inevitable consequence of the acts of the first person. It is also a general proposition of our law, as I understand it, that it makes no difference to the matter as I have stated it that the doer, the first person I have mentioned, in his action was actuated by malice or spite against the person who suffered damage, or, as a general proposition, that his acts were done with the intention of producing that result, i.e., aimed at the person who suffered the loss. But, like all general propositions, if they are stated bereft of any context, they require the caution of some reservation or qualification. I do not, for example, forget that there are some actions in tort of which malice may be the gist of the case. It occurs, for example, in the law relating to defamation and in regard to malicious prosecution, but I need not dilate on that aspect of the matter, because it is agreed on all hands that malice in the sense of spite or ill-will directed by any defendant against the plaintiffs plays no part in this case and is an entirely irrelevant consideration. As regards the question of intention, the aim and the purpose of the act complained of, the matter is, however, otherwise. The general proposition which I have stated is undoubtedly now subject (whatever may be the qualification to be put on it) to the existence of the tort which I have described and which is commonly described as the tort of procuring breaches of contract, and in that tort it is conceded that the actor must have acted with the intention of doing damage to the person damaged and that he must have succeeded in his efforts.

Historically, as I follow it, this tort arose from cases of master and servant, and, therefore, may have been connected rather with matters of status than of contract, but since the majority decision in the well-known case of *Lumley v.*

Gye (3), subsequently affirmed in *Quinn v. Leathem* (1), and other decisions, it is also plain that this tort of procuring breaches of contract is not confined to contracts between master and servant. *Lumley v. Gye* (3) was itself a case in which the contract breached was a contract for services rather than of service—a contract under which an operatic singer had engaged herself to sing for the plaintiff.

In *South Wales Miners' Federation v. Glamorgan Coal Co.* (4), to which I shall hereafter refer as the *Glamorgan* case (4), a case in this court on which counsel for the plaintiffs greatly relies, the contracts broken were contracts of service between the employees of coal mining concerns and the concerns themselves. In that case the alleged wrongdoers had directly intervened personally between the contracting parties. They had themselves induced and procured a number of individuals, being parties to the contracts of service, to break their bargains with the other parties to the contracts, their employers. It was suggested in the course of argument that the tort must still be properly confined to such direct intervention, i.e., to cases where the intervener or persuader uses by personal intervention persuasion on the mind of one of the parties to the contract so as to procure that party to break it. I am unable to agree that any such limitation is logical, rational or part of our law. In such cases where the intervener (if I may call him such) does so directly act on the mind of a party to the contract as to cause him to break it, the result is, for practical purposes, as though in substance he, the intervener, is breaking the contract, although he is not a party to it. Such a statement of the matter I take from POLLOCK ON TORTS, 14th ed., p. 266, where reference is made to STREET'S FOUNDATIONS OF LEGAL LIABILITY. At any rate, it is quite clear that, when there is such a direct intervention by the intervener, the intervention itself is thereby wrongful. But, as I have indicated, I cannot think that the result is any different if the intervener, instead of so acting on the mind of the contracting party himself, by some other act, tortious in itself, prevents the contracting party from performing the bargain. A simple case is where the intervener, for example, physically detains the contracting party so that the contracting party is rendered unable by the detention to perform the contract. The cases, as I shall presently show, contain several instances where the intervener has employed such means, being means wrongful in themselves. An example is to be found in a recent case which came before ROXBURGH, J., *British Motor Trade Assocn. v. Salvadori* (5), where there was a criminal conspiracy involved and the party procuring the breach acted in pursuance of such a conspiracy.

The matter then proceeds to the next stage. So far I have considered only the case in which the intervener directly acts himself, either by persuasion or by some wrongful act of his own. What is the situation if he attains the same result, indirectly, by bringing his persuasion or procuration to bear on some third party, commonly a servant of the contracting party, but possibly an independent third person? In my judgment, it is reasonably plain (and the result, as it seems to me, would otherwise be highly illogical and irrational) that, if the act which the third party is persuaded to do is itself an unlawful act or a wrongful act (including in that phrase a breach of contract) and the other elements are present (viz., knowledge and intention to do the damage which is in fact suffered), then the result is the same and the intervener or procurer will be liable for the loss or damage which the injured party sustains.

The cases which have been referred to include some instances of that nature. A strong case was that of *G.W.K., Ltd. v. Dunlop Rubber Co., Ltd.* (6), where the act performed in itself constituted a trespass quoad the goods of one plaintiff, though not of the goods of the second plaintiff. A recent instance of the application of the same principle is to be found in the last case which was cited in reply by counsel for the plaintiffs, a case in the Privy Council, *Jasperson v. Dominion Tobacco Co.* (7), where the substance of the matter was that the appellant, Jasperson, induced an agent of the name of Deacon, who had to the

appellant's knowledge only a limited authority to buy tobacco for the defendants, to act in breach of his agency agreement with the respondents and to engage himself to buy tobacco far in excess of the limit which had been imposed on him. Another instance—I do not pretend to cover the whole ground—is *National Phonograph Co., Ltd. v. Edison-Bell Consolidated Phonograph Co., Ltd.* (8), where fraud was practised by certain persons on the factors, so as to cause those factors to break their agreements with their principals. In all these cases which I have mentioned there was a wrongful act committed—I use that term to cover breach of contract—by the party directly induced, either a servant or an agent, as the case may be, and commonly, but not I think necessarily, an independent wrongful act by the party inducing, i.e., an act itself wrongful apart from the tort for which he was sued.

I have, however, come to the conclusion that the result is otherwise where the persons induced, being third parties, servants or otherwise, are induced to do acts which are in themselves lawful and involve no breach of contract on their part with the contracting party. I think that, if the matter is examined, any other view involves so serious an inroad on the principles of the law that I cannot persuade myself that, from so casual a beginning as would otherwise be the case, that has now to be taken as established as the law. In the course of the reply of counsel for the plaintiffs, I put to him an instance to which I venture to return. It may be useful, since, at any rate, it is quite free from any complication such as may arise from industrial relationships. My instance was of a contract between A and B, whereby A had contracted to sell his house to B at a price beneficial to A. I will assume that it had been disclosed by A to B that there was in fact a public right of way passing close to the property, but that B had been informed, correctly, that the use of such right of way had become so slender that it was of little, if any practical significance. Then let it be supposed that some third party, desiring to cause B to resile from the contract with A and to lose for A the benefit of the contract, persuaded a number of individuals in the neighbourhood to resume the use of the right of way, so that there then passed near the premises a considerable stream of persons, all legitimately using the right of way as such, as a result of which B decided that the amenities of the premises were so damaged that he was no longer willing to continue. I find it exceedingly difficult to suppose that, the exercise of the right of way by the persons persuaded being lawful, the intervener would be liable according to the principles of the law for having persuaded them to do that lawful thing. The persons using it might or might not themselves have been innocent of any desire to cause damage to A. They might be innocent of any knowledge of the existence of a contract between A and B. If they were so innocent, they themselves would, in my view, clearly not be under any liability, but, if they knew of the existence of a contract and intended to cause its breach, another question might arise (and this is a matter to which I shall have later to return) whether they would in any circumstances be themselves liable. Another instance may be quoted which was taken by JENKINS, L.J., earlier in the case. Let it be supposed that A had made a contract to supply certain goods to B and that the intervener, knowing of the contract and intending to deprive B of its benefit, had proceeded to go into the market and buy up all the goods that he could find of that character, so as to render it impossible for A in fact to perform the contract. Again, I think it is impossible to say, according to the principles of our law, that the intervener in such a case was acting tortiously.

I have referred to cases where the intervener procured or persuaded a servant. The difficulty of carrying the matter so far may be to some extent illustrated by considering what would be the position of the servant if he were persuaded to do something within the terms of his contract, but (to his knowledge) directed to procuring a breach of his master's contract. For in such case a claim might be said to arise not only against the intervener but also against the servant. As was pointed out by counsel for the first three defendants, so long as the servant

acted within the scope of his authority, the master would be responsible for the act of the servant. In other words, the servant's acts would be the master's acts, and the curious situation would then result that the master would be inducing a breach of his own contract. Quite plainly, he could not be sued both for breach of contract and also for inducing his own breach—in the latter event the damages being at large. So much, I think, emerged from *Said v. Butt* (9), which was approved by this court in *Scammell G. & Nephew, Ltd. v. Hurley* (10). I adopt for this purpose the statement that I find in WINFIELD'S TEXTBOOK OF THE LAW OF TORT, 3rd ed., p. 577. Dealing with this tort of interfering with contracts, the learned author says:

"If my servant acting bona fide within the scope of his authority, procures or causes me to break a contract which I have made with you, you cannot sue the servant for interference with the contract; for he is my alter ego here, and I cannot be sued for inducing myself to break a contract . . ."

Such is the inference from *Said v. Butt* (9), which he then discusses. Later he says:

"If the servant does not act bona fide, presumably he is liable on the ground that he has ceased to be his employer's alter ego . . ."

The difficulty (and I think it is a real difficulty) is avoided if the act which the servant is procured to do is not an act in accordance with or under his contract, but is in breach or violation of it.

I come then to such formulation of the result as seems to me to be correct, but I should first add this. The argument that this tort should be confined to such direct intervention or interference as is illustrated, for example, in *Lumley v. Gye* (3) introduces this strange difficulty. A limited liability company, a persona ficta, can only act through agents or servants. If the intervention has to be of so direct a kind, it would obviously create strange problems in the case of a limited liability company. No doubt, if I approach some person in the company who has authority on the company's behalf to make contracts, I may be said to be approaching the company direct. But I think that the illustration of the company emphasises the anomaly which would result if in the case of a limited company a tortious act were only committed if the person approached or induced had a particular office or responsibility (actual or perhaps ostensible) in the company. But dealing, first, with individual contractors, it seems to me that the intervener, assuming in all cases that he knows of the contract and acts with the aim and object of procuring its breach to the damage of B, one of the contracting parties, will be liable not only (i) if he directly intervenes by persuading A to break it, but also (ii) if he intervenes by the commission of some act wrongful in itself so as to prevent A from in fact performing his contract, and also (iii) if he persuades a third party, for example, a servant of A, to do an act in itself wrongful or not legitimate (as committing a breach of a contract of service with A) so as to render, as was intended, impossible A's performance of his contract with B. In the case of a company, the approach to or the persuasion of a managing director, or of some person having like authority, may be regarded as being in all respects equivalent to the direct approach of the individual contractor, as found in *Lumley v. Gye* (3) and in the *Glamorgan* case (4), but, if the approach is made to other servants of the company, the case, in my view, becomes parallel to an approach made, not to the contracting party himself, but to some servant of the contracting party, so that the intervener will only be liable if the act which he procures the servant to do is either a breach of contract towards the servant's master or is otherwise tortious in itself.

I have stated the matter broadly and as though the slate were clean, or, at any rate, very nearly clean, but I must now make some reference to the numerous cases to which we have been very properly referred during the long and interesting argument. I have already made mention of VISCOUNT SIMON'S speech in the

Crofters case (2). For a short statement of the principles involved in all that I have tried to explain I would respectfully like to read and adopt what is said by VISCOUNT SIMON, L.C. ([1942] 1 All E.R. 148):

A “First, then, apart from the effects of combination, it is clear that, first, if A is damaged by the action of B, A nevertheless has no remedy against B if B’s act is lawful in itself and is carried out without employing unlawful means. In such a case, A has to endure *damnum absque injuria*. Secondly, it makes no difference to the above proposition that B in so acting has the purpose of damaging A. A bad motive does not per se turn an individual’s otherwise lawful act into an unlawful one. Thirdly, if C has an existing contract with A and B is aware of it and persuades or induces C to break the contract with resulting damage to A, this is, generally speaking, a tortious act, for which B will be liable to A for the injury he has done him.”

B The phrase “generally speaking” alludes to what follows, namely, the possibility of justification. That is a short statement in very general terms. As counsel for the plaintiffs points out, without further explanation and exposition it may be fairly said not to be completely exhaustive, but it is, I venture to think, a correct statement of our law, and the first two propositions cover the general law as it stands and stood before the impact of the tort of procuring a breach of contract, a tort originating in its present form in *Lumley v. Gye* (3).

C It would be impossible in a case of this sort to pass the matter over without some reference to *Allen v. Flood* (11). It is, indeed, useful to refer to what LORD MACNAGHTEN said in that case ([1898] A.C. 151):

D “I do not think that there is any foundation in good sense or in authority for the proposition that a person who suffers loss by reason of another doing or not doing some act which that other is entitled to do or to abstain from doing at his own will and pleasure, whatever his real motive may be, has a remedy against a third person who, by persuasion or some other means not in itself unlawful, has brought about the act or omission from which the loss comes, even though it could be proved that such person was actuated by malice towards the plaintiff, and that his conduct if it could be inquired into was without justification or excuse. The case may be different where the act itself to which the loss is traceable involves some breach of contract or some breach of duty, and amounts to an interference with legal rights. There the immediate agent is liable, and it may well be that the person in the background who pulls the strings is liable too, though it is not necessary

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F in the present case to express any opinion on that point.”

Counsel for the plaintiffs said that in the last words which I have read LORD MACNAGHTEN was, perhaps, prophetic of his later utterance in *Quinn v. Leatham* (1). For the present I only pause to observe that, where, as is contemplated, some servant by a tortious or other wrongful act procures his master to break his contract, LORD MACNAGHTEN is indicating that, given the knowledge and intention, that servant may be liable, and further suggesting that the person behind the scenes, the person who pulls the strings, the intervener, may be liable also. But the passage I have read seems to me to be consistent with, and only consistent with, such a general formulation of the law as I have attempted already to state.

G In *Ware & De Freville, Ltd. v. Motor Trade Assocn.* (12) ([1921] 3 K.B. 84 et seq.), ATKIN, L.J., dealt at some length with the incidence and the significance of intention, motive and so on. That passage may also usefully be considered in this connection, but, having referred to it, I shall not take up time by reading it. There is a short passage in *Sorrell v. Smith* (13) which may be usefully noted. LORD DUNEDIN, after having expressed entire approval of the judgment of ATKIN, L.J., in *Ware & De Freville* (12), says ([1925] A.C. 723):

H “My Lords, it may seem self confident to be positive when so many

learned persons have expressed other views, but candidly I never held a clearer opinion than the one I now express, that the effect of *Allen v. Flood* (11) and *Quinn v. Leathem* (1) is to settle beyond dispute that in an action against an individual for injury he has caused to the plaintiff by his action, the whole question is whether the act complained of was legal, and motive or intent is immaterial; but that in an action against a set of persons in combination, a conspiracy to injure, followed by actual injury, will give a good cause for action, and motive or intent when the act itself is not illegal is of the essence of the conspiracy."

Again, I think it may fairly be said that that statement is much compressed, but I venture to think that it pays due respect to the well-established principles of law, against the background of which the statements in *Quinn v. Leathem* (1) must be viewed.

I come now to consider those statements. I read first a short passage, to which I have already briefly alluded, from LORD MACNAGHTEN's speech. After referring to *Lumley v. Gye* (3), he says ([1901] A.C. 510):

"Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference."

A similar commendation of the decision in *Lumley v. Gye* (3) is to be found in LORD LINDLEY's speech (*ibid.*, 535):

"If the above reasoning is correct, *Lumley v. Gye* (3) was rightly decided, as I am of opinion it clearly was. Further, the principle involved in it cannot be confined to inducements to break contracts of service, nor indeed to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him."

Those, as I have said, are wide statements. But I think, for reasons which I have attempted to give, that it would be wrong and contrary to the intention of LORD MACNAGHTEN and LORD LINDLEY to expand them to an extent greater than I have defined. I think that neither of those very learned Lords could have intended so startling an inroad into what other noble Lords in other cases treat as axiomatic in our law, nor do I think that any of the succeeding cases did more than apply the law so formulated, but also limited as I have already indicated, in the cases which they had to decide. Certainly no case has been found which extended the principle which I have stated beyond the limits which I have attempted to give it. LORD MACNAGHTEN used, after all, the strong word "violation", a word, I should have thought, necessarily carrying with it the idea of something more than mere influence by acts otherwise in themselves lawful, and LORD LINDLEY speaks, not of acts, but of wrongful acts done intentionally to damage a particular individual and actually damaging him.

If that be the law, I must now come to the facts and see what the conclusion must be. I have already indicated—I hope to make out what I have said as I proceed—that there is, in my opinion, no sufficient case made out for a conspiracy of the kind for present purposes in question. I must, therefore, deal with each of the defendants in turn.

[HIS LORDSHIP reviewed the evidence. As regards the first three defendants Messrs. Deakin, Intin and Wood, he said that their sworn evidence was that they had not given instructions that members of their union, the Transport and General Workers' Union, employed by Bowaters were not to handle or move any paper for delivery to the plaintiffs, and the result was that the evidence did not establish against any of them any such action as would constitute the

tort of wrongfully procuring the breach of contract in question. The defendant Briginshaw, general secretary of the National Society of Operative Printers and Assistants, had called for assistance from other unions, but his exhortations would not of themselves have operated to cause members of other unions to act in breach of their respective contracts. The same applied to the defendant Moncrieff. The defendant Morrison, the secretary of the National Union of Printing, Bookbinding and Paper Workers, denied that he had issued or authorised or acquiesced in the issue of any instructions to the loaders employed by Bowaters and that the refusal of the loaders to load newsprint for delivery to the plaintiffs was in any way connected with anything done or said by him. HIS LORDSHIP continued:] As to the whole of the defendants, it follows, accordingly, from what I have said that, in my judgment, there is not on this motion proved any procuring of any wrongful act by any member of any of the unions concerned. I need only add that on the evidence there was no breach of contract by any workmen, since Bowaters, for reasons which, I doubt not, were prudent, took the line that they would not order any man either to load or to deliver paper for the plaintiffs. They accepted the situation as they found it, and, again I doubt not prudently, made no attempt to contrive to get the paper to the plaintiffs by any other means. It is true, if my analysis is correct, that there was in the case of the first three defendants what might be called a direct approach to Bowaters, but, so far as I understand the evidence, I cannot see that that direct approach amounted to anything more than a statement of the facts as the members of the union understood them to be. In particular, there was a reference to picketing, which was obviously of great significance, and, whether that reference was correct or incorrect, there is no suggestion that it was not made in the bona fide belief of its truth. I appreciate that in these matters there is a difficult question of distinguishing between what might be called persuasion and what might be called advice, meaning by the latter a mere statement of, or drawing of the attention of the party addressed to, the state of facts as they were. In *Camden Nominees v. Slack* (14), it was held that the advice given was of such a character that it was obviously intended to be acted on and so for all practical purposes was equivalent to persuasion. But, if the matter be advice merely (in the ordinary sense of that word), it seems to me that there can be no complaint about it, nor do I think that counsel for the plaintiffs can derive any substantial assistance by saying that Bowaters proved themselves merely chicken-hearted. The ease with which a person may be persuaded is not a relevant consideration in determining whether the persuader was wrongful in what he was doing. That may, as a general proposition, be true, but in this case it seems to me, as I have already more than once indicated, that the evidence on this motion, whatever may emerge when the matter is fully investigated, falls short of any proof of what is required to constitute a cause of action such as would entitle the plaintiffs to an injunction. Put another way, I cannot see that the evidence establishes that there was anything done by Bowaters vis-à-vis the plaintiffs which is fairly attributable to any such pressure, persuasion or procurement on the part of any of these defendants as would in any event cause them to be liable in tort.

The whole matter is, indeed, when it is examined at large, of a very vague character. The links in the chain which connect the defendants with the plaintiffs are, at points at any rate, as I think, very unsubstantial. I have referred already to the absence of proof of direct procurement or attempted procurement of wrongful acts on the part of the workmen. There were in fact, so far as I can see, no wrongful acts at all on the workmen's part. There is, moreover, no evidence that there was actual knowledge, on the part of any of the persons charged, of the contract or of any contract between Bowaters and the plaintiffs, assuming such contract to have been broken, or at least, if these persons thought that there might be or was some contract, any knowledge of the terms of that contract. If all else were satisfactorily proved, it might well be (having regard

to common knowledge about the way business is conducted) that absence of such strict proof would not suffice to prevent the grant of relief, but, when the whole matter is generally regarded, it seems to me that the case is very different from anything that was contemplated by LORD MACNAGHTEN in *Quinn v. Leathem* (1) and approved in subsequent cases in which *Quinn v. Leathem* (1) has been applied. I find it, therefore, not unnatural that the learned judge thought that the chain of causation, at some point at any rate, had been broken. I only venture to differ from him in so far as he rested his conclusion on the proposition that it was insufficient for the purposes of the plaintiffs' claim to show that the alleged breach of contract by Bowaters was indirectly procured through breaches of contract by the workmen, since, as I think, if it were shown that the workmen were induced or procured to break their contract vis-à-vis Bowaters, prima facie, if the intent and knowledge were shown, that would suffice for present purposes. A

Having reached that conclusion, it is unnecessary for me to express concluded opinions on the matters raised in regard to the Trade Disputes Act, 1906, particularly on the point of great difficulty which emerges in reference to s. 3 of that Act. The section provides: B

"An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills." C

Having read the section, it is pertinent to observe that, having regard to the concession of counsel for the plaintiffs, it would not be a wrongful or actionable act on the part of these defendants vis-à-vis Bowaters to cause workmen belonging to their respective unions to break their contracts of employment, but, if that be so, it does not in the least follow, nor is it, in my judgment, the case, that, if the workmen did break their contracts, they, the workmen, did not do an unlawful act, in the sense of committing a breach of contract. I should, therefore, be prepared to hold that the defendants would not be entitled to resist the plaintiffs' claim merely by saying that their own procuration of the workmen's breach of contract vis-à-vis Bowaters was protected by s. 3. I would, however, like to make clear that I am not to be taken, in formulating the case as I have, to be deciding that, if the workmen broke their contracts with Bowaters, they would themselves be liable to the plaintiffs for the damage which the plaintiffs suffered. Of course, as a premise to any such claim knowledge and intent of the workmen would have to be proved, but, even so, since the workmen could lawfully have given notice, which presumably would be of a very short character, it may well be that the damage could not be said to flow from the fact that they had ceased loading immediately instead of after giving the requisite notice. Further, it seems to me difficult to suggest as against any one individual workman that his particular act could have resulted in the damage which the plaintiffs suffered. Whether any case for conspiracy would lie against all of them is, of course, another matter, and we are not in any way concerned with it. D E F

There remains, however, the more substantial point that the defendants were in any case protected by the second limb of s. 3, "or that it is an interference with the trade, business, or employment of some other person". It is clear that that limb, if available, could be used, not only as excusing the acts themselves, but also as a justification for the acts done, if otherwise not excusable. I confess that the words "an interference with the trade, business, or employment of some other person", being so wide in scope, would appear at first sight to cover such a matter as that with which we are now concerned, but there are, I think, and as counsel for the plaintiffs has suggested, forcible arguments to the contrary. G H

It is right, in my judgment, as counsel for the plaintiffs asked us to do, to construe this section by having due regard to the state of the law at the time the

section was enacted. The judgment of ROMER, L.J., in *Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland* (15), in 1903, is, I think, some indication that at that date the extent to which a person might be liable merely for interfering in some way with the trade or business of other persons was in doubt: see also the speech of LORD LOREBURN, L.C., in *Conway v. Wade* (16) ([1909] A.C. 510). Moreover, it would be a curious way to enact the matter if so wide a significance was to be given to the second limb, for in that event the words "of employment" in the first limb seem to be otiose, unless it was intended by the first limb to deal with the specific matter most in the minds of the legislature and then to use in the second part of this section general words which might or might not also cover the subject-matter of the first limb. Such opinions as have been expressed on the meaning of the second limb would appear to support the argument of counsel for the plaintiffs. The matter came before RUSSELL, J., in *Brimelow v. Casson* (17), and in that case RUSSELL, J., expressed the view ([1924] 1 Ch. 314) that the argument for which counsel for the plaintiffs contends was, to use the learned judge's language, "a good point"—a view which had also, though no reasons were stated, been taken in the Irish case of *Riordan v. Butler* (18). Finally, in the notes to the passage in HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 32, pp. 521, 522, which was written by SLESSER, L.J., the same view is taken.

In the circumstances, and, in particular, having regard to the fact that this matter may be argued by the defendants on the question of justification, I think it desirable that I should express no view of my own on this matter, except to say that, if the plaintiffs proved themselves otherwise entitled, I should myself be inclined to think that the reference to s. 3 of the Trade Disputes Act, 1906, did not suffice to prevent the granting of an injunction on this motion.

Other points were taken on s. 4 and s. 5 of the Trade Disputes Act, 1906, which I hope that I shall be excused for dealing with somewhat summarily. It was suggested that there was protection to be derived from s. 4, since the defendants were, in truth, officials of the union, and s. 4 was directed to prohibiting actions of tort against a union. I do not think that that is any answer to the present case, if otherwise good, nor do I find in the definition paragraph of s. 5 anything which would assist the defendants towards their construction of s. 3. The point was made by counsel for the first three defendants that in no circumstances was it shown that there was any sufficient knowledge of the contract or intent that it should be broken, in the sense that it was entirely repudiated so that the breach went to the root of the contract. On those matters, likewise, I express no view—not the less because the other party to the contract, Bowaters, is not before the court. I only indicate, though expressing no concluded opinion, that, notwithstanding the view expressed by PORTER, J., in *De Jetley Marks v. Lord Greenwood* (19), I am not at present satisfied that the breach procured must be of a kind that goes to the root of the contract. I am not clear on what principle that view was based. These, however, are all matters which in the circumstances I think I can, and should, leave without saying more about them. I must also not be taken by any means to assent to the view that, if entire repudiation, a breach going to the root of the contract, is required, that did not in the present circumstances occur.

It is plain, finally, that it is unnecessary for me also to say anything in regard to the form of injunction that might be appropriate, if I had thought that any injunction were appropriate on this motion. The circumstance that it might not in all the circumstances be wholly effective, no doubt is something which the court will consider, but I am far from satisfied that that circumstance would, if the plaintiffs were otherwise right, be a sufficient ground for persuading the court to grant no remedy at all to the plaintiffs. I should, however, like to make it quite plain that I accept without reservation the assurance given to this court by all the defendants through their counsel that, if any injunction were granted, it would be loyally implemented by each of the defendants to the best

of his ability. In the circumstances, which I have stated in a judgment the length of which I greatly regret, I come to the conclusion that this appeal fails and should be dismissed.

JENKINS, L.J.: This is an appeal from an order of UPJOHN, J., refusing the plaintiffs interlocutory relief in an action brought by them against certain trade union officials in respect of allegedly wrongful acts done by the defendants in furtherance of what, for the purposes of the motion to which the appeal relates, is admittedly a trade dispute within the meaning of the Trade Disputes Act, 1906. The occasion of the dispute seems to have been the alleged summary dismissal by the plaintiffs from their employment of one McKay, a member of the National Society of Operative Printers and Assistants (Natsopa), but the substantial bone of contention, if I may so describe it, is the policy pursued by the plaintiffs for many years of excluding trade union members from their employment. In furtherance of the dispute Natsopa members in the employ of the plaintiffs (for there appears to have been a considerable number of such, notwithstanding the ban) were called out on strike on Apr. 19, 1952, and the acts complained of in the action are in the nature of allegedly wrongful interference with contractual relations between the plaintiffs and other companies, designed to deprive and in fact depriving the plaintiffs, who are printers and publishers, of necessary supplies of paper and ink. The parties to this unfortunate controversy are entitled to advance their respective sides of it by any lawful means they think fit to adopt, and the sole question for the court is whether the defendants or any, and, if so, which, of them have, as alleged by the plaintiffs, overstepped the bounds of lawful action in the promotion of their cause, or, perhaps I should say, the cause of Natsopa.

Apart from the effect of the Trade Disputes Act, 1906, the principles of law to be applied in this case are thus summarised by VISCOUNT SIMON, L.C., in *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch* (2) ([1942] 1 All E.R. 148):

“First, then, apart from the effects of combination, it is clear that, first, if A is damaged by the action of B, A nevertheless has no remedy against B if B’s act is lawful in itself and is carried out without employing unlawful means. In such a case, A has to endure *damnum absque injuria*. Secondly, it makes no difference to the above proposition that B in so acting had the purpose of damaging A. A bad motive does not per se turn an individual’s otherwise lawful act into an unlawful one. Thirdly, if C has an existing contract with A and B is aware of it and persuades or induces C to break the contract with resulting damage to A, this is, generally speaking, a tortious act, for which B will be liable to A for the injury he has done him. In some cases, however, B may be able to justify his procuring of the breach of contract . . . ”

In view of the disclaimer of counsel for the plaintiffs for the purposes of the motion of any allegation of conspiracy to injure, the reference to the effect of combination, developed later in the same speech, requires no further notice here.

The first and second propositions of LORD SIMON, L.C., found earlier recognition in the speech of LORD MACNAGHTEN in *Allen v. Flood* (11), where he said ([1898] A.C. 151):

“I do not think that there is any foundation in good sense or in authority for the proposition that a person who suffers loss by reason of another doing or not doing some act which that other is entitled to do or to abstain from doing at his own will and pleasure, whatever his real motive may be, has a remedy against a third person who, by persuasion or some other means not in itself unlawful, has brought about the act or omission from which the loss comes, even though it could be proved that such person was actuated by malice towards the plaintiff, and that his conduct if it could be inquired into

was without justification or excuse. The case may be different where the act itself to which the loss is traceable involves some breach of contract or some breach of duty, and amounts to an interference with legal rights. There the immediate agent is liable, and it may well be that the person in the background who pulls the strings is liable too, though it is not necessary in the present case to express any opinion on that point."

A See also the judgment of ATKIN, L.J., in *Ware & De Freville, Ltd. v. Motor Trade Assn.* (12), where he said ([1921] 3 K.B. 84):

B "Now in what respect does an intention to injure the plaintiff affect the legal position stated above? It appears to me to be finally decided by the majority in the House of Lords in *Allen v. Flood* (11) that an act otherwise lawful is not made unlawful by an intention to injure, except in the case of a combination to injure. That decision is binding upon every tribunal in the land; it certainly binds the Court of Appeal; and though, after it was given, divers judicial personages more or less respectfully kicked against the pricks, speaking humbly for myself I unreservedly accept the reasoning of the majority judgments."

C To the same effect is this passage from the speech of LORD DUNEDIN in *Sorrell v. Smith* (13) ([1925] A.C. 723):

D "My Lords, it may seem self confident to be positive when so many learned persons have expressed other views, but candidly I never held a clearer opinion than the one I now express, that the effect of *Allen v. Flood* (11) and *Quinn v. Leathem* (1) is to settle beyond dispute that in an action against an individual for injury he has caused to the plaintiff by his action, the whole question is whether the act complained of was legal, and motive or intent is immaterial; but that in an action against a set of persons in combination, a conspiracy to injure, followed by actual injury, will give a good cause for action, and motive or intent when the act itself is not illegal is of the essence of the conspiracy."

E LORD SIMON'S third proposition refers to what may be described as the primary form of the type of wrong held to be actionable in *Lumley v. Gye* (3) and in that form commonly designated "procuring or inducing a breach of contract". This type of wrong was more broadly defined by LORD MACNAGHTEN in *Quinn v. Leathem* (1), where he said ([1901] A.C. 510):

F "Speaking for myself, I have no hesitation in saying that I think the decision [in *Lumley v. Gye* (3)] was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference."

G To this should be added LORD LINDLEY'S statement of the law in the same case (*ibid.*, 535):

H "If the above reasoning is correct, *Lumley v. Gye* (3) was rightly decided, as I am of opinion it clearly was. Further, the principle involved in it cannot be confined to inducements to break contracts of service, nor indeed to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him."

We were referred to a great many more authorities, but no useful purpose will be served by multiplying citations, as the passages I have quoted sufficiently indicate the general principles of law to be applied.

After a full and elaborate argument, I am satisfied, first, that LORD SIMON'S third proposition does not exhaustively define the type of actionable wrong to which it refers, as there may, on the principles stated by LORD MACNAGHTEN

and LORD LINDLEY in *Quinn v. Leathem* (1), be an actionable interference with contractual rights where other means of interference than persuasion or procurement or inducement, in the sense of influence of one kind or another, brought to bear on the mind of the contract breaker to cause him to break his contract, are used by the interferer, but, secondly, that (apart from conspiracy to injure, which, as I have said, is not in question so far as this motion is concerned) acts of a third party lawful in themselves do not constitute an actionable interference with contractual rights merely because they bring about a breach of contract, even if they were done with the object and intention of bringing about such breach. With these two propositions in mind, I turn to consider what are the necessary ingredients of an actionable interference with contractual rights.

(1) The breach of contract complained of must be brought about by some act of a third party (whether alone or in concert with the contract breaker), which is in itself unlawful, but that act need not necessarily take the form of persuasion or procurement or inducement of the contract breaker, in the sense above indicated. Direct persuasion or procurement or inducement applied by the third party to the contract breaker, with knowledge of the contract and the intention of bringing about its breach, is clearly to be regarded as a wrongful act in itself, and where this is shown a case of actionable interference in its primary form is made out: *Lumley v. Gye* (3). (2) But the contract breaker may himself be a willing party to the breach, without any persuasion by the third party, and there seems to be no doubt that if a third party, with knowledge of a contract between the contract breaker and another, has dealings with the contract breaker which the third party knows to be inconsistent with the contract, he has committed an actionable interference: see, for example, *British Industrial Plastics, Ltd. v. Ferguson* (20), where the necessary knowledge was held not to have been brought home to the third party; and *British Motor Trade Assocn. v. Salvadori* (5). (3) The inconsistent dealing between the third party and the contract breaker may, indeed, be commenced without knowledge by the third party of the contract thus broken, but, if it is continued after the third party has notice of the contract, an actionable interference has been committed by him: see, for example, *De Francesco v. Barnum* (21). (4) Again, so far from persuading or inducing or procuring one of the parties to the contract to break it, the third party may commit an actionable interference with the contract, against the will of both and without the knowledge of either, if, with knowledge of the contract, he does an act which, if done by one of the parties to it, would have been a breach. Of this type of interference the case of *G.W.K., Ltd. v. Dunlop Rubber Co., Ltd.* (6) affords a striking example. (5) Further, I apprehend that an actionable interference would, undoubtedly, be committed if a third party, with knowledge of a contract and intent to bring about its breach, placed physical restraint on one of the parties to the contract, so as to prevent him from carrying it out.

It is to be observed that in all these cases there is something amounting to a direct invasion by the third party of the rights of one of the parties to the contract, by prevailing on the other party to do, or doing in concert with him, or doing without reference to either party, that which is inconsistent with the contract, or by preventing, by means of actual physical restraint one of the parties from being where he should be or doing what he should do under the contract. But here the acts complained of as constituting the actionable interference do not amount to a direct invasion of the plaintiffs' contractual rights. The plaintiffs' case as regards paper is that the defendants persuaded, induced or procured employees of Bowaters (that is, drivers employed by Bowaters Sales Co., Ltd., and loaders employed by Bowaters Mersey Mills, Ltd.) to break their contracts of employment by refusing to drive lorries loaded with, or to load lorries with, paper destined for the plaintiffs, with the object and intention of causing Bowaters Sales Co., Ltd., to break, or making it impossible for them to fulfil, their contract for the supply of paper to the plaintiffs, and that the defendants did in fact by the means I have stated produce the intended result.

The plaintiffs' case as regards inks, so far as any case at all can be gathered from the evidence, is mutatis mutandis of a similar order.

I have stated the plaintiffs' case in the only form in which (if made out on the facts) it can, in my view, be maintainable in law apart from conspiracy to injure, for I reject as inconsistent with the authorities referred to at the beginning of this judgment the submission of counsel for the plaintiffs that it is unnecessary for him in order to make out his case to show that any acts wrongful in themselves
A were done by the defendants in order to bring about the breach of Bowaters' contract with the plaintiffs, provided they were done with the intention of causing and did in fact cause such breach, and, so far as I can see, the only acts wrongful in themselves which there is any question of imputing to the defendants on the evidence must consist in their having persuaded, induced or procured the employees concerned to break their contracts of employment. I have not overlooked
B the submission of counsel for the plaintiffs that there is evidence of direct persuasion or procurement or inducement of Bowaters Sales Co., Ltd. (in the persons of Messrs. Botterill and Cassidy) to break the contract with the plaintiffs, but I do not agree that this is so, and will, therefore, deal with that part of counsel's argument when I come to examine the evidence.

The plaintiffs' case does seem to me to involve an extension of the range of
C actionable interference with contractual rights beyond any actual instance of this type of wrong to be found in the decided cases. Here there is no direct invasion of the plaintiffs' rights under the contract. It was no part of their contract that these particular employees, or any particular employees, should be employed by Bowaters for the purpose of effecting deliveries of paper to them. Thus the breaches by these men of their contracts of service with Bowaters
D (if made out on the facts) did not in themselves involve any breach of Bowaters' contract with the plaintiffs. The breaches of the contracts of service (if made out) were, so to speak, at one remove from the breach of contract complained of. Nevertheless, I think that in principle an actionable interference with contractual relations may be committed by a third party who, with knowledge of a contract between two other persons and with the intention of causing its
E breach, or of preventing its performance, persuades, induces or procures the servants of one of those parties, on whose services he relies for the performance of his contract, to break their contracts of employment with him, either by leaving him without notice or by refusing to do what is necessary for the performance of his contract, provided that the breach of the contract between the two other persons intended to be brought about by the third party does in fact
F ensue as a necessary consequence of the third party's wrongful interference with the contracts of employment. I take this view because I see no distinction in principle for the present purpose between persuading a man to break his contract with another, preventing him by physical restraint from performing it, making his performance of it impossible by taking away or damaging his tools or machinery, and making his performance of it impossible by depriving him, in
G breach of their contracts, of the services of his employees. All these are wrongful acts, and, if done with knowledge and an intention to bring about a breach of a contract to which the person directly wronged is a party, and if in fact producing that result, I fail to see why they should not all alike fall within the sphere of actionable interference with contractual relations delimited by LORD MACNAGHTEN and LORD LINDLEY in *Quinn v. Leatham* (1). But, while admitting
H this form of actionable interference in principle, I would hold it strictly confined to cases where it is clearly shown, first, that the person charged with actionable interference knew of the existence of the contract and intended to procure its breach; secondly, that the person so charged did definitely and unequivocally persuade, induce or procure the employees concerned to break their contracts of employment with the intent I have mentioned; thirdly, that the employees so persuaded, induced or procured did in fact break their contracts of employment; and, fourthly, that breach of the contract forming the alleged subject

of interference ensued as a necessary consequence of the breaches by the employees concerned of their contracts of employment. I should add that by the expression "necessary consequence" used here and elsewhere in this judgment I mean that it must be shown that, by reason of the withdrawal of the services of the employees concerned, the contract breaker was unable, as a matter of practical possibility, to perform his contract. In other words, I think the continuance of the services of the particular employees concerned must be so vital to the performance of the contract alleged to have been interfered with as to make the effect of their withdrawal comparable, for practical purposes, with a direct invasion of the contractual rights of the party aggrieved under the contract alleged to have been interfered with, as, for example (in the case of a contract for personal services), the physical restraint of the person by whom such services are to be performed. A

I make the above reservations in regard to the scope of this newly propounded form of actionable interference with contractual rights for these reasons. It is now well settled that, apart from conspiracy to injure, no actionable wrong is committed by a person who, by acts not in themselves unlawful prevents another person from obtaining goods or services necessary for the purposes of his business, or who induces others so to prevent that person by any lawful means. It follows, in my view, that (again apart from conspiracy to injure) there is nothing unlawful, under the law as enunciated in *Allen v. Flood* (11) and subsequent cases, in general appeals to others to prevent a given person from obtaining goods or services, for that is a purpose capable of being lawfully carried out, and there can, therefore, be nothing unlawful in advocating it, unless unlawful means are advocated. The result of such advocacy may well be that unlawful means are adopted by some to achieve the purpose advocated, but that is not to say that a person who advocates the object without advocating the means is to be taken to have advocated recourse to unlawful means. If by reference to the form of actionable interference with contractual rights now propounded, general exhortations issued in the course of a trade dispute, such as "Stop supplies to X", "Refuse to handle X's goods", "Treat X as 'black'", and the like, were regarded as amounting to actionable interference, because persons reached by such exhortations might respond to them by breaking their contracts of employment and thereby causing breaches of contracts between their employers and other persons, and because the person issuing such exhortations must be taken constructively to have known that the employers concerned must have contracts of some kind or other with other persons, and that his exhortations (general as they were) might lead to breaches of those contracts through breaches of contracts of employment committed by persons moved by his exhortations, then the proposition must be accepted that it is an actionable wrong to advocate objects which can be achieved by lawful means because they can also be achieved by unlawful means, and to that proposition I decline to subscribe. Furthermore, as the learned judge in effect pointed out in his judgment, almost every strike, if to any extent successful, must cause breaches of contracts between the employer against whom it is directed and the persons with whom he is doing business, the very object of the strike being to bring his business to a standstill or himself to terms. Again, many a strike embarked on in support of a strike in progress in some other concern must have had for its immediate object the cutting off of supplies to, or prevention of distribution of the products of, or the application of similar pressure on, that other concern. Yet we have been referred to no case in which the persons inciting a strike have been held liable for actionable interference with contractual relations between the strikers' employers and the persons with whom they deal, and in principle I do not think that the inciters of the strike could be held so liable in the absence of proof that they knew of the existence of a particular contract, and, with a view to bringing about its breach, counselled action by employees in itself necessarily unlawful (as for example breach of their contracts of employment) designed to achieve that end. To hold B C D E F G H

otherwise would, in my view, be to admit not only an addition to the means whereby actionable interference with contractual rights may be compassed (which addition, as I have said, I am in principle prepared to accept), but also an enlargement of the character and scope of the tort itself (which I cannot agree to).

A Finally, not every breach of a contract of employment with a trading or manufacturing concern by an employee engaged in services required for the performance of a contract between his employer and some other person carries with it as a necessary consequence (in the sense above indicated) the breach of the last-mentioned contract. For instance, A induces B, C's lorry driver, to refuse, in breach of his contract of employment, to carry goods which C is under contract to deliver to D, and does so with a view to causing the breach of C's contract with D. C could, if he chose, engage some other lorry driver, or arrange B alternative means of transport, but he does not do so. He fails to deliver the goods, telling D he is prevented from doing so by B's breach of contract. In such circumstances, there has been no direct invasion by A of C's rights under his contract with D, and, although A has committed an actionable wrong against C, designed to bring about the breach of C's contract with D, and a breach has occurred, it cannot be said that the breach has been caused by A's wrongful C act, and, therefore, D cannot, in my view, establish as against A an actionable interference with his rights under his contract with C.

D It remains briefly to relate the foregoing considerations to the facts of the present case. The defendants Briginshaw and Moncrieff are respectively the general secretary and northern district secretary of Natsopa, the union immediately concerned in the dispute with the plaintiffs. I am content to accept D the learned judge's description of the part they played in the matter. Their concern was to put the maximum pressure on the plaintiffs in furtherance of Natsopa's side of the dispute, and there is no doubt that they did advocate as a means of pressure the cutting off of the plaintiffs' supplies of paper and ink, and also (though this is not relied on for the purposes of the present motion) E the prevention of the distribution of the plaintiffs' publications. But the evidence does not appear to me to bring home to them anything more than general exhortations of the type to which I have already referred and which cannot, in my view, be properly regarded as amounting to persuasion, inducement or procurement of breaches of contracts of employment generally, still less of breaches by any particular employees of Bowaters or anyone else of their contracts of employment. There is no evidence that either of these defendants F had knowledge of the existence of Bowaters' contract with the plaintiffs, or that they had in view the breach of that contract. As appears from what I have said above, it is not, in my judgment, enough to impute to them constructively knowledge that there must have been contracts of some kind or other between the plaintiffs and their suppliers of paper which or some of which might be broken in the event of employees of such suppliers breaking their contracts of G service. Actual knowledge of the existence of a particular contract, an intention to bring about the breach of that contract, and unequivocal persuasion, inducement or procurement of the employees concerned to break their contracts of employment to the extent necessary to achieve that end, must, in my view, be shown; and, in my view, none of these things is shown so far as the defendants H Briginshaw and Moncrieff are concerned. Moreover, counsel for the plaintiffs did not dispute that, save as regards members of Natsopa, the exhortations of these two defendants must be regarded as directed to securing support by other unions and inducing them to bring their members into action, rather than as directed to individual members of other unions with a view to securing independent action by them without instructions from the unions to which they respectively belonged. For these reasons, the case against the defendants, Briginshaw and Moncrieff, is not, in my view, such as to warrant interlocutory relief against them or either of them.

I will next consider the cases of the defendants Deakin, Intin and Wood, who are respectively the general secretary, the regional secretary (region No. 6), and trade group secretary (in the same region) of the Transport and General Workers' Union, the union to which the lorry drivers employed by Bowaters Sales Co., Ltd., belong. The evidence as regards these three defendants has been reviewed by my Lord and I will not take time by reading it over again. The evidence of Messrs. Cassidy and Botterill might, if uncontradicted, conceivably suffice to make out a *prima facie* case for interlocutory relief against these three defendants, but it is not uncontradicted. An entirely different version of what took place is given by these three defendants and for the purposes of the motion I think that their evidence, which has not been replied to, must clearly be regarded as displacing any *prima facie* case which the evidence on the plaintiffs' side might otherwise have sufficed to establish, particularly as the evidence of these three defendants is supported by the letter and copy letter sent by the defendant Wood to Mr. Botterill and Mr. Lloyd's minute of what took place at the drivers' committee meeting. Counsel for the plaintiffs suggested that on these defendants' own evidence a case of persuading Bowaters (in the persons of Messrs. Botterill and Cassidy) to break the contract with the plaintiffs was made out. I cannot agree. The defendant Wood told Mr. Cassidy that in his (Wood's) opinion it would be unwise to send any more paper to the plaintiffs' works. The defendant Intin advised Mr. Botterill that he should not ask his men to load anything for Thomsons. Mr. Lloyd told Mr. Cassidy of the terms of the committee meeting's resolution, which was to the effect that, in view of what was happening it would be unwise to handle the plaintiffs' newsprint, the shop steward, Mr. Lloyd, being told to inform Mr. Cassidy to that effect. Messrs. Botterill and Cassidy accepted the view of the position taken by the defendants Intin and Wood and by the men's committee, and did not thereafter attempt to send any further loads to the plaintiffs or give any further orders for lorries to be loaded for or driven to the plaintiffs' works. It was not, so far as I can see, a case of yielding to persuasion or pressure. It was a case of avoiding a course of action which in circumstances by no means under the control of Bowaters' drivers was likely to cause trouble if pursued, and by no means necessarily trouble of the drivers' own making. The defendants Intin and Wood and Mr. Lloyd cannot fairly be said to have done any more than put the facts to Messrs. Botterill and Cassidy. Messrs. Deakin, Intin, Wood and Lloyd were not, so far as I can see on the evidence as it at present stands, concerned at all to bring about the breach of any contract between Bowaters and the plaintiffs, nor is there any evidence that they knew anything at all about any such contract. Their main object seems to have been to keep their union in general and Bowaters' drivers in particular out of trouble in what was plainly a difficult position for the latter, though, no doubt, it was also their wish to give such support as they properly could to Natsopa in that union's dispute. Nor, as it seems to me, is it shown that the drivers broke their contracts. They drove no more loads to the plaintiffs, but they were never asked to do so. Further, it is not shown that the breach of Bowaters' contract with the plaintiffs followed as a necessary consequence of the attitude of these particular drivers. Non constat that Bowaters could not have made other arrangements for delivery, had they thought it expedient to do so, but I find nothing in the evidence to suggest that they ever even attempted anything of the kind. Their passive attitude may well have been due to anxiety not to become embroiled in the dispute, but that is not to say that their breach of contract with the plaintiffs was caused by any unlawful action on the part of these three defendants. Accordingly, I think that the motion was rightly refused as against these three defendants also.

There remains the case of the defendant, Morrison, the secretary of the National Union of Printing, Bookbinding and Paper Workers, the union to which Bowaters' loaders belong. There is considerable force in the criticism by counsel for the plaintiffs of his evidence, and when the case comes to trial he may have some

difficult questions to answer in cross-examination, but on the evidence as it stands I cannot find even *prima facie* proof that he gave any instructions at all to Bowaters' loaders, still less any instructions to them amounting to persuading or procuring or inducing them to break their contracts of employment. As to the supplies of ink, the employees concerned were Natsopa members and as such under the aegis of the defendant, Briginshaw, but, to my mind, the evidence as it stands on this part of the case leaves too much to the imagination to make it reasonably possible to infer that the defendant Briginshaw persuaded, induced or procured these employees to break their contracts of employment. As regards the allegation of a conspiracy among the defendants to do the various acts complained of as unlawful, I agree with my Lord that no such conspiracy is made out on the present evidence, and in any case I do not see how this allegation could assist the plaintiffs' claim for interlocutory relief, inasmuch as on the evidence as it now stands it does not appear to me that any unlawful act is brought home to any of the defendants, individually or collectively.

Following my Lord's example, I do not propose to express any view on the effect of the defence based on the Trade Disputes Act, 1906, s. 3, which for the present purpose is, so far as I can see, the only point of substance arising under that Act. This is obviously a question of difficulty, which, having regard to the view I have formed of the position at common law on the facts at present available, it is unnecessary, for the purposes of the motion, to decide one way or the other. For the reasons I have endeavoured to state, I agree that this appeal fails and should be dismissed.

MORRIS, L.J.: The decision in *Lumley v. Gye* (3), which was argued on demurrer, was that the principle governing an action for enticing away servants could be applied if it were proved that a defendant procured the breach of a contract to give professional services. In discussing the principle, ERLE, J., expressed the view (2 E. & B. 232) that the procurement of the violation of a right is a cause of action. In two of the counts of the declaration the word "maliciously" was used and in all three it was alleged that the defendant "enticed and procured" Miss Wagner. When, in *Quinn v. Leatham* (1), LORD MACNAGHTEN considered *Lumley v. Gye* (3), he approved it, and did so, not on the ground of malicious intention, which he said was not the gist of the action, but on the ground that a violation of legal right committed knowingly is a cause of action. He said that it is a violation of legal right to "interfere" with contractual relations recognised by law if there is no sufficient justification for the interference. LORD LINDLEY also indorsed the decision in *Lumley v. Gye* (3) and expressed himself as follows ([1901] A.C. 534):

"But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffered from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact—in other words, if he is wrongfully and intentionally struck at through others, and is thereby damaged—the whole aspect of the case is changed: the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done."

There follows shortly afterwards the passage in the speech of LORD LINDLEY to which my Lords have already referred. It is to be observed that LORD LINDLEY speaks of interference which is "wrongful" and of acts which are "wrongful".

In tune with the opinions to which I have referred is the well-established principle that an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent. In his speech in *Quinn v. Leathem* (1) LORD MACNAGHTEN expressed the view that the headnote to *Allen v. Flood* (11) might well have run in those words. In *Allen v. Flood* (11), LORD HERSCHELL said ([1898] A.C. 123):

"It is certainly a general rule of our law that an act *prima facie* lawful is not unlawful and actionable on account of the motive which dictated it. I put aside the case of conspiracy, which is anomalous in more than one respect."

Clear guidance in these matters is afforded by the propositions formulated by VISCOUNT SIMON, L.C., in his speech in the *Crofters* case (2) ([1942] 1 All E.R. 148). It is conceded in the present case that there is in existence a trade dispute. In so far as conspiracy is alleged, it is expressly disclaimed that there is any conspiracy or combination which has the injury of the plaintiffs as its real purpose. The motive or purpose of the defendants is to secure freedom for the employees of the plaintiffs to join a trade union and to dissuade the plaintiffs from continuing a ban on trade union membership, which the plaintiffs have for many years enforced. With the competing viewpoints in regard to the controversy which is thus denoted this court is not, and cannot be, in any way concerned. Though no combination wilfully to injure the plaintiffs is alleged, so as to be actionable on the basis of *Sorrell v. Smith* (13), it is alleged that the defendants combined or conspired to commit the tort described in the writ as procuring a breach or breaches of contract. When considering this part of the case it may be useful to have in mind the words of LORD LINDLEY in his speech in the House of Lords in *South Wales Miners' Federation v. Glamorgan Coal Co.* (4), when he said in reference to the law of conspiracy ([1905] A.C. 252):

"But the possession of great power, whether by one person or by many, is quite as consistent with its lawful as with its unlawful employment; and there is no legal presumption that it will be or has been unlawfully exercised in any particular case. Some illegal act must be proved to be threatened and intended, or to have been committed, before any court of justice in the United Kingdom can properly make such conduct the basis of any decision."

Much debate took place during the hearing in regard to the nature and definition of the tort which the plaintiffs allege was committed by the defendants. The words used by LORD MACNAGHTEN when expressing his reasons for approving the decision in *Lumley v. Gye* (3) were adopted in this court by ROMER, L.J., and STIRLING, L.J., in the *Glamorgan Coal Co.* case (4). Various words and phrases have been used at different times. Among them are the words "induce" and "procure", but the principle which underlies the matter is laid down by LORD MACNAGHTEN and LORD LINDLEY. The tort is committed if a person without justification knowingly and intentionally interferes with a contract between two other persons. There must, therefore, be knowledge of the existence of contractual relations between others and the intentional commission without justification of some act which interferes with those contractual relations so as to bring about or procure or induce a breach resulting in damage. If A has a contract with B, the tort will be committed by X if there is a violation of the right B has under his contract by the intentional interference of X. If the contract between A and B is lawfully terminated, then there is no violation. In this context the notion of interference involves something wrongful. The breach of contract must be brought about or procured or induced by some act which a man is not entitled to do, which may take the form of direct persuasion to break a contract or the intentional bringing about of a breach by indirect methods involving wrongdoing. A clear illustration is furnished if X with knowledge persuades A to break his contract with B. The tort would also be committed if X with knowledge coerced A to break his contract. Infinite varieties of facts

may occur calling for the application to them, when they are precisely ascertained, of the principles laid down. Thus, if X with knowledge and intention forced A to break his contract with B by depriving A of his only possible means of performing the contract (as, for example, by removing the only available essential tools or by kidnapping a necessary or irreplaceable servant or by persuading a necessary and irreplaceable servant to break his contract) then probably in such cases the liability of X could be proved. In these illustrations I leave out
A of account the effect of the Trade Disputes Act, 1906.

Unless it is shown that some of the defendants combined and agreed together to do acts which included the commission of this tort, the inquiry resolves itself into considering how the matter stands in regard to each defendant separately. In my judgment, that inquiry does so resolve. Two of the defendants were present at the meeting which took place on Apr. 22. Those present all agreed to do what
B they could to stop supplies for the plaintiffs and agreed to take what they regarded as common trade union action. I do not consider that the worst construction must be placed on these resolves so that it must be assumed that the objectives were to be reached by unlawful means. The purposes which the defendants sought to achieve were purposes which could be achieved by the adoption of lawful means.

C My Lords have dealt with the facts and I do not propose to do more than to refer to certain aspects of them. The defendant Deakin states that after hearing that there had broken out a dispute between the National Society of Operative Printers and Assistants and its members, on the one side, and the plaintiffs, on the other, he asked the officials of the Transport and General Workers' Union to give the employees' side to the dispute such assistance as they properly could,
D but he states that he gave no instructions that members were not to handle or move papers for delivery to the plaintiffs. I cannot see that a case for interlocutory relief is made out. It cannot be assumed that this defendant knew of any contract between Bowaters Sales Co., Ltd., and the plaintiffs or that he intended to bring about its breach. This defendant made no approach to Bowaters and did not ask anyone to make such an approach. It cannot be
E assumed that this defendant took steps to bring about a breach of the contract between the plaintiffs and Bowaters. As regards the defendant, Wood, he states that he spoke to Cassidy and expressed the view that, as the plaintiffs' works in Salford were being picketed, it would be unwise to send any more paper. The opinion of this defendant was that, whatever instructions the drivers received from their union, they would not have delivered the supplies when they found
F that the plaintiffs' works were picketed. The defendant, Intin, states that he told Botterill that they intended to support the National Society of Operative Printers and Assistants where they properly could, but that they did not want Bowaters to be involved, and he advised Botterill not to ask the men to load anything for the plaintiffs. In considering these matters it has to be remembered that, once the dispute had broken out relating to the plaintiffs and once the
G plaintiffs' premises were being picketed, there was a situation which was not of the creation of Deakin or Wood or Intin, but was one with which Bowaters had to reckon. If it be the case that the drivers would, apart from any advice or instruction to them from their union, refuse to deliver to picketed premises, then that also was a serious feature of the situation. Bowaters could have put the matter to the test by ordering the drivers to drive, but they did not. Bowaters
H may have feared interference with the vehicles and drivers from elsewhere if they sought to deliver paper. It does not seem to me that Wood or Intin would have any knowledge of the contractual position between the plaintiffs and Bowaters, though they might guess or assume that a projected delivery would be pursuant to some contract. They would not necessarily know, nor, perhaps, would they pause to speculate, whether any projected future deliveries would be pursuant to some already existing contract.

In view of all these circumstances, I do not consider that it would be fitting on the present material to proceed on the basis that these defendants, Intin and Wood, had procured Bowaters to break their contract, either by way of some direct approach to Bowaters or by way of any persuasion of the drivers to break their contracts of employment. In view of the conclusions which I have expressed, I do not find it necessary to deal with the question whether, if these defendants had induced the drivers to break their contracts of employment, the effect of the Trade Disputes Act, 1906, s. 3, would be to exclude such conduct from the category of wrongful interference. Counsel for the first three defendants took certain additional points. He submitted that it must be shown that there is not a mere breach of contract, but a repudiation of it. He submitted that, if the main elements of the tort were established, the defendants could show that there was justification for their interference, that before the tort can be committed the particular terms of the contract must be known, and that Bowaters did not in fact break their contract with the plaintiffs. I do not find it necessary for present purposes to deal with these contentions. It may be that the evidence in regard to the contractual position between the plaintiffs and Bowaters is not yet in all respects complete and, save to such extent as is unavoidable, it is undesirable in litigation to which Bowaters are not parties and in which they have not been heard to express views as to the contractual position. In regard to the other defendants, I am not satisfied that it is shown that with knowledge they brought about a breach of contract by some action which they were not entitled to take. I have reached the same conclusions as my Lords and I am in accord with the reasoning they have expressed in their review of the facts.

Appeal dismissed.

Solicitors: *Neish, Howell & Haldane* (for the plaintiffs); *Pattinson & Brewer* (for the first three defendants); *Shaen, Roscoe & Co.* (for the fourth and fifth defendants); *W. H. Thompson* (for the sixth defendant).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

MINISTRY OF HEALTH v. STAFFORD CORPORATION.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.), May 28, 29, July 4, 1952.]

National Health Service—Hospital—Transfer to Minister—"Hospitals vested in a local authority"—Reversionary interest in freehold of hospital premises—National Health Service Act, 1946 (c. 81), s. 6 (2).

From 1907 onwards the S. corporation used as an isolation hospital certain premises which it owned in fee simple. On May 27, 1943, a joint hospital board, constituted under the Ministry of Health Provisional Order Confirmation (Mid-Staffordshire Joint Hospital District) Act, 1938, by agreement with the corporation acquired a tenancy of the premises for ten years from Oct. 1, 1941, with an option to extend the tenancy for a further period of ten years. Immediately before July 5, 1948, the "appointed day" under the National Health Service Act, 1946, the premises were being used by the joint hospital board as an isolation hospital. As the board came within the definition of "local authority" in s. 79 (1) of the Act of 1946, under s. 6 (2) of the Act the term of years held by them were transferred to and vested in the Minister of Health on July 5, 1948. On the question whether the freehold interest of the corporation, who were also a local authority within s. 79 (1), also vested in the Minister under s. 6 (2)

HELD: the word "vested" in the phrase "all hospitals vested in a local authority", in s. 6 (2) of the Act of 1946, indicated the ownership of a proprietary interest as part of the hospital undertaking, and the subsection was concerned only with the interests which, immediately before

the appointed day, belonged to a local authority which was carrying on a hospital and providing hospital services; as the corporation were not carrying on a hospital or providing hospital services at the material time, their reversionary interest in the hospital premises was not within the scope of the sub-section; and, therefore, it did not vest in the Minister under the Act.

Semle: the words "all hospitals" in s. 6 (2) do not include legal or equitable interests in the land occupied by the hospital premises, but only refer to hospital activities as distinct from the premises in which such activities are carried on and a reversionary interest therein.

Decision of DANCKWERTS, J. ([1952] 1 All E.R. 744), reversed.

FOR THE NATIONAL HEALTH SERVICE ACT, 1946, s. 6 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 15, p. 339.

APPEAL by defendants from an order of DANCKWERTS, J., dated Mar. 4, 1952, and reported [1952] 1 All E.R. 744.

By an agreement, dated May 27, 1943, and made between the defendant corporation and the Mid-Staffordshire Joint Hospital Board, the corporation granted to the board a tenancy of premises, which they held in fee simple and had used as an isolation hospital, for a term of ten years from Oct. 1, 1941, for use as an isolation hospital, and until July 5, 1948 (the "appointed day" under the National Health Service Act, 1946), the board used the premises as an isolation hospital. On a summons by the Ministry of Health to determine whether, on the true construction of the National Health Service Act, 1946, the premises were, on July 5, 1948, transferred to and vested in the Minister of Health, both as to the leasehold interest and the fee simple reversion, or only as to the leasehold interest, DANCKWERTS, J., held that the effect of s. 6 (2) of the Act was to transfer to the Minister all the interests in the hospital which, immediately before the appointed day, were vested in a local authority, and, therefore, both the fee simple and the term of years held respectively by the corporation and the board were thereby transferred to and vested in the Minister.

Cross, Q.C., and J. V. Nesbitt for the corporation.

The Attorney-General (Sir Lionel Heald, Q.C.), and Denys B. Buckley for the Ministry of Health.

Cur. adv. vult.

JULY 4. SIR RAYMOND EVERSLED, M.R.: I have had the advantage of seeing the judgment which has been prepared by ROMER, L.J. I entirely agree with it and have nothing that I wish to add.

BIRKETT, L.J.: I, too, have had the same opportunity, and I, too, agree and have nothing to add.

ROMER, L.J., read the following judgment. The question for determination in this case is whether the freehold interest in the site of a hospital in Stafford known as the Tithe Barn Hospital has become vested in the Minister of Health by reason of the passing of the National Health Service Act, 1946. DANCKWERTS, J., has answered this question in the affirmative, and the defendant corporation, who were the owners in reversion of the freehold immediately before the appointed day under the Act (July 5, 1948), have appealed against his decision.

The site of the hospital was acquired by the corporation under the Stafford Corporation Act, 1880. From the date of its acquisition until 1907 the site remained vacant, but in that year the corporation erected on it and, until the agreement hereinafter mentioned, maintained there an isolation hospital. On Dec. 22, 1938, there was passed the Ministry of Health Provisional Order Confirmation (Mid-Staffordshire Joint Hospital District) Act, 1938. This Act formed a number of constituent districts (which included the borough of Stafford) into a united district called the Mid-Staffordshire Joint Hospital District for the

purpose of the provision of hospital accommodation for persons in the constituent districts who were suffering from infectious diseases other than smallpox, and set up a joint board which was to be known as the Mid-Staffordshire Joint Hospital Board (hereinafter referred to as "the board"). After the passing of the Act of 1938 the corporation were precluded (by reason of s. 7 (1) of the Public Health Act, 1936) from discharging in their district any functions of the board, but by virtue of para. 22 of the order of the Minister which is set out in the schedule to the Act of 1938 they were, in effect, authorised to continue the Tithe Barn Hospital until a hospital provided by the board was ready for the reception of patients. The corporation acted in pursuance of this authority until 1943, when they were requested by the board to lease the hospital to them. Accordingly, by an agreement dated May 27, 1943, the corporation demised to the board the land in Tithe Barn Road together with the isolation hospital and ancillary buildings erected thereon and the fixtures and fittings therein mentioned for the term of ten years from Oct. 1, 1941, at the yearly rent of £320. The board covenanted (*inter alia*) to maintain and use the hospital as an isolation hospital for the reception of persons suffering from infectious diseases other than smallpox. The agreement gave the board an option of leasing the hospital for a further ten years at the expiration of the demised term. From the date of the said agreement until July 5, 1948, the board maintained and used the property as an isolation hospital as provided by the agreement. It is not disputed that on that day the property vested in the Minister for the residue of the term granted by the agreement, since the board in whom that term was vested immediately before the appointed day were a local authority within the definition of that expression contained in s. 79 (1) of the National Health Service Act, 1946.

The question is, as already stated, whether the freehold reversion in the property also vested, and this turns on certain provisions of the Act of 1946 to which it will now be convenient to refer. Section 1 reads as follows:

"(1) It shall be the duty of the Minister of Health (hereafter in this Act referred to as 'the Minister') to promote the establishment in England and Wales of a comprehensive health service designed to secure improvement in the physical and mental health of the people of England and Wales and the prevention, diagnosis and treatment of illness, and for that purpose to provide or secure the effective provision of services in accordance with the following provisions of this Act. (2) The services so provided shall be free of charge, except where any provision of this Act expressly provides for the making and recovery of charges."

Section 6 reads :

"(1) Subject to the provisions of this Act, there shall, on the appointed day, be transferred to and vest in the Minister by virtue of this Act all interests in or attaching to premises forming part of a voluntary hospital or used for the purposes of a voluntary hospital, and in equipment, furniture or other movable property used in or in connection with such premises, being interests held immediately before the appointed day by the governing body of the hospital or by trustees solely for the purposes of that hospital, and all rights and liabilities to which any such governing body or trustees were entitled or subject immediately before the appointed day, being rights and liabilities acquired or incurred solely for the purposes of managing any such premises or property as aforesaid or otherwise carrying on the business of the hospital or any part thereof, but not including any endowment within the meaning of the next following section or any rights or liabilities transferred under that section. (2) Subject to the provisions of this Act, there shall also, on the appointed day, be transferred to and vest in the Minister by virtue of this Act all hospitals vested in a local authority immediately before the appointed day, and all property and liabilities held

by a local authority, or to which a local authority were subject, immediately before the appointed day, being property and liabilities held or incurred solely for the purposes of those hospitals or any of them or for the purpose of securing accommodation for persons in the area at any hospital not vested in the authority . . . (4) All property transferred to the Minister under this section shall vest in him free of any trust existing immediately before the appointed day, and the Minister may use any such property for the purpose of any of his functions under this Act, but shall so far as practicable secure that the objects for which any such property was used immediately before the appointed day are not prejudiced by the provisions of this section."

By s. 79 (1) :

"... 'hospital' means any institution for the reception and treatment of persons suffering from illness or mental defectiveness, any maternity home, and any institution for the reception and treatment of persons during convalescence or persons requiring medical rehabilitation, and includes clinics, dispensaries and out-patient departments maintained in connection with any such institution or home as aforesaid, and 'hospital accommodation' shall be construed accordingly . . . 'property' includes rights . . . 'voluntary' means not carried on for profit and not provided by a local or public authority."

By s. 9:

"(1) For the purposes of the foregoing provisions of this Part of this Act relating to the transfer of property and liabilities, the expression 'hospital' includes, in addition to the premises specified in the definition of the said expression contained in s. 79 of this Act, any clinic, dispensary or out-patient department not maintained in connection with such premises as aforesaid at which treatment by or under the direction of medical or dental practitioners is provided, not being—(a) a clinic or out-patient department maintained by a local education authority or maintained by any other local authority for the care of expectant and nursing mothers and young children ; or (b) a clinic, out-patient department or dispensary where medical advice or treatment is ordinarily given by general medical practitioners and not by specialists ; and also includes any part of a workhouse within the meaning of the Poor Law Act, 1930, which would, if it were a separate institution, be a hospital as defined by the said s. 79, but save as aforesaid does not include any premises forming part of or ancillary to any institution or undertaking of which the main purpose is not therapeutic. (2) Where in connection with a voluntary hospital any premises are used for providing accommodation for paying patients and any profits thereby earned are made available for the benefit of the hospital, the premises shall be deemed for the purposes of this Part of this Act to form part of the hospital. (3) Where—(a) any premises are intended to be used for the purposes of a hospital to which s. 6 of this Act applies but have not been so used before the appointed day, and work has been done before that day for the purpose of adapting the premises for such use ; (b) it is intended to construct on any land new buildings or works which will on completion be used for the purposes of such a hospital as aforesaid, and the work of constructing the buildings or works has commenced before the appointed day ; (c) any premises used for the purposes of such a hospital as aforesaid have been destroyed and have not been restored before the appointed day ; or (d) any premises normally used for the purposes of such a hospital as aforesaid are, owing to damage or any other cause, not so used immediately before the appointed day ; any interests in those premises or in that land or, in the case of destroyed premises, the site thereof held immediately before the appointed day by the governing body of the hospital or trustees

or, as the case may be, the local authority in whom the hospital is vested, being interests held solely for the purposes of the hospital, shall be deemed for the purposes of this Part of this Act to be interests in premises forming part of the hospital. (4) Where any premises or land normally used for other purposes are or is temporarily used immediately before the appointed day by a local authority for the purposes of a hospital, the premises or land shall not be deemed for the purposes of this Part of this Act to be a hospital or, as the case may be, to form part of a hospital."

As the Tithe Barn Hospital was not a "voluntary" hospital it vested in the Minister by virtue of s. 6 (2) of the Act and not by virtue of s. 6 (1), and the argument for the Minister is, in brief, that the words in sub-s. (2) "all hospitals vested in a local authority" are sufficient to include, not only the term of years which was granted by the corporation to the board (a local authority), but also the freehold reversion which was vested in the corporation (another local authority). In his judgment DANCKWERTS, J., after referring to s. 6 (2), said ([1952] 1 All E.R. 746):

"The first thing which strikes one on reading that sub-section after having also read sub-s. (1) is that, whereas sub-s. (1) refers to 'interests in or attaching to premises', which suggests that the quality of ownership was evidently before the mind of the draftsman when he was dealing with voluntary hospitals, when one comes to sub-s. (2) one finds no reference to interests at all, but a reference to 'all hospitals vested in a local authority'. It would appear that the draftsman of the Act, when he dealt with hospitals belonging to a local authority, if I may use that term, had in mind simply the corporeal existence of the hospital as a building or an activity which was conducted by or on behalf of the local authority, and it does not appear to have occurred to him that the hospital might not be vested solely in the local authority so far as all interests in land were concerned otherwise than for all time in fee simple. It does not appear to have occurred to him that a local authority might be carrying on a hospital on land in which it had only a very limited interest, such as a short term of years. It appears to have been assumed that nobody other than the local authority would be interested in the land on which the hospital stood, and so, if a certain construction were put on the sub-section, it might result in the appropriation of a citizen's property entirely without compensation. If I look at a hospital merely as a building or activity carried on by a local authority immediately before the appointed day, I might find that there was a short leasehold interest vested in the local authority and that, subject to that, the site of the hospital belonged in fee simple to some private person. If I then construe the sub-section as simply vesting the hospital without further consideration in the Minister without regard to the interests of other persons in the land concerned, it would appear that the sub-section would have the effect of depriving a private person of his fee simple without any provision for compensation."

The learned judge said (*ibid.*, 747) that he could not believe that that was the intention of the sub-section, and expressed the view that what must be vested in the Minister must be

"... a hospital, meaning the site and activities to the extent to which the site or the interests in the site are vested in a local authority."

Then, after considering the respective positions in the matter of the joint hospital board and the corporation, he said (*ibid.*):

"It is a matter which appears to me to be of considerable difficulty. I have taken one step, which is to limit the interests transferred by this sub-section to interests in the land vested in a local authority, and the question is whether I ought to impose a further limitation on the construction

of this sub-section. It seems to me that I must apply the sub-section according to the words which are used, and that, if there is any interest in land which is used for the purposes of a hospital immediately before the appointed day, I must regard this sub-section as transferring to the Minister the interests in that land which are vested in any local authority. Therefore, while in some respects the result is rather surprising, I come to the conclusion, invoking the Interpretation Act, that the provisions of this sub-section may apply to two or more local authorities as well as to one. Consequently, it seems to me that, this being land on which the activities of a hospital were carried on immediately before the appointed day, whatever interests in that land were vested in a local authority are transferred by this sub-section to the Minister of Health, and that not only the leasehold term, which was held by the Mid-Staffordshire Joint Board, but also the fee simple interest, which was owned by Stafford Corporation, were vested in the Minister by the provisions of s. 6 (2) of the Act of 1946."

It will be seen that the learned judge, in effect, implied into the earlier part of s. 6 (2) the reference to interests in or attaching to premises which appears in s. 6 (1), but confined such interests to those which belonged to a local authority. If this implication is warranted, it has the result of vesting the sites and structures of "local authority" hospitals in the Minister by virtue of the words "all hospitals" in sub-s. (2) without recourse to the later part of the sub-section which relates to the vesting of "property." If, however, the implication is unjustified, the Minister could not, and does not, contend that the freehold reversion now in question vested in him under the provision relating to "property", for, although the reversion was, undoubtedly, property held by a local authority, it was certainly not held "solely for the purposes of the hospital", and it is only property so held that vests by virtue of that provision.

I will consider first, then, the question of the meaning of the phrase "all hospitals" in the earlier part of s. 6 (2). Does it mean or include physical property, or is it referring only to hospital activities as distinct from the buildings and premises in which such activities were, immediately before the appointed day, being carried on? Inasmuch as the second part of the sub-section deals specifically with

"...all property...held by a local authority...immediately before the appointed day, being property...held...solely for the purposes of those hospitals..."

it would seem at first sight that the phrase "all hospitals" in the first part of the sub-section was referable to activities and not to physical premises. This prima facie impression gains some support from the fact that in sub-s. (1) (in contrast to sub-s. (2)) the words "premises...used for the purposes of a voluntary hospital" are expressly used, and, further, that such words themselves indicate a distinction between property, on the one hand, and the purposes of an enterprise, on the other: and see also sub-s. (4), where that which is to vest in the Minister free of any trust is "property" and not "hospitals". As against this there is in sub-s. (1) (but not in sub-s. (2)) a reference to "premises forming part of a voluntary hospital".

Notwithstanding, however, the impression which, as I have said, derives at first sight from sub-s. (2), it was contended before us by counsel for the Ministry that a reference to the definition of "hospital" in s. 79 (1) of the Act and to some of the provisions of s. 9 leads to a different result. It seems to me, however, that the language of the definition in s. 79 (1) is referable rather to a variety of objects or purposes than to land or buildings. In any event, it cannot be regarded as solely referable to the latter. Then, as to s. 9, sub-s. (1) thereof refers to the subject-matter of the definition of "hospital" in s. 79 (1) as "premises" and makes certain additions to them. The rest of s. 9 (1), however, seems to indicate

that the word "premises" itself is being used in a sense indicative rather of activities or of an undertaking than of property and, therefore, does not carry the matter much further. Section 9 (2) provides that

"Where in connection with a voluntary hospital any premises are used for providing accommodation for paying patients and any profits thereby earned are made available for the benefit of the hospital, the premises shall be deemed for the purposes of this Part of this Act to form part of the hospital."

Here the word "hospital" in relation to the availability of profits means, apparently, the "enterprise" and in relation to premises includes, it would seem, both enterprise and property. Section 9 (3) distinguishes clearly between premises, land and buildings, on the one hand, and "hospital" in the sense of activity or enterprise, on the other. Finally, s. 9 (4) again draws a distinction between a hospital in the sense of an enterprise and the land on which that enterprise is carried on. There are other references also to be found in the Act to premises and property and hospitals, but, in my judgment, neither they nor those which I have mentioned disturb what I regard as the natural meaning and effect of s. 6 (2), viz., that there vest in the Minister, first, all hospital activities (including management and control) which were formerly vested in local authorities, and, secondly, all property and rights which had been held by such authorities solely for the purpose of those activities.

It is, however, not necessary to express a concluded view on this question for, even assuming that the words "all hospitals vested in a local authority" in s. 6 (2) include legal and equitable interests in the land and premises on and in which the activities of the hospitals were conducted, I am clearly of opinion that the reversionary interest of the Stafford Corporation in the Tithe Barn Hospital was not within their scope. In my judgment, the word "vested" as used in s. 6 (2) indicates the ownership of a proprietary interest as part of the hospital undertaking. Certain interests which, prior to the appointed day, belonged to a local authority which was carrying on a hospital and providing hospital services were to pass into the ownership and possession of the Minister. It is with those interests, and those alone, that the sub-section was concerned. Such a result is not only strictly and fully in accordance with the language used, but it is in conformity with the heading to s. 6, which is "Transfer of hospitals to the Minister." The language does not appear to me to be at all appropriate to include a reversionary interest belonging to a local authority which was not itself carrying on a hospital or providing hospital services, and I can see no sufficient warrant for attributing a strained interpretation to the language of s. 6 (2) merely for the purpose of achieving a degree of compulsory and uncompensated confiscation which is unnecessary, on the one hand, and productive of uncertainty and confusion, on the other.

The validity of the Minister's contention that the corporation's reversionary interest in the hospital became vested in him was, during the argument, tested by applying two different hypotheses. The first was the assumption that the corporation had granted a lease of the premises in question for the purposes of a voluntary hospital, and that they were being used as such immediately prior to July 5, 1948. If such had been the position, it is as clear that the term granted to the lessees would have vested in the Minister under s. 6 (1), as it is that the corporation's reversionary interest would not. Nevertheless, if the Minister's argument on s. 6 (2) be right, the reversion would have vested in him thereunder so that the vesting provisions of that sub-section would have the incidental effect of enlarging those of sub-s. (1). The Attorney-General was not disposed to accept this as reflecting the probabilities of the matter and sought to meet the difficulty by suggesting that sub-s. (1) and sub-s. (2) should be treated as wholly isolated from one another and that effect should be given to each without any regard to the other. This treatment of two consecutive sub-sections in an Act

of Parliament is one only to be resorted to in case of necessity. No such necessity is to be found here, and, further, s. 9 (3), to which I have already referred, operates indifferently on all hospitals affected by s. 6, both those which are dealt with by s. 6 (1) and those which are the subject of s. 6 (2).

A It seems to me, accordingly, that the Minister's contention does not successfully survive the first of the tests which were suggested in argument, nor did it fare any better when subjected to the second. This took the form of an inquiry as to what the position would be if the Stafford Corporation had granted a lease of the premises in question to A. (a private individual), who had then sub-let to the board, and the board were using the premises as a hospital under that sub-lease immediately prior to the appointed day. Would the Minister, in those circumstances, claim that the corporation's freehold reversion vested in him under s. 6 (2), notwithstanding that the leasehold reversion which was vested in A. did not? The Attorney-General was inclined to think that the freehold reversion would not vest, but junior counsel for the Minister thought that it would. I do not myself see how, consistently with the interpretation of s. 6 (2) which the Minister contends is the right one, he could do other than accept the view of junior counsel on this point as correct, and yet it is difficult to suppose that the legislature could have contemplated as a practicable proposition that the Minister should enter into possession of a hospital for a term of years, then relinquish possession for what might be another period of years, and then re-enter for an estate in fee. No such difficulties as these would or could arise if one is content to accept the language of s. 6 (2) as one finds it and to confine its operation to the vesting in the Minister of that which a local authority which was providing a hospital service was capable of transferring, viz., such legal interest in the premises of the hospital as it had.

D As an alternative way of presenting the Minister's case it was suggested that certain of the provisions of the Ministry of Health Provisional Order Confirmation (Mid-Staffordshire Joint Hospital District) Act, 1938, demonstrate that the defendant corporation still retained a sufficiently active part in the management of the hospital in question as to justify the view that in some sense the hospital was vested in them. It was pointed out that under s. 4 (1) and sched. I of the Minister's order, which is set out in the schedule to the Act, the corporation contribute four out of the twenty-seven members who constitute the board, that by para. 11 of the schedule to the Act the corporation are empowered to make orders for the admission of persons to the hospital, and that, by para. 13 and para. 15, they have to contribute financially to the common fund of the board. These features of the Act, however, are common to all the constituent districts which constitute the Mid-Staffordshire Joint Hospital District, and, in my opinion, they have no appreciable relevance to the question whether the corporation's reversionary interest which is in issue in these proceedings became vested in the Minister by virtue of the Act of 1946. I have already indicated that, in my opinion, it did not. It is to be borne in mind that the provisions of s. 6 of this Act are of a confiscatory character, and the courts are not disposed to hold that a man—or, as here, a local authority—is dispossessed of his property without compensation in the absence of language which clearly leads to that conclusion. In my judgment, for the reasons which I have endeavoured to express, the language of s. 6 (2) does not lead to that conclusion in relation to the reversionary interest of the defendant corporation. It leads, on the contrary, to the conclusion that the corporation's ownership of that interest remained altogether unaffected by the Act. In my opinion, accordingly, this appeal should be allowed.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *T. B. Nowell*, town clerk, Stafford (for the corporation) ; *Solicitor, Ministry of Health.*

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

BEST v. SAMUEL FOX & CO., LTD.

[HOUSE OF LORDS (Lord Porter, Lord Goddard, Lord Oaksey, Lord Morton of Henryton and Lord Reid), April 28, 29, 30, May 1, 5, July 11, 1952.]

Negligence—Wife's loss of consortium—Injury to husband causing sexual incapacity—Tortfeasor's liability to wife.

Husband and Wife—Consortium—Right of consortium—Husband injured and losing sexual capacity owing to defendant's negligence—Defendant's liability to wife.

The right of a husband to damages for loss of consortium against a person who negligently injures his wife is an anomaly at the present day and should not be extended to a wife in the case of a tort depriving her of the consortium of her husband.

By reason of the negligence of the respondents the appellant's husband sustained physical injuries, one of the results of which was that he became incapable of sexual intercourse, and, in consequence, the appellant suffered in health. The appellant claimed damages from the respondents for loss of her husband's consortium in that she was deprived of the opportunity of having further children and of normal marital relations.

HELD: there was no principle or authority in English law on which such an action could be founded, and the appellant was not entitled to succeed.

Place v. Searle ([1932] 2 K.B. 497), distinguished.

Decision of COURT OF APPEAL ([1951] 2 All E.R. 116), affirmed.

AS TO RIGHTS OF CONSORTIUM, see HALSBURY, Hailsham Edn., Vol. 16, pp. 610-612, paras. 956-960; and FOR CASES, see DIGEST, Vol. 27, pp. 78-83, Nos. 607-649, and Digest Supp.

Cases referred to:

- (1) *Gray v. Gee*, (1923), 39 T.L.R. 429; 27 Digest 82, 645.
- (2) *Place v. Searle*, [1932] 2 K.B. 497; 101 L.J.K.B. 465; 147 L.T. 188; Digest Supp.
- (3) *Wright v. Cedzich*, (1929), 43 C.L.R. 493; (1930), V.L.R. 141; 3 A.L.J. 437; (1930), Argus L.R. 105; Digest Supp.
- (4) *Lynch v. Knight*, (1861), 9 H.L. Cas. 577; 5 L.T. 291; 11 E.R. 854; 27 Digest 82, 644.
- (5) *Lumley v. Gye*, (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 118 E.R. 749; 42 Digest 987, 169.
- (6) *Rogers v. Rajendro Dutt*, (1860), 13 Moo. P.C.C. 209; 8 Moo. Ind. App. 103; 25 J.P. 3; 15 E.R. 78; *sub nom. Rogers v. Dutt*, 3 L.T. 160; 42 Digest, 968, 4.
- (7) *Quinn v. Leathem*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 42 Digest 971, 30.
- (8) *Admiralty Comrs. v. S.S. Amerika*, [1917] A.C. 38; 86 L.J.P. 58; 116 L.T. 34; 1 Digest 35, 266.
- (9) *Edwards v. Porter*, [1925] A.C. 1; 94 L.J.K.B. 65; 132 L.T. 496; 27 Digest 214, 1851.

APPEAL by the appellant from an order of the Court of Appeal (COHEN, BIRKETT and ASQUITH, L.J.J.), dated May 10, 1951, and reported [1951] 2 All E.R. 116, dismissing an appeal from CROOM-JOHNSON, J., dated July 20, 1950, and reported [1950] 2 All E.R. 798, whereby he dismissed the appellant's claim for damages for interference with her right to the consortium of her husband.

On Mar. 23, 1946, the appellant's husband, in the course of his employment with the respondents, met with an accident and sustained severe personal injuries as a result of which he became incapable of sexual intercourse. On July 20, 1948, the husband recovered damages from the respondents in an action for damages for breach of statutory duty and negligence. In the present action

the appellant claimed damages on the ground that as a result of the respondent's negligence her consortium with her husband had been interfered with without justification and she had been deprived of the opportunity of having marital relations and further children. The Court of Appeal held that a wife could only succeed in such an action if she could prove total loss of, as distinct from impairment or interference with, consortium, and, as that had not been proved, the appellant's claim failed.

A *Pritt, Q.C., G. N. Black and R. P. Smith* for the appellant.
Paull, Q.C., and Leslie for the respondents.

The House took time for consideration.

July 11. The following opinions were read.

B **LORD PORTER:** My Lords, I agree with the view entertained, I believe, by all your Lordships that this appeal should be dismissed. The facts have been set out by LORD GODDARD and it is unnecessary to repeat them. The salient fact, as I see it, is that the wife had herself suffered no physical injury and could only base her claim on the circumstance that she had lost the consortium of her husband by reason of the injury to him. Such a claim was put forward on the analogy of the enticement cases of which the most recent are C *Gray v. Gee* (1) and *Place v. Searle* (2). In the first the jury found for the defendant, and in the latter the statement that the wife had the same right as the husband was obiter. Both, however, take the view that wife and husband alike have a cause of action against a third party who, without justification, destroys that consortium. In that class of case, however, the wrong is a deliberate action taken with the object of inducing the wife to leave her husband or the husband to leave his wife—malicious because it is their mutual duty to give D consortium to one another and the defendant has persuaded the errant spouse not to fulfil that duty. They are not authorities for the conclusion that in all cases of tort resulting in injury to the one which deprives the other of his or her consortium the party deprived can sue the wrongdoer, and I know of no case E where such a right of action has even been suggested where there is no evidence that the defendant knew of the existence of a wife or husband. Indeed it has been held (notwithstanding the vigorous opposition of ISAACS, J.) in the High Court of Australia in *Wright v. Cedzich* (3), that the wife has no such right.

On behalf of the appellant it is urged that a husband can bring an action for the loss of the consortium of his wife by reason of any tort which deprives him of that consortium and that in the circumstances prevailing today a wife must F have a similar right. Even, however, if it be assumed that in enticement cases the husband and wife have equal rights, it does not follow that today they have equal rights and liabilities one towards the other in all respects. I do not think it possible to say that a change in the outlook of the public, however great, must inevitably be followed by a change in the law of this country. The common G law is a historical development rather than a logical whole, and the fact that a particular doctrine does not logically accord with another or others is no ground for its rejection. Undoubtedly, certain differences between the position of husband and wife have been extinguished or modified by Act of Parliament with the result that the general opinion of the relationship which exists between the spouses has been changed, and it is quite true that modern text-books H express inconsistent opinions. Those which support the argument now presented on behalf of the appellant appear to have founded their conclusions on the observations of some of their Lordships who sat to adjudicate in *Lynch v. Knight* (4). The opinion of LORD CAMPBELL, L.C., is certainly in conformity with their view. LORD WENSLEYDALE, on the other hand, was of the opposite way of thinking and expressed a vigorous dissent, while the other two members of the House gave no decided opinion. Nor was it necessary to do so. As LORD GODDARD points out, the wife in that case was herself wronged by a defamatory

statement, and the question which had to be decided was whether the loss of her husband's consortium constituted special damage at a time when special damage was a necessary element in the wife's claim, and the actual decision merely determined that on the facts of the case the loss was too remote a consequence of the slander. Those who reject the view of LORD CAMPBELL, L.C., are able to rely on the older authorities such as BRACON and BLACKSTONE and to quote the opinion of the late SIR WILLIAM HOLDSWORTH in favour of their contention, and I see no sufficient reason for rejecting the earlier view.

Even if it be conceded that the rights of husband and wife ought to be equalised, I agree with LORD GODDARD that today a husband's right of action for loss of his wife's consortium is an anomaly and see no good reason for extending it. If the change is to be made I should prefer to abolish the husband's right rather than to grant the like remedy to the wife. On this short ground, which has been fully and clearly set out by ASQUITH, L.J., as the first basis of his conclusion and by LORD GODDARD in your Lordships' House I would dismiss the appeal.

As however BIRKETT and COHEN, L.J.J., decided the case in the Court of Appeal on a different ground, viz., that consortium is one and indivisible and the wife had not lost it as a whole, and as ASQUITH, L.J., agreed with this contention, I think it desirable that I should express a tentative opinion on it. My Lords, I think there is much to be said for this view and, indeed, I find it difficult to draw the boundary between what is and what is not loss of consortium or to divide it into its component parts. But, having regard to the opinion which I hold on the other contention, it is not necessary to come to a final decision on this point in the present case. Nor do I think that any serious damage will be done to a wife by such a conclusion. Today the damages which a husband receives for injury to his wife are commonly measured by his expenses, whether for medical treatment of the wife or in payment for household services which her injuries prevent her from performing, and little, if any, attention is paid to a loss of consortium which involves other considerations beyond those two. The expenses so recovered by the husband fall on *him* whereas his wife does not incur any similar liability, and, therefore, it is natural that he should recover and she should not. To my mind it is desirable that causes of action should not be multiplied, but that the wrong to the husband should be compensated by damages to him if he survives or if he dies to the wife under Lord Campbell's Act or the Law Reform (Miscellaneous Provisions) Act, 1934, and I see no reason for extending the liability further than the law demands. As I have said, I would dismiss the appeal.

LORD GODDARD: My Lords, the question that falls for decision in this case may, I think, thus be stated: Has a married woman, whose husband has been injured by a negligent act or omission, a right of action against the person causing that injury for the loss or impairment of consortium consequential on the injury? CROOM-JOHNSON, J., in a careful judgment held that no such right existed. In the Court of Appeal, BIRKETT, L.J., who delivered the first judgment, held that a wife had a right of action, but only if the consortium was wholly destroyed and not merely impaired. COHEN, L.J., agreed that the action could not lie for mere impairment as distinct from total loss, but expressed considerable doubt whether the action lay at all. ASQUITH, L.J., agreed with the other two members of the court on this point, but was of the opinion that neither for total nor partial loss of consortium had a wife any cause of action. But for the importance and novelty of the case I should have been content to say that I am in entire agreement with his conclusion.

The facts can be shortly stated. The appellant, Mrs. Best, is a young woman of about twenty-five years of age, and she is the wife of Rex Holroyd Best, a man of about thirty years of age. Mr. Best was a steel erector, and on Mar. 23, 1946, he was employed by the Steel Constructor Co., which at the trial was a third

party. The Steel Constructor Co. was carrying out certain work at the respondents' premises at Stockbridge for the respondents, and on the day mentioned Mr. Best was engaged in re-sheeting the roof of part of the respondents' steelworks. In the course of his work he was obliged to go on to the wheel track of an overhead travelling crane, and while he was there, owing to the negligence of the respondents, he was run into by the crane, knocked off the track, and, in falling, sustained the most grievous personal injuries. The agreed medical report

A makes it plain that as a result of his injuries Mr. Best is afflicted with a form of sexual impotence. He still retains the sexual urge, but is unable to perform the sexual act. Mr. Best brought his action against the respondents, alleging breaches of statutory duty and negligence at common law, and on July 20, 1948, at the Leeds Assizes he was awarded the sum of £4,238 15s. with the costs of the action. About six months after Mr. Best had succeeded in his action the appellant, B Mrs. Julia Best, issued her writ against the respondents—on Jan. 12, 1949. In her statement of claim, delivered with the writ of summons, she claimed damages from the respondents on the ground that because of the respondents' negligence her consortium with her husband had been interfered with without justification, in that she had been deprived of the opportunity of having further children and of ordinary marital relations. The argument has ranged over a wide field and C the industry of counsel has brought to the attention of the House a vast number of cases, but I hope I may not be accused of over-simplification if I say that, in my opinion, the question can be determined on a rather short, but none the less certain, ground.

First, it appears to me desirable to point out that the present suggested cause of action is, in truth, wholly distinct from what for convenience may be described D as one for enticement. In my opinion, *Place v. Searle* (2) was rightly decided, and, though that was an action by a husband, I agree with the opinion of SCRUTTON and SLESSER, L.JJ., that the cause of action that was held available to a husband existed also in a wife, and while it does not appear that GREER, L.J., expressed a definite opinion on that matter, not only did he not dissent from it, but I think it may fairly be gathered from his judgment that he held the same view. Enticement actions depend, in my opinion, on the well-established E legal principle that the violation of a legal right committed knowingly is a cause of action. This was the ground of the decision in *Lumley v. Gye* (5); it was emphasised in *Rogers v. Rajendro Dutt* (6) and established beyond question in this House in *Quinn v. Leathem* (7). A wife is entitled to enjoy the society, comfort and protection of her husband and to be maintained by him, and if F another entices him from her so that she is bereft of those benefits she is as much entitled to claim damages as is a husband whose wife is for any reason, save humanity, abducted or persuaded to leave his home. There has been a conscious and wilful invasion of her right. But here it is said that one who injures another by a breach of duty is liable to the injured person's wife, of whose G existence he may be entirely ignorant, because that breach of duty renders the husband incapable in whole or in part of performing all or some of the acts involved in the marriage state.

If there be such a cause of action in the wife it must be found either in principle or authority. As to authority I would adapt to these circumstances words used by LORD SUMNER in *Admiralty Comrs. v. S.S. Amerika* (8) ([1917] A.C. 51):

H " . . . never during the many centuries that have passed since reports of the decisions of English courts first began has the recovery of damages for . . . [such] injury been recorded,"

It was said for the appellant that this is due to the procedural difficulties which before 1882 precluded a married woman from bringing an action without joining her husband as plaintiff. This, no doubt, might well account for the reason why no action for enticement had ever been brought by a married woman till the procedural fetters were removed by the Married Women's Property Act, 1882.

A married woman could not force her husband to lend his name as plaintiff: per LORD SUMNER in *Edwards v. Porter* (9) ([1925] A.C. 42), and who could suppose that a husband would lend his deserted wife his name to bring an action against his mistress? But if the action were possible, what impediment could exist to a husband lending his name to one brought to benefit a wife by reason of an injury done to himself, especially as in the old law the damages when recovered would belong to him? There would be every inducement for him to do so, as the result would be to augment the damages which he would receive, nor do I see that in the action for the loss by the wife of her husband's consortium a plea of *res judicata* or satisfaction could have been set up on the ground that the husband had been compensated either by action or agreement for the injury suffered by him. The two causes of action would be distinct. As, then, the alleged right of action in the wife is not to be found in authority, by what principle can it be supported? The action, if any, would obviously lie in case. Negligence, if it is to give rise to legal liability, must result from a breach of duty owed to a person who thereby suffers damage. But what duty was owed here by the employers of the husband to the wife? If she has an action in this case so must the wife of any man run over in the street by a careless driver. The duty there which gives rise to the husband's cause of action arises out of what may for convenience be called proximity; the driver owes a duty not to injure other persons who are using the road on which he is driving. He owes no duty to persons not present except to those whose property may be on or adjoining the road which it is his duty to avoid injuring. It may often happen that an injury to one person may affect another. A servant whose master is killed or permanently injured may lose his employment, it may be of long standing, and the misfortune may come when he is of an age when it would be very difficult for him to obtain other work, but no one would suggest that he thereby acquires a right of action against the wrongdoer. Damages for personal injury can seldom be a perfect compensation, but where injury has been caused to a husband or father it has never been the case that his wife or children, whose style of living or education may have radically to be curtailed, have on that account a right of action other than that which, in the case of death, the Fatal Accidents Act, 1846, has given.

But, it is said, as I understand the argument, loss of consortium stands on a different footing. There the law gives an action to a husband, therefore, at least in these days, it must give the same to the wife. My Lords, except for *Lynch v. Knight* (4), I do not think it necessary to examine in detail the numerous cases which have been cited, interesting and instructive as many of them are. Not one of them suggests that the wife had an action for the loss of consortium, or that any action lay for injury to her save where some actual battery or assault on her was alleged, where, if the gist of the action was the battery or assault, she could be and ought to be joined as a plaintiff. The passages cited to us from BRACON, vol. 2, p. 547, edition by SIR TRAVERS TWISS; BLACKSTONE'S COMMENTARIES, vol. 3, chap. 8, pp. 139, 140; and HOLDSWORTH'S HISTORY OF ENGLISH LAW, vol. 8, p. 430—and there are no books of higher authority—all show that the action which the law gives to the husband for loss of consortium is founded on the proprietary right which from ancient times it was considered the husband had in his wife. It was, in fact, based on the same ground as gave a master a right to sue for an injury to his servant if the latter was thereby unable to perform his duties. It was an action of trespass for an invasion of the proprietary right which, arising from the status of villeinage or serfdom, a master had in his servant. On the same footing stood the action of crim. con., though it is interesting to observe that the courts seem to have had doubt as to the true nature of that action as it is spoken of in some of the cases as either trespass or case. The fact that the wife consented to adulterous intercourse was no answer because her consent was irrelevant to the husband's claim for the injury to his right. But a wife could never bring this action, and so far as I know never tried to.

It remains, therefore, to consider LORD CAMPBELL's dicta in *Lynch v. Knight* (4). He said (9 H.L. Cas. 589):

"Nor can I allow that the loss of consortium, or conjugal society, can give a cause of action to the husband alone . . . I think it *may* be a loss which the law *may* recognise, to the wife as well as to the husband."

A somewhat guarded dictum. He then goes on to hold that the wife is not the servant of her husband, and says the action of crim. con. does not rest on the fiction of loss of service as does the action for seduction of a daughter. With this the earlier cases agree as it is based on the interference with his rights as a husband. There was a vigorous dissent by LORD WENSLEYDALE, and a less positive dissent by LORD BROUGHAM, while LORD CRANWORTH, though strongly inclined to agree with LORD CAMPBELL, refrained from expressing a decided opinion. Clearly, therefore, the point now before your Lordships was not decided in that case and, in fact, the decision was on another ground. It is to be observed that the action was one for slander, imputing unchastity to the wife before marriage, and brought before the Slander of Women Act, 1891, had rendered special damage unnecessary to support the action. I think there is much to be said for the opinion of RICH, J., in *Wright v. Cedzich* (3) (43 C.L.R. 530), in which he closely analyses the case and comes to the conclusion that LORD CAMPBELL was not supporting the right of a wife to bring an action for loss of consortium, but was considering whether the estrangement of a husband from his wife with consequent distress and suffering of the latter due to the slander was not sufficient special damage to support the action.

My Lords, so entirely has the concept of the relation of husband and wife and of master and servant changed since the days of BRACTON, and, indeed, of BLACKSTONE, that I agree with COHEN and ASQUITH, L.J.J., that, if the matter were now *res integra*, the law, they say probably, while I am tempted to say, certainly, would refuse to give an action to the husband merely for loss of consortium due to negligence. It is too late now for the courts to deny an action which has existed for hundreds of years. It is an anomaly at the present day that a husband can obtain damages for an injury to his wife. English law is free neither of some anomalies nor of everything illogical, but this is no reason for extending them. There is this about it that is neither anomalous nor illogical, still less unjust. A husband nowadays constantly claims and recovers for medical and domestic expenses to which he has been put owing to an injury to his wife. As to the first, I think his claim really lies in his legal obligation to provide proper maintenance and comfort including medical and surgical aid for his wife, and the fact that a wrong does cause that obligation to be incurred is regarded as giving him a right to recover, while the latter is truly a remnant, and perhaps the last, of his right to sue for the loss of servitium, for, to use LORD WENSLEYDALE's words, it is to the protection of such material interests that the law attends rather than mental pain or anxiety.

This, in my opinion, disposes of the action, but there remains the question whether in any case an action would lie for the impairment, as distinct from a total loss, of consortium. As this can now only arise in the case of a claim by a husband I feel some hesitation in dealing with it in a case which relates only to the loss by a wife. But as all the members of the Court of Appeal dealt with this matter and it was elaborately argued at the Bar, I think one ought to express an opinion, and I am in agreement with the Court of Appeal. Consortium seems to me to be essentially an abstraction. Where the exercise of a profession or the call of duty involves prolonged absence abroad of one of the spouses there is not an interruption of consortium, nor is there because one of them may become a permanent invalid to be waited on and nursed by the other. Again, there may be loss of affection, but, provided the spouses continue to live together as man and wife, it seems to me that it still exists however different life may be from the days of the honeymoon. Sexual relations are, doubtless, a most important part

of the marriage relation, but, if age or illness or even disinclination impairs the potency of either of the spouses who continue to live together as husband and wife, I do not think the consortium is affected. It would be only if on this account one of them withdrew and decided to live apart. In truth, I think the only loss that the law can recognise is the loss of that part of the consortium that is called servitium, the loss of service, and it is that to which LORD WENSLEYDALE referred in the passage I have quoted above. I would dismiss the appeal.

LORD OAKSEY: My Lords, I have had an opportunity of reading in print the opinion which is to be delivered by my noble and learned friend, LORD REID. I agree with it and have nothing to add.

LORD MORTON OF HENRYTON: My Lords, on Mar. 23, 1946, the husband of the appellant, a steel erector employed by the Steel Constructor Co., was working in the respondents' factory when he was accidentally struck by an overhead travelling crane and was severely injured. It was admitted that the circumstances rendered the respondents liable to Mr. Best in negligence, and he recovered £4,238 15s. in an action against them. The respondents were liable to Mr. Best because he was an invitee on their premises and thus they owed a duty to him. The appellant claims that the respondents must pay her damages because, as a result of the accident to her husband (to quote her statement of claim)

" . . . she has been deprived of the opportunity of having further children and of normal marital relations, as a result whereof she suffers from nervousness, instability and insomnia. The happiness of her married life has deteriorated and continues to deteriorate. She is restless and suffers from a degree of tachycardia."

My Lords, with one exception to which I shall shortly return, it has never been the law of England that an invitor, who has negligently but unintentionally injured an invitee, is liable to compensate other persons who have suffered, in one way or another, as a result of the injury to the invitee. If the injured man was engaged in a business, and the injury is a serious one, the business may have to close down and the employees be dismissed. A daughter of the injured man may have to give up work which she enjoys and stay at home to nurse a father who has been transformed into an irritable invalid as a result of the injury. Such examples could easily be multiplied. Yet the invitor is under no liability to compensate such persons, for he owes them no duty and may not even know of their existence. There is thus no general principle of English law which would entitle the appellant to succeed in the present case. Nor is her claim justified by authority. It is true that a husband is entitled to recover damages for loss of consortium against a person who negligently injures his wife, but this exceptional right is an anomaly at the present day, as my noble and learned friend, LORD GODDARD, has said. It is founded on old authorities decided at a time when the husband was regarded as having a quasi-proprietary right in his wife, and is now so firmly established that it could only be abolished by statute. A wife, on the other hand, was never regarded as having any proprietary right in her husband, and the old authorities do not help the appellant.

For the reasons which have already been stated by two of your Lordships, *Place v. Searle* (2) is of no assistance to the appellant. It dealt with a very different cause of action, for a deliberate and malicious destruction of the consortium. I express no opinion on the question whether consortium is one and indivisible. That question does not arise in the present case, and it may arise for decision hereafter on a claim by a husband for a partial loss of consortium. I would dismiss the appeal.

LORD REID: My Lords, I have had an opportunity of reading the speech of my noble and learned friend, LORD GODDARD, and I am in complete agreement

with it except on one point which, in his judgment and in mine, is not material to the decision of this case—the nature of a husband's right to sue for loss of consortium. I also feel some hesitation in dealing with this matter, but I agree that in the circumstances one ought to express one's opinion about it.

A In the old cases a number of words are used to describe the husband's loss or damage. He has by the act of the wrongdoer lost his wife's services, assistance, comfort, society, etc. Sometimes the word "consortium" is used in conjunction with one or more of these words. Sometimes it appears to be intended to include them. I doubt whether there was any fixed practice. But it would seem that there was only one single cause of action in respect of loss in all these matters. There was not one action for loss of consortium and another for loss of servitium, and in the same cause of action loss or damage under any of these heads could properly be taken into account though often the main emphasis might be on the value of the services or assistance which the husband had lost. The origin of the husband's right of action seems to have been that he was regarded as having a quasi-proprietary right, and I think that it included a right to his wife's society as well as to her services. I can see no sign of any difference in quality between his right to her assistance and his right to her society, and indeed it would be difficult to say where in fact assistance ends and society begins, either today or in the Middle Ages. No doubt, her services and assistance had an additional value because her comfort and society went with them. I do not think that consortium was an abstraction. It seems to me rather to be a name for what the husband enjoys by virtue of a bundle of rights some hardly capable of precise definition.

D I do not think that it is open to doubt that an impairment of a wife's capacity to render assistance to her husband was enough to found an action. Certainly an injury which temporarily incapacitated her was sufficient, and I cannot find any ground for the view that an injury which did not produce complete incapacity at any time was insufficient even if it resulted in serious and permanent impairment of her capacity to render services. Any such injury might well deprive the husband to a large extent of his wife's comfort and society but at no time deprive him wholly of it, and I have seen nothing to lead me to think that in such a case that impairment of the consortium must be left out of account, and, if impairment of the consortium is enough, I have seen nothing to lead me to think that the destruction of a wife's capacity for sexual intercourse should not be regarded as such an impairment.

F Solicitors: *W. H. Thompson* (for the appellant); *Corbin, Greener & Cook*, agents for *Raworth, Lomas-Walker & Co.*, Harrogate (for the respondents).

Appeal dismissed.

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

CORK v. KIRBY MACLEAN, LTD.

[COURT OF APPEAL (Singleton, Denning and Romer, L.J.J.), June 27, 30, 1952.]

Building—Safety regulations—Working platform—Inadequate width—Failure to provide guard-rails or toe-boards—Workman's fall through epileptic fit—Onus of proof—Apportionment of liability—Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), reg. 22 (c), reg. 24 (1).

Negligence—Contributory negligence—Apportionment of liability—Breach of building regulations—Fatal accident—Employee's fall from platform—Employee failing to disclose liability to epileptic fits—Law Reform (Contributory Negligence) Act, 1945 (c. 28), s. 1 (1).

A workman entered the defendants' employment as a painter, without informing them that he was subject to epileptic fits and that his doctor had forbidden him to work at a height above ground. While working on a platform some twenty feet above ground which, in breach of the duty imposed on the defendants by regs. 22 (c) and 24 (1) of the Building (Safety, Health and Welfare) Regulations, 1948, was less than thirty-four inches wide and was not provided with guard-rails and toe-boards, he had a fit, fell to the ground, and was killed. On a claim by the workman's widow, as administratrix of his estate, for damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Acts, 1846 to 1908, for breach of statutory duty,

HELD: there was no burden on the defendants to prove that the workman would have fallen from the platform even if the regulations had been complied with; the true inference from the evidence was that there were two causes of the accident, the defendants being at fault in not complying with the regulations and the workman being at fault in not disclosing that he was subject to epileptic fits; the responsibility for the accident fell equally on the workman and on the defendants; and, therefore, under s. 1 (1) of the Law Reform (Contributory Negligence) Act, 1945, the damages recoverable by the plaintiff in respect of the accident must be reduced by one half.

Observations of SCOTT, L.J., in *Vyner v. Waldenberg Bros., Ltd.* ([1945] 2 All E.R. 549), explained.

Decision of DONOVAN, J. ([1952] 1 All E.R. 1064), reversed in part.

AS TO CONTRIBUTORY NEGLIGENCE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 679-689, paras. 963-973; and FOR CASES, see DIGEST, Vol. 36, pp. 109-121, Nos. 726-809.

FOR THE BUILDING (SAFETY, HEALTH AND WELFARE) REGULATIONS, 1948, reg. 22 (c), reg. 24 (1), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 8, pp. 218, 220.

Cases referred to:

- (1) *Vyner v. Waldenberg Bros., Ltd.*, [1945] 2 All E.R. 547; [1946] K.B. 50; 115 L.J.K.B. 119; 173 L.T. 330; 110 J.P. 76; 2nd Digest Supp.
- (2) *Lee v. Nursery Furnishings, Ltd.*, [1945] 1 All E.R. 387; 172 L.T. 285; 2nd Digest Supp.
- (3) *Mist v. Toleman & Sons*, [1946] 1 All E.R. 139; 110 J.P. 149; 38 B.W.C.C. 150; 2nd Digest Supp.
- (4) *Blyth v. Birmingham Waterworks Co.*, (1856), 11 Exch. 781; 25 L.J.Ex. 212; 26 L.T.O.S. 261; 20 J.P. 247; 156 E.R. 1047; 43 Digest 1098, 275.
- (5) *Nance v. British Columbia Electric Ry. Co., Ltd.*, [1951] 2 All E.R. 448; [1951] A.C. 601; 2nd Digest Supp.
- (6) *Jones v. Livox Quarries*, [1952] 1 T.L.R. 1377.
- (7) *Minister of Pensions v. Chennell*, [1946] 2 All E.R. 719; [1947] K.B. 250; [1947] L.J.R. 700; 176 L.T. 164; 2nd Digest Supp.
- (8) *Watts v. Enfield Rolling Mills (Aluminium), Ltd.*, [1952] 1 All E.R. 1013.

APPEAL by the defendants from an order of DONOVAN, J., dated Apr. 7, 1952, and reported [1952] 1 All E.R. 1064, awarding the plaintiff £1,500 damages under the Fatal Accidents Acts, 1846 to 1908, and £294 3s. 6d. under the Law Reform (Miscellaneous Provisions) Act, 1934.

A The learned judge found that the defendants had been in breach of their statutory duty under reg. 22 (c) of the Building (Safety, Health and Welfare) Regulations, 1948, in allowing the deceased workman to work on a platform which was less than thirty-four inches wide, and under reg. 24 (1) in failing to provide guard-rails and toe-boards. He also found that the defendants were liable in full for the damage resulting from the workman's fall, as they had failed to discharge the onus of proving that the fall would have occurred even if guard-rails and toe-boards had been provided.

B *Bowen, Q.C.*, and *H. J. Davies* for the defendants.
F. H. Lawton for the plaintiff.

C **SINGLETON, L.J.:** This is an appeal by the defendants from a judgment of DONOVAN, J., who held that the administratrix of the estate of Albert Edward Samuel Langhorn Cork was entitled to damages owing to breaches of statutory duty on the part of the defendants who were his employers when he met with his death. The submission made on behalf of the defendants is that judgment should have been given in their favour, or, alternatively, that they should not have been held wholly to blame. After hearing full argument on the matter, I am of opinion that there are elements for consideration which were not present to the mind of the learned judge at the time when he gave his judgment.

D On Jan. 14, 1950, Mr. Cork was working for the defendants as a painter on the re-decoration of the factory premises of Davey Paxman, Ltd., in Colchester. With others he had to paint the inside of the roof of a part of the factory. It might have been possible to have had some sort of cradle for the painters to stand in, but instead of that, for reasons which were considered good, a sort of scaffolding or platform was erected on a crane which ran from one end of the building to the other. That platform was about twenty feet above ground.
E While Mr. Cork was working on it he fell to the floor of the factory and was killed. The case for the plaintiff, the widow, who brought the action on her own behalf and on behalf of her child, was that the defendants were in breach of the statutory duty which they owed to their workpeople under and by virtue of the Building (Safety, Health and Welfare) Regulations, 1948. It was said there were breaches of those regulations in three respects. One arises under reg. 22:

F "Every working platform from which a person is liable to fall more than six feet six inches shall be . . . (c) at least thirty-four inches wide if the platform is used for the deposit of material."

A question arose on the trial whether the platform was used for the purpose of the deposit of material. The learned judge was satisfied that it was so used,
G and he came to the conclusion that there was a breach of the regulation, the platform not being as wide as it should have been. The other regulation is reg. 24 (1):

H "Subject to paras. (3), (4) and (5) of this regulation, every side of a working platform or working place, being a side thereof from which a person is liable to fall a distance of more than six feet six inches, shall be provided with a suitable guard-rail or guard-rails of adequate strength, to a height of at least three feet above the platform or place and above any raised standing place on the platform, and with toe-boards up to a sufficient height being in no case less than eight inches and so placed as to prevent so far as possible the fall of persons, materials and tools from such platform or place."

DONOVAN, J., found that there were breaches of that regulation in two respects: first, that there was no guard-rail, and, secondly, that there were no toe-boards,

and he found, too, that the exceptions to that regulation dealt with in paras. (3), (4) and (5) did not apply. Thus, on his findings there were three breaches of the regulations on the part of the defendants.

One difficulty which arises is that Mr. Cork suffered from epilepsy. He was thirty-nine years of age at the time of his death and had been under treatment for epilepsy for many years. He was in a condition in which a fit might come on at any time, and he had been told by his doctor that he must not work at any height above ground. He had been employed by the defendants for only two days before the day on which he met with his death. He had not told them that he was subject to fits. On the findings of the learned judge he had a fit and fell when he was working on this platform which was twenty feet above the ground, and so DONOVAN, J., came to the conclusion in one sense that there were two causes of his death—an epileptic fit which caused him to fall and the fact that the defendants were in breach of their statutory duties in one or all of the respects I have mentioned. A B

Having found that there was no guard-rail, DONOVAN, J., said ([1952] 1 All E.R. 1066):

“The immediate cause was the workman’s fall from the platform and the effect of what the Court of Appeal said in *Vyner v. Waldenberg Bros., Ltd.* (1) seems to me to be that I must treat the breach of the statutory regulations as occasioning that fall, unless the defendants establish the opposite.” C

Later in his judgment he said (*ibid.*):

“The defendants say, therefore, as I think they must, that, had the workman told them of his affliction, he would never have been on the platform at all. In my view, they must go further. They must establish that the workman would have fallen off the platform even had hand-rails and toe-boards been provided. But this is pure speculation. There is an obvious chance that toe-boards might have saved him. It is also possible that he had some sudden, if short, warning of the fit, sufficient to enable him to grip a hand-rail.” D E

I do not regard the learned judge’s statement of the law as wholly accurate. He based it on the words of SCOTT, L.J., in *Vyner v. Waldenberg Bros., Ltd.* (1), in which the learned lord justice cited a passage from the judgment of LORD GODDARD, sitting in this court, in *Lee v. Nursery Furnishings, Ltd.* (2). In the course of his judgment in that case (a dangerous machinery case) LORD GODDARD said ([1945] 1 All E.R. 390): F

“In the first place I think one may say this, that where you find there has been a breach of one of these safety regulations and where you find that the accident complained of is the very class of accident that the regulations are designed to prevent, a court should certainly not be astute to find that the breach of the regulation was not connected with the accident, was not the cause of the accident. I think here that the evidence is clear enough on one point.” G

In *Vyner v. Waldenberg Bros., Ltd.* (1), which arose out of an accident in using a circular saw, SCOTT, L.J., giving the judgment of the court, said ([1945] 2 All E.R. 549):

“... the judge [at the trial] indicated that, if the case stopped there, it would mean judgment for the plaintiff. We agree with him. But we go further. If there is a definite breach of a safety provision imposed on the occupier of a factory, and a workman is injured in a way which could result from the breach, the onus of proof shifts on to the employer to show that the breach was not the cause. We think that that principle lies at the very basis of statutory rules of absolute duty.” H

The learned lord justice repeated that which LORD GODDARD had said in *Lee v. Nursery Furnishings, Ltd.* (2). I am satisfied that those words of SCOTT, L.J., in *Vyner v. Waldenberg Bros., Ltd.* (1) go a little further than was necessary for the judgment in that case and that they cannot be accepted as a true statement of the onus in every case arising under the Factories Act. Indeed, in *Mist v. Toleman & Sons* (3) MACKINNON, L.J. (who was a member of the court in all three cases) said, after reference to the words of SCOTT, L.J. ([1946] 1 All E.R.

A 141):

“ Counsel for the plaintiff argues that that is a pronouncement as regards any breach of any of the provisions of the Factories Act and that, therefore, inasmuch as it is established that there was a breach of s. 47 (1) of the Act of 1937, as regards the ventilation to be provided where dust is produced, and since the activation of tuberculosis could result from that breach, the onus of proving that it did not result from that breach is cast upon the employer. In my view, that is a misapplication of the words of SCOTT, L.J., which were directed to the particular case then under consideration. The statutory regulations, which were under consideration in that case, directed that a guard must be provided and kept properly adjusted to prevent a workman from cutting his fingers off by the circular saw. There was no possibility that his fingers could be cut off by any other cause than the circular saw and, therefore, when SCOTT, L.J., said, ‘ If there is a definite breach of a safety provision . . . and a workman is injured in a way which could result from the breach ’, his mind was directed to the breach of the regulations regarding the adjustment of the guard to the circular saw to prevent the workman from cutting his fingers and the workman cutting his fingers by reason of the incorrect adjustment of that guard. That that is clearly what SCOTT, L.J., had in mind is, I think, shown by the sentence which he then quoted ([1945] 2 All E.R. 547, at p. 549) from the judgment of GODDARD, L.J., in *Lee v. Nursery Furnishings, Ltd.* (2) . . . ”

In the present case there was no need to search for another cause, or to be astute to find one. It was there, as DONOVAN, J., found. He found that it was a fit which caused Mr. Cork to fall, and there was evidence on which he could so find.

The next question which arises (and there was evidence on it) was whether, if there had been a proper guard-rail, or if the platform had been wider, and, perhaps, I should say if there had been toe-boards, the accident would have resulted in a fall to the ground, or whether it is not more likely that Mr. Cork would have been saved from falling to the ground twenty feet below ? That, like the first question, was largely a matter of inference. I do not think the question of onus of proof really comes into this case as between the two conflicting contentions. Two causes were in operation—one the fit which came on Mr. Cork when he was on the platform, and the other the fact that the defendants had not complied with their statutory duties. If two people had met after the death of Mr. Cork and discussed the accident, and one had asked the other whose fault it was, one might well have said: “ It was his own fault. He ought not to have been there after he had been warned by his doctor of the risk. What happened was the very thing which the doctor had feared might happen if he worked above ground.” The other person might have said: “ They ought to have had a guard-rail there. The law says there should have been one, and, if there had been one, quite likely he would not have been killed. I think the employers were at fault.” In one sense both those views may be said to be right.

I turn to the Law Reform (Contributory Negligence) Act, 1945, which counsel for the defendants told this court was mentioned by the learned judge, though the precise terms of s. 1 were not brought to his attention. Section 1 (1) is in these terms:

“ Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect

of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

Sub-section (4) applies the provisions of sub-s. (1) to an action which is brought under the Fatal Accidents Acts, 1846 to 1908, as this action is. On the judge's findings I regard this accident as due partly to Mr. Cork's own fault and partly to the fault of his employers, and I see no reason for saying that the fault is more on one side than it is on the other. The use of the word "fault" in s. 1 (1) of the Act aptly covers this case. Section 4 defines "fault" in this way:

" 'fault' means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence."

In *Blyth v. Birmingham Waterworks Co.* (4) ALDERSON, B., said (11 Exch. 784):

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

I take that definition of negligence as, again, it seems to me to cover this case in every sense. A man who knew himself to be in the condition in which Mr. Cork knew that he was ought to have told his employers. However anxious he was to get work, he owed a duty to his employers and to his fellow workmen as well as to himself, and failure to inform the employers, followed by instructions from them to work at some height above ground, involved risk to other workmen as well as risk to himself. I am satisfied that that is "fault" within the definition in s. 4 of the Act of 1945, and within the natural and ordinary meaning of the word in s. 1. Counsel in argument said that in certain respects it was speculation to say that a guard-rail would or would not have saved this man. It seems to me that on each issue raised in this case the real question is: What is the true and proper inference from the facts? DONOVAN, J., was satisfied that the fit was the cause of the fall. He must also have been satisfied that the absence of a guard-rail was a cause of the death, or else he could not have found for the plaintiff. In my judgment, both causes were operating together. When the plaintiff seeks to recover damages from the defendants, the defendants may properly say that Mr. Cork was guilty of contributory negligence. VISCOUNT SIMON, in *Nance v. British Columbia Electric Ry. Co., Ltd.* (5), said ([1951] 2 All E.R. 450):

“ But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.”

It seems to me that this is a case which can properly be dealt with under the Law Reform (Contributory Negligence) Act, 1945. I do not see that it is possible to say that the responsibility for the damage is more on one side than it is on the other, which means that the damages awarded to the plaintiff ought to be reduced by one-half. I would allow the appeal to that extent.

DENNING, L.J.: In this case we are again involved in the troublesome question of causation. Nowadays in tort we do not search, as previously, for the effective or predominant cause of the damage. We recognise that there may

be many causes of one damage, and we ask: What were the causes of it? What faults were there which caused the damage? Since the Act of 1945 the law says that every person who is guilty of a fault which is one of the causes of the damage must bear his proper share of responsibility for the consequences.

A In the present case there were, on the judge's findings, two faults: (i) The employers' fault in not providing a guard-rail or toe-boards in accordance with the regulations; (ii) the man's fault in not telling his employers that he was an epileptic and had been forbidden to work at heights. But the judge has not found that both those faults were causes of the accident. He has found that the employers' fault was a cause of the accident, but the man's fault was not. The man's fault was, he said, only a *causa sine qua non*.

B Subject to the question of remoteness, causation is, I think, a question of fact. If you can say that the damage would not have happened but for a particular fault, then that fault is in fact a cause of the damage; but if you can say that the damage would have happened just the same, fault or no fault, then the fault is not a cause of the damage. It often happens that each of the parties at fault can truly say to the other: "But for your fault, it would not have happened." In such a case both faults are in fact causes of the damage.

C In this case, on the facts, I am clearly of opinion that both faults were causes of the damage. The man's fault (in not telling his employers he was forbidden to work at heights) was clearly one of the causes of his death. But for that fault on his part, he would never have been on this platform at all and would never have fallen. The employers' fault (in not providing a guard-rail or toe-boards) is more doubtful a cause. One cannot say that but for that fault the accident *would* not have happened. All that can be said is that it *might* not have happened. A guard-rail and toe-boards *might* have saved him from falling. If D this was a very remote possibility, it could not be said to be a cause at all. But the judge did not so regard it. He thought that it probably would have saved him. On that view the employers' fault was also one of the causes of the man's death.

E There remains the question of remoteness. Were either of these causes too remote to be regarded by the law as causes of the damage? This is a question of law. The judge has held that the man's fault was too remote to be regarded as a cause, but the employers' fault was not. There is, of course, as the judge said, a distinction between a remote cause and a proximate cause or, as it is sometimes put, between a *causa causans* and a *causa sine qua non*—and this distinction is a very real one. But, so far as I know, no one has been able satisfactorily to define the difference. It is, I believe, a question of degree which must F be decided according to "the ordinary plain common sense of the business" (*Jones v. Livox Quarries* (6)). All that can be said is that, if the damage might reasonably have been foreseen by the wrongdoer, or if there was no intervening or concurrent cause, then the cause is not too remote. But the converse is not true. A cause does not necessarily become too remote because the damage could G not have been foreseen, or because there intervened or concurred the deliberate, or wrongful, or negligent act of another. It is always a matter of seeing whether the particular event was sufficiently powerful a factor in bringing about the result as to be properly regarded by the law as a cause of it: see *Minister of Pensions v. Chennell* (7).

H In this case I think the employers' fault was not too remote a cause. The regulations were intended to guard the workman from the very thing that happened—a fall. The breach, therefore, was a cause of it. It would have been different if he had been injured by something with which the regulations had nothing to do: see *Watts v. Enfield Rolling Mills (Aluminium), Ltd.* (8) explaining *Vyner v. Waldenberg Bros., Ltd.* (1).

I take the view also that the man's fault was not too remote a cause. One reason alone is sufficient—the consequences might reasonably have been foreseen by him. He had indeed been warned of the very thing which befell him. In

any case, according to ordinary plain common sense, it was one of the causes of his death.

There were, therefore, two faults which caused this man's death—one his own fault; the other his employers' fault. The damages fall to be apportioned according to the causative potency and blameworthiness of the respective faults. I agree that they should be borne half-and-half, and that the appeal should be allowed accordingly.

ROMER, L.J.: I agree with the conclusions which my brethren have expressed and the reasons on which those conclusions are based, and I only desire to add a word or two as we are varying the order that the learned judge made in the court below.

There is one short passage in the judgment which, if it means what I think it means, is, I respectfully think, inaccurate. The learned judge says ([1952] 1 All E.R. 1066):

"One cannot help feeling some sympathy with the defendants for they knew nothing of the workman's complaint, but the consequences of disobedience to these statutory regulations cannot depend on whether or not the workman discloses all or some of his infirmities."

If the word "consequences" in that context means results and includes the liability, or freedom from liability, of the workman concerned in respect of contributory negligence, then I do not think it is right, and I cannot agree with it.

In the present case the deceased workman, Mr. Cork, not only knew that he was unfitted for the kind of job that he was engaged on at the time of the accident, but he had gone so far as to promise his doctor, who took a very strong view about it apparently, not to undertake work of that description. With full knowledge of all that he refrained from informing his employers of his trouble, and the reason for his reticence is reasonably obvious, namely, that he was afraid that they would not employ him if they knew the facts, and, for my part, I am sure that his fears were justified and that the defendants would not have given him employment had they known of this unfortunate tendency to epilepsy, and it was very wrong of him not to have told them. He was neglectful of his own personal safety in keeping it to himself, and so the position really in brief is this: Had the defendants known the facts they would not have employed him, at all events on this kind of job, and, therefore, no accident would have occurred. Certainly this accident would not have occurred, because there would have been no opportunity for it to happen, and in those circumstances it seems to me quite impossible to say that the silence on this matter of the workman was not at least a contributory cause of the accident within the ambit of the principles as formulated by VISCOUNT SIMON in giving the judgment of the Judicial Committee of the Privy Council in the case of *Nance v. British Columbia Electric Ry. Co., Ltd.* (5), to which SINGLETON, L.J., has referred. Accordingly, it appears to me that we are compelled to the view that the unfortunate workman did contribute to his own misfortune, and I agree that the proportion of his contribution was the same as that of his employers, with the result that SINGLETON, L.J., has indicated.

Appeal allowed.

Solicitors: *Kimber, Williams, Sweetland & Stinson* (for the defendants); *Ellison & Co.* (for the plaintiff).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

Re HARRIS (deceased). MURRAY v. EVERARD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), July 14, 1952.]

Probate—Signature of will—Place of testator's signature—Wills Act Amendment Act, 1852 (c. 24), s. 1.

Across the top of a piece of paper the testator wrote "My last will and testament", and immediately below, but on the right-hand side of the paper, he placed his signature. Below that he set out the dispositive provisions.

HELD: the signature was not so placed that it was apparent on the face of the document that the testator intended to give effect by his signature to the document as his will, and, therefore, the document could not be admitted to probate.

Re Stalman (1931) (145 L.T. 339), applied.

AS TO PLACE OF TESTATOR'S SIGNATURE ON WILL, see HALSBURY, Hailsham Edn., Vol. 34, pp. 58-60, paras. 71-74; and FOR CASES, see DIGEST, Vol. 44, pp. 251-253, Nos. 783-801.

Cases referred to:

- (1) *In the Goods of Hornby*, [1946] 2 All E.R. 150; [1946] P. 171; 175 L.T. 161; 2nd Digest Supp.
- (2) *In the Estate of Roberts*, [1934] P. 102; 103 L.J.P. 61; 151 L.T. 79; Digest Supp.
- (3) *In the Goods of Usborne*, (1909), 25 T.L.R. 519; 44 Digest 253, 801.
- (4) *Re Stalman*, (1931), 145 L.T. 339; Digest Supp.

PROBATE action.

The plaintiff claimed probate of a will dated Sept. 24, 1939, and the defendant counterclaimed for probate of a will dated July 24, 1950. The question in issue was whether or not the document of July 24, 1950, was duly executed.

Ormerod for the plaintiff.

A. R. Ellis for the defendant.

WILLMER, J.: This case raises a difficult question with regard to a document which is put forward by the defendant as being a will of Miss Louisa Annie Harris, who died on Feb. 2, 1951. The question is whether it is a valid testamentary document, and that, in its turn, depends on whether it was duly executed in accordance with the provisions of the Wills Act, 1837, as amended by the Wills Act Amendment Act, 1852.

To understand what I am about to say it is necessary to describe the form of the document which is propounded. It is a small piece of paper, about four inches by four inches, which has clearly been torn from a larger piece of paper. What is contained thereon is in the handwriting of the deceased. Across the top are written the words "My last will and testament." Immediately below that, but on the right-hand side of the paper, there is the signature "L. Harris." Below that, on separate lines, come a number of names of persons with a pecuniary legacy opposite each name. At right angles to the list of names of legatees and opposite them is written, up the right-hand side of the paper, the date "July 24, 1950." Continuing down the paper, there are the signatures of two witnesses, which, again, are over on the right-hand side of the paper. Below that follows a line which merely says "other assets," the significance of which I do not appreciate. Below that, again, is a line mentioning three more names and providing legacies for each of those three persons, and, finally, on the last line, right at the bottom of the paper, is "any remaining assets to go to" the defendant who is named as residuary legatee.

The question arises whether a document bearing the signature of the testator and the signatures of the attesting witnesses in the positions which I have described is such as to come within the provisions of the Act of 1852. By s. 9

of the Wills Act, 1837, it was provided that no will was to be valid unless signed at the foot or end thereof. That provision was amended by s. 1 of the Act of 1852, which provides that

“ . . . Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the [Wills Act, 1837] as explained by this Act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will . . . ”

Then I would like to pass to these concluding words of the section, because they are not without importance:

“ . . . no signature under the [Wills Act, 1837] or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made.”

The question which I have to determine is whether it is apparent on the face of this document that the testator, having regard to the position in which her signature appears, intended to give effect by her signature to the document as a whole.

Prima facie, it cannot be said that a signature written in the position that I have described, namely, in the top right-hand corner of the document, is “ placed at or after, or following, or under, or beside, or opposite to the end of the will ”. Were it not for the fact that I have had cited to me a number of decisions of this court, dealing with unusual signatures in other cases in which it has been held to be apparent that the testator intended to give effect to a document as his will, I should have thought it was barely open to me to say that the signature in this case came within the provisions of the Act. However, I must deal with the cases that have been cited to me. In three of them the signature may be described as being in the margin of the will. It would not be appropriate to describe the signature in the present case as being in the margin, because, if one looks at the document as a whole, one cannot really say that there is any margin at all. The whole width of the paper is written across.

In *In the Goods of Hornby* (1), which, I think, is the most recent decision on the provisions of this Act of 1852, WALLINGTON, J., held that what might be described as a marginal signature was such as to make it apparent on the face of the document that the testator did intend to give effect to the document as his will. In that case, however, what has been described as a “ box ” had been specially prepared in the margin of the will—ruled off with lines—for the insertion of the signature. It was a very unusual document, the form of which is reproduced at [1946] P. 173. In those very unusual circumstances WALLINGTON, J., came to the conclusion that by signing it in this way the testator manifested an intention that the signature so placed should authenticate the whole document.

The next case to which I wish to refer is *In the Estate of Roberts* (2). That was again a case of a marginal signature which SIR BOYD MERRIMAN, P., held in the circumstances to be adequate to give effect to the will. In that case the body of the will extended over the whole length of the piece of paper on which it was written, so that there was no room at the foot for the signatures of the testator and witnesses. Accordingly, the paper had been turned sideways in the way that some people who write letters and do not want to use an extra sheet of paper turn their letters sideways for the purpose of signing, and the signature of the testator and the signatures of the witnesses were written in the margin at right-angles to the main body of the will. The learned President held that by signing in that way the testator made it apparent on the face of the document that he intended to give effect to it as his will.

The third case in which what I may call a marginal signature was held to be sufficient was *In the Goods of Osborne* (3). Unhappily it is not very fully reported. It appears that the testator in that case, being too ill to sign, made a cross in the margin, which was duly witnessed by witnesses who also signed in the margin. Apparently the case came before the court on motion. There was no opposition, and the matter does not appear to have been argued at all, or, at any rate, not fully argued, and the report does not disclose what were the reasons, if he stated them, why BARGRAVE DEANE, J., came to the conclusion that that document was signed in such a way as to make it apparent on its face that the signature was intended to give effect to it as the testator's will. However, the learned judge did so decide, and admitted the document to probate.

A Those three cases were all relied on by counsel for the defendant in propounding this document as being a valid will, but the answer to his argument in relation
B to all of them is that they are not this case. This is not a case where a special place or "box" has been prepared at the side of the document for the signature to be inserted; it is not a case where, the paper being otherwise full, the testator has turned it sideways and signed in the margin, which might very well be taken, in accordance with the habits of ordinary letter writers, to be a continuation from the bottom of the page; nor is it the case of a testator being incapable of
C writing and merely making his mark by means of a cross. It was argued by counsel that I could not decide against him and in favour of the plaintiff in this case without saying that these three cases were all wrongly decided. I do not agree with that submission, because I do not think any of those three cases governs what I have to decide in the present case. So far as I know, there is no case in the books which is precisely similar to this case. In my judgment,
D the nearest case is one which was decided in the Court of Appeal, *Re Stalman* (4), in which the body of the will continued right down to the bottom of the page so that there was no room for signatures at the bottom. The signature of the testator and the signatures of the attesting witnesses were written in the space at the top of the document, so that the whole of the rest of the document followed the signatures of the testator and the witnesses. It was held by the Court of
E Appeal that the document could not be admitted to probate. I do not think I need read the whole of the report, but the case is, of course, binding on me unless I can distinguish it. It is said that it is distinguishable because there the document started with the signatures of the testator and the witnesses, whereas the document in the present case starts with the words: "My last will and testament," and the signature is tucked away underneath that sentence and over on
F the right-hand side of the paper. To my mind, that is not really a valid distinction. It seems to me that, in effect, the signature in this case really forms part of the heading of the document—that is to say, it virtually runs in this way: "My last will and testament. L. Harris", and following that come the dispositive provisions. If that is the correct way of looking at this document, I can see no distinction in principle between this case and *Re Stalman* (4). That
G decision of the Court of Appeal is not only binding on me, but it also confirms the view which I would in any case have formed without the assistance of previous decisions. Unassisted, I would have said that there was no alternative but to say that this signature did not come within the statute. Fortified by that decision of the Court of Appeal, which I do not see how to distinguish, I am satisfied that my decision must be against the defendant who propounds this
H will and I will pronounce in favour of the will of Sept. 24, 1939.

Grant of probate of earlier will dated Sept. 24, 1939.

Solicitors: *Knapp-Fisher & Wartnaby & Blunt* (for the plaintiff); *Ellis, Peirs & Co.* (for the defendant).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

BECK v. NEWBOLD.

[COURT OF APPEAL (Somervell, Birkett and Hodson, L.J.J.), July 2, 1952.]

Rent Restriction—Permitted increase—Transfer of burden—Transfer to landlord of liability to repair previously borne by landlord as tenant—Right of appeal—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 2 (3)—Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), s. 11 (1).

In 1932 a dwelling-house was let for twenty-one years at a rent of £195 a year, which became the standard rent, the tenant being liable for repairs. In 1948 the present landlord took an assignment of the lease, having sub-let a top-floor flat to a sub-tenant at 17s. 6d. a week, the sub-tenant not being liable for repairs under the sub-lease. On an application by the sub-tenant for an apportionment of the standard rent under s. 12 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and for the determination of the recoverable rent under s. 11 (1) of the Rent and Mortgage Interest Restrictions Act, 1923,

HELD: (i) comparing the letting in 1932 under which the standard rent was fixed with the letting to the sub-tenant, there had been a transfer of burden from the sub-tenant to the landlord within s. 2 (3) of the Act of 1920, and, therefore, the landlord was entitled to add to the apportioned rent of the flat the equivalent proportion of the estimated burden of the repairing covenant.

Winchester Court, Ltd. v. Miller ([1944] 2 All E.R. 106), and *Asher v. Seaford Court Estates, Ltd.* ([1950] 1 All E.R. 1018), applied.

(ii) although by s. 2 (6) of the Act of 1920, on an application for the determination of a question arising under s. 2 (3), the decision of the county court was final, a question as to the increase of rent under that sub-section could be raised on an application under s. 11 (1) of the Act of 1923 and the Court of Appeal had jurisdiction on such an application to entertain an appeal from a determination of the amount of rent recoverable.

FOR THE INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACT, 1920, s. 2 (3), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 987; and FOR THE RENT AND MORTGAGE INTEREST RESTRICTIONS ACT, 1923, s. 11 (1), see *ibid.*, p. 1040.

Cases referred to:

- (1) *Bainbridge v. Congdon*, [1925] 2 K.B. 261; 94 L.J.K.B. 682; 133 L.T. 286; 31 Digest, Replacement, 685, 7773.
- (2) *Winchester Court, Ltd. v. Miller*, [1944] 2 All E.R. 106; [1944] K.B. 734; 114 L.J.K.B. 152; 171 L.T. 150; 31 Digest, Replacement, 679, 7723.
- (3) *Asher v. Seaford Court Estates, Ltd.*, [1950] 1 All E.R. 1018; [1950] A.C. 508; 31 Digest, Replacement, 679, 7719.
- (4) *Elvington Tenants, Ltd. v. Hatton*, (1928), 139 L.T. 211; 92 J.P. 92; 31 Digest, Replacement, 684, 7766.
- (5) *Broomhall v. Property Agents & Owners, Ltd.*, [1922] 1 K.B. 311; 91 L.J.K.B. 332; 126 L.T. 344; 31 Digest, Replacement, 668, 7663.

APPEAL by the landlord from an order of His Honour JUDGE SIR GERALD HARGREAVES, sitting at West London County Court, dated Mar. 4, 1952, on an application by the tenant for the apportionment of the standard rent and the determination of the recoverable rent of a dwelling-house.

On Aug. 29, 1932, the premises were let for twenty-one years at a rent of £195 a year, the tenant being liable for repairs. In 1946 the landlord, Miss Newbold, took over the residue of the lease, occupying the first-floor flat and sub-letting the top flat to the tenant, Mrs. Beck, at a rent of 17s. 6d. a week. Under the sub-lease the tenant was not liable for repairs. In 1948 the landlord was granted a formal assignment of the lease of 1932. In 1950 she bought the reversion of the lease, and in 1951 she purchased the freehold. On Nov. 15, 1951, the tenant

applied for an apportionment of the standard rent of the premises, and, by agreement between the parties, the registrar gave leave to amend the summons to include an application to determine the recoverable rent under s. 11 (1) of the Rent and Mortgage Interest Restrictions Act, 1923. It was agreed that the standard rent of the whole house was £195. The registrar apportioned the rent of the top flat at five eighteenthths of the £195, and held that, as in 1939 the premises were let at £195 a year and the then tenant was under a liability to do repairs, whereas now the premises were let to a tenant who was under no liability for repairs, there was a transfer to the landlord of part of the burden of repairs that had been borne by the tenant in 1939, and, having found that the liability for repairs under the tenancy in 1939 was £40, he added five-eighteenthths of that sum to the apportioned standard rent as the rent recoverable in respect of the top flat. The county court judge held that, so far as the obligations of the tenant in relation to the landlord were concerned there had been no transfer of burden whereby the rent could be increased. On appeal by the landlord it was contended by the tenant that the decision of the county court judge as to the transfer of burden was final, and that the Court of Appeal had no jurisdiction to determine the question.

Stephen Stewart for the landlord.

Hackforth-Jones for the tenant.

SOMERVELL, L.J., stated the facts and continued: By s. 12 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, it is provided:

"Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which that dwelling-house is comprised, the county court may, on application by either party, make such apportionment as seems just, and the decision of the court as to the amount to be apportioned to the dwelling-house shall be final and conclusive."

In *Bainbridge v. Congdon* (1), it was held that, in apportioning under that sub-section, the county court judge could only consider the size, accessibility, aspect, and other physical advantages enjoyed by the tenant of the dwelling-house in respect of which the standard rent was to be ascertained, as compared with those of the rest of the property in which it was comprised. One follows the logic of that decision. The standard rent is defined as the rent at which the dwelling-house is let on a certain date or dates, and, therefore, when the county court comes to apportion, it simply considers what proportion of rent should be apportioned or allocated having regard to the amount of the premises which has been carved out of the whole. It is plain that the landlord, having regard to the decision in *Bainbridge's* case (1), wished to argue that, whereas under the original lease the lessee was bound to repair, under the sub lease the tenant was not bound to repair.

In the notes of the learned registrar's judgment he says

"I gave leave for the summons to be amended to include an application for the determination of the recoverable rent under s. 11 of the Rent and Mortgage Interest Restrictions Act, 1923."

That meant that the landlord, who, at the time of the sub-lease, was tenant, on the one hand, and landlord, on the other, was seeking to say that, having regard to the difference in the burden under the original agreement of 1932 from that under the sub-lease, she ought to be allowed to increase the standard rent under the provisions of the Rent Acts. Section 2 (3) of the Act of 1920 provides:

"Any transfer to a tenant of any burden or liability previously borne by the landlord shall, for the purposes of this Act, be treated as an alteration

of rent, and where, as the result of such a transfer, the terms on which a dwelling-house is held are on the whole less favourable to the tenant than the previous terms, the rent shall be deemed to be increased, whether or not the sum periodically payable by way of rent is increased, and any increase of rent in respect of any transfer to a landlord of any burden or liability previously borne by the tenant where, as the result of such transfer, the terms on which any dwelling-house is held are on the whole not less favourable to the tenant than the previous terms, shall be deemed not to be an increase of rent for the purposes of this Act."

The construction of s. 2 (3) came before this court in *Winchester Court, Ltd. v. Miller* (2). There the dwelling-house had originally been let in 1936 on a seven years' lease at a rent of £195 with, as here, a full repairing covenant by the tenant. In 1941 that lease was surrendered, and a new tenant came into occupation under a lease containing less onerous covenants to repair. The landlords claimed to be entitled to a permitted increase of £20, being the cost of repairs for which the former tenant would have been liable, but for which the then tenant was not liable. It was held that "a transfer to a landlord of any burden or liability previously borne by the tenant" was not confined to a transfer to a landlord of a burden by the tenant who himself bore it immediately before the increase of rent, but included the transfer of a burden borne by the tenant a demise to whom fixed the standard rent. SCOTT, L.J., after having set out the basis of standard rent, said ([1944] 2 All E.R. 108):

"When adopting that basis for the standard rent as fair to both parties, Parliament cannot have been blind to the other main incidents of the relationship of landlord and tenant. Every consensual rent is, in economic theory, the outcome of bargaining between the parties in the light of the respective advantages and burdens, which the other intended terms of the contract will confer or impose respectively on each of them. When agreement is reached the agreed rent may thus fairly be regarded as the money measure of the balance of those advantages and burdens for which the tenant is content to pay the agreed rent; and it is obvious that Parliament so regarded the problem. But if that be true—and I think it is true—it is equally obvious that the equilibrium represented by that bargaining is susceptible of disturbance as time goes on, not only by a change in the amount of rent, but also by a 'transfer of,' or a change in any one of the economic advantages and burdens upon which, in the nicely adjusted and bargained balance, the fairness of the rent depended. It must be assumed that Parliament was, in 1920, alive to the obvious fact that alterations in those basic advantages and burdens of the tenancy might easily make the fixed standard rent irremediably unfair, unless the resultant change of balance could be redressed by a compensating money change. That to my mind must have been both the genesis and the object of s. 2 (3) of the Act of 1920; and that characteristic need of some way of maintaining the fairness of the original balance, which seems to me inherent in the legislation, is, I think, a sufficient reason for so resolving any ambiguity there may be in the wording of s. 2 (3) of the Act of 1920 as to give it the meaning for which the appellant company contends. And it is to be observed further that such a change in the balance of economic considerations underlying the rent may in the life history of the house occur at any time, not only as between the original tenant and the original landlord, but after either or both of them has or have ceased to be in any way concerned in the house. The house, on the other hand, has its permanent status with its permanent statutory rent (subject only to permitted increases) and so far as the theory of the Act is concerned goes on for ever, though landlords and tenants come and go. Unless this interpretation of the sub-section is well-founded, the legislation must not infrequently lead to results which are permanently unfair; for it will contain no provision for ensuring that

the standard rent shall retain its quality of fairness in relation to the agreed distribution of the other burdens of the tenancy agreement, a relationship upon which the standard rent was obviously based by Parliament in 1915; and however the sub-section ought to be construed, it is indubitable that the Acts were not intended to petrify the terms of the tenancy other than rent."

A That decision was approved by the House of Lords in *Asher v. Seafood Court Estates, Ltd.* (3) where LORD PORTER, having stated that s. 2 (3) was intended to keep the balance even between landlord and tenant, said ([1950] 1 All E.R. 1021):

B "If this statement of the purpose of s. 2 (3) of the Act is correct, as I think it is, it appears that a comparison must be made between the letting under which the standard rent is fixed and the letting which adds to or diminishes the rent to the tenant. The Court of Appeal so decided in *Winchester Court, Ltd. v. Miller* (2), and, in my view, were right in so deciding."

C The present case differs from the *Winchester Court* case (2) in that we are here dealing with part of the premises comprised within the lease which determines the standard rent, which is to be apportioned, but, if one finds, as here, that the burden on the tenant under the agreement which fixes the standard rent is a burden which does not rest on the sub-lessee who has part of the premises and whose standard rent is the amount apportioned, it would, to my mind, be unjust if that matter could not be taken into consideration. Having regard to the principle laid down in *Winchester Court, Ltd. v. Miller* (2), it seems to me plain that it can be taken into consideration, basing oneself, of course, on the decision, which I think is plainly right, in *Bainbridge v. Congdon* (1). Suppose the burden had shifted as between lessee and lessor of the whole premises, no one disputes that, if the burden on the tenant was less, s. 2 (3) could be operated. It seems to me to follow that if, when one compares a sub-lease of part of premises and its apportioned rent with a lease fixing the standard rent of the whole premises, one finds that in the case of the sub-lease the sub-tenant does not bear any part of the burden which the tenant bore under the lease, applying the general principle of construction laid down by SCOTT, L.J., that is precisely the type of change of burden with which Parliament intended to deal and has dealt with by the terms of s. 2 (3).

F The registrar, as I read the notes of his judgment, decided the case on those lines. I do not think that he regarded the subsequent purchase of the reversion and the freehold as relevant. He was, in my view, right in directing his mind to the conditions at the time when the sub-lease was entered into. He decided that the landlord was entitled to add to the apportioned part of the rent the same proportion of the estimated figure of the burden of the repairing covenant, which was £40. The matter went before the learned judge, and, undoubtedly, the later purchases by the landlord were referred to before him. Indeed, he recites the argument for the landlord as being based on that. Counsel for the landlord said that that was a misapprehension of his argument, though I think he probably did refer to those facts. But he says that he argued on the other basis and I think in the circumstances of this case where all these facts were before the registrar and the learned judge one ought not to regard the point as not open in this court because, as I have said, it seems to me to be the basis of the registrar's decision which was no doubt before the learned judge. For these reasons I think that on the merits the appeal succeeds and the landlord is entitled to add to the rent the proportion of the estimated burden of the repairing covenant. I think questions might arise, having regard to rising costs, whether that burden should be estimated at the time when the sub-lease was made or at the date when the original standard rent lease was entered into. I express no opinion on that because no point was taken with regard to the figure of £40 before us, but it seems to me a matter on which there might be argument.

I now come to the question of jurisdiction. Section 2 (1) of the Act of 1920 deals with what increases of the standard rent may be imposed, e.g., the percentage allowed on improvements, the increases allowed in respect of rates, and so on. Sub-section (2) deals with an application which may be made by the tenant or the sanitary authority for an order suspending the increase on the ground that the house is not reasonably fit. Sub-section (3) deals with the increases allowed in respect of transfer of burden. By sub-s. (6):

"Any question arising under sub-s. (1), (2) or (3) of this section shall be determined on the application either of the landlord or the tenant by the county court, and the decision of the court shall be final and conclusive."

In *Elvington Tenants, Ltd. v. Hatton* (4), a notice of increase purporting to increase the rent on account of the landlord's liability for repairs and other grounds came before the county court. The landlord applied under sub-s. (6) to determine the question whether the notice of increase was valid. It was held that, although questions of law were involved in the matters submitted, the terms of the statute made the decision of the county court final and no appeal lay from it.

In *Broomhall v. Property Agents & Owners, Ltd.* (5), an application was made to a county court judge to determine the standard rent. The Divisional Court held that the county court had no jurisdiction under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, or the rules of 1920 made thereunder, or otherwise, to entertain an application to determine as a sole and independent question what was the "standard rent" of a dwelling-house within the meaning of the Act. No doubt such a question may arise and be determined in the course of proceedings on a claim for rent or something of that sort, but the court held that there was no power to make an application simpliciter determining the standard rent. It is suggested by counsel that that decision resulted in an amendment of the law. The law was, undoubtedly, amended so as to cover the gap that *Broomhall's* case (5) indicated had existed. Section 11 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, provided as follows:

"The county court shall have power on the application of a landlord or a tenant to determine summarily any questions as to the amount of the rent, standard rent or net rent of any dwelling-house to which the principal Act applies, or as to the increase of rent permitted under that Act or this Part of this Act."

If it had been intended merely to fill the gap disclosed by *Broomhall's* case (5) that would have been done, and, perhaps, more than done, by the words which precede "or as to the increase of rent permitted under that Act or this Part of this Act". It is common ground that whereas, if a party proceeds under s. 2 (6), the decision of the county court is final, if he proceeds under s. 11 (1), there are no words which cut out the ordinary statutory right of appeal.

We were referred to the provisions in the Landlord and Tenant (Rent Control) Act, 1949, where the matters dealt with in s. 8 (4) are, under s. 8 (9), to be determined on application by the county court, and the decision of the court is to be final and conclusive. I do not get much assistance from that because the difficulty seems to me to arise on the legislation as it was after the passing of the Act of 1923. There was then on the statute book s. 2 (6) of the Act of 1920, which provided that the decision of the county court should be final and conclusive, and also s. 11 (1) of the Act of 1923 in which there were no words excluding a right of appeal. I think to a very large extent, therefore, there was an overlap and two procedures in respect of the same subject-matter which an applicant could pursue, one which entitled an unsuccessful party to appeal from a decision of the county court and one which did not. Whether that was intended or was an oversight is a matter with which I do not think we are concerned. The last words of s. 11 (1) of the Act of 1923 seem to me to make it impossible to contend that a question as to an increase of rent under s. 2 (3) of the Act of 1920 is not a matter which may be raised on application under s. 11 (1). I think the question in the

present case must be treated as having been raised by way of application under s. 11 (1) because it was on the basis of an application under that section that, according to the notes of his judgment, the learned registrar, allowed the matter to be raised. For those reasons I think we have jurisdiction to entertain this appeal, and that it should be allowed.

- BIRKETT, L.J.:** I am of the same opinion. I would like to add a word on the point as to jurisdiction. In the ordinary way decisions under the Rent Restrictions Acts in the county courts can be appealed to the Court of Appeal. The only exceptions to that general rule are specific, as, in s. 2 (6) which provides: "the decision of the [county] court shall be final and conclusive." Similarly, in s. 12 (3) of the Act of 1920, relating to the apportionment of a rent, and in the Rent Restrictions (Notices of Increase) Act, 1923, s. 2 (4), when the amount of arrears is in question, again that formula is adopted. In the Landlord and Tenant (Rent Control) Act, 1949, s. 8 (4), which refers to increases of rent or transfer of burdens the same words appear. There is no question that these proceedings come before us, as they came before the registrar, by virtue of s. 11 (1) of the Rent and Mortgage Interest Restrictions Act, 1923. As my Lord has pointed out, one of the governing reasons for the passing of this sub-section was the decision in *Broomhall v. Property Agents & Owners, Ltd.* (5). Section 11 (1) of the Act of 1923 is very wide, and no word is there said that a decision of the county court shall be final and conclusive. It may well be, as my Lord said, there is here some overlapping, but, whether that is so or not, it seems to me to be plain that in s. 11 (1) of the Act of 1923 there are no words providing that the decision of the county court shall be final. I think, therefore, the point on jurisdiction fails, and I agree with the judgment of my Lord.

- HODSON, L.J.:** I have found the question of jurisdiction a difficult one, but I have arrived at the same opinion as my Lords. The application before the registrar purported to be under s. 11 (1) of the Act of 1923 which is in very wide terms, and clearly covers this case and does not restrict the right of appeal. On the main question I agree that this case was covered in principle by the decision of the Court of Appeal in *Winchester Court, Ltd. v. Miller* (2), expressly approved by more than one of their Lordships in the House of Lords in *Asher v. Seaford Court Estates, Ltd.* (3). The proposition was stated quite shortly by LORD PORTER when he said ([1950] 1 All E.R. 1021) that the comparison must be made between the letting under which the standard rent was fixed and the letting which adds to or diminishes the rent of the tenant. In this case the letting under which the standard rent had to be determined was a letting in 1932 which contained a provision that the tenant should be liable to do the repairs. That had to be compared with the tenancy which the present sub-tenant holds on the terms that she is not liable to do any repairs. As the learned registrar put it:

- "As in 1939 the premises were let at £195 per annum and the tenant was under a liability to do repairs whereas now the premises were let to a tenant who was under no liability for repairs, it seemed to me that there was a transfer to the present landlord of the burden of repairs that had been borne by the 1939 tenant."

- The sub-tenant does not have to bear the burden which she would have had to carry if the terms of her tenancy had been the same as those of the lease by reference to which the standard rent was fixed. In that event, I think there has been, as the registrar thought, a transfer of burden. Accordingly, the liability which the sub-tenant does not have to bear with regard to repairs has to be taken into consideration in arriving at the figure which she has to pay. I agree that the appeal must be allowed.

Solicitors: *Oswald Hanson & Smith* (for the landlord); *L. O. Glenister & Sons* (for the tenant).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

BLOOMSTEIN v. RAILWAY EXECUTIVE.

[QUEEN'S BENCH DIVISION (Parker, J.), July 1, 2, 3, 4, 1952.]

Negligence—Invitee—Railway station—Passenger on premises *Applied.* BLACKMAN v. RY. EXECUTIVE. [1953] 1 All E.R. 4.
—Transport Act, 1947 (c. 49), s. 5 (9) (a).

While walking along a pathway in a railway station which was occupied by the Railway Executive, the plaintiff, who had travelled to that station on the underground railway, which was occupied by the London Transport Executive, tripped over a nut and iron bolt protruding above the level of the pathway and was injured. The nut and bolt were part of a weighing machine maintained by the manufacturers under contract with the Railway Executive.

Held: (i) the duty of invitor to invitee was owed by the British Transport Commission in respect of all their properties, including those in respect of which the commission had delegated their liabilities to the Railway Executive and the London Transport Executive, under s. 5 (9) (a), of the Transport Act, 1947, and that duty was to be treated as the duty of the executive in whose area a person's injury was received, and, therefore, the plaintiff was an invitee of the Railway Executive, who were liable to her for negligence.

(ii) the duty of care in the maintenance of the weighing machine which was owed by the Railway Executive to invitees was not discharged by their having employed a competent independent contractor to maintain the machine since this was not a case in which the Railway Executive had to rely on the technical knowledge and experience of such a contractor.

Haseldine v. Daw & Son, Ltd. ([1941] 3 All E.R. 156), distinguished.

AS TO DUTY TO INVITEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 600-609, paras. 851-858; and FOR CASES, see DIGEST, Vol. 36, pp. 35-45, Nos. 208-281.

Case referred to:

(1) *Haseldine v. Daw & Son, Ltd.*, [1941] 3 All E.R. 156; [1941] 2 K.B. 343; 111 L.J.K.B. 45; 165 L.T. 185; 2nd Digest Supp.

ACTION for damages for negligence.

The defendants were the occupiers of Euston railway station, London. A pathway for pedestrians on the station premises led to an exit to Eversholt Street. On Sept. 18, 1950, the plaintiff, who had been a passenger on the underground railway from Camden Town to Euston Station, tripped over a bolt and nut which were protruding above the level of the pathway near the base of, and being part of, a weighing machine. She alleged that, when using the path, she was an invitee of the defendants, and that the bolt and nut constituted an unusual danger about which the defendants ought to have known, and that they ought to have removed it or warned her of it. The defendants contended that the plaintiff was not an invitee of theirs, but a licensee, since the underground railway, on which she had been a passenger, was operated, not by them, but by the London Transport Executive. They also said that the weighing machine was maintained by the manufacturers under a contract with them (the defendants).

I. H. Jacob for the plaintiff.

Neil Lawson for the defendants.

PARKER, J., stated the facts, found as a fact that the plaintiff had travelled on the underground railway, that there had been a nut and bolt at the corner of the weighing machine, which the plaintiff had tripped over, and he continued: It is argued by counsel for the defendants that in relation to the Railway Executive, the plaintiff was a mere licensee because the Railway Executive is distinct and apart from the London Transport Executive, the authority responsible for the underground railway. He rightly says the onus is on the plaintiff to show she was an invitee, but I think she was. Under the Transport Act, 1947, s. 12 (1),

all the properties of the railway undertakers specified in sched. III, Part I, which properties included both Euston station, which had belonged to the London, Midland and Scottish Railway Co., and also the underground railway undertaking of the London Passenger Transport Board, vested in the British Transport Commission. The powers, liabilities and duties of the commission have been delegated to the various executives including the Railway Executive and the London Transport Executive. Section 5 (4) of the Act provides:

A "Each executive shall, as agents for the commission, exercise such functions of the commission as are for the time being delegated to them by or under a scheme made by the commission and approved by the Minister."

Sub-section (9) provides:

B "As respects matters for the time being falling within the scope of any such delegation, the following provisions shall have effect except as between the executive and the commission, that is to say—(a) any rights, powers and liabilities of the commission shall be treated as rights, powers and liabilities of the executive, and the executive only . . ."

C It seems to me that the duty of invitor to invitee is owed by the British Transport Commission in respect of its properties, and for convenience those duties of the commission are to be treated as the duties of the executive in question. Accordingly, it seems to me that under the Act of 1947 the duty that the commission owed to the plaintiff as a passenger on the underground part of their transport system is to be treated as a duty of the executive within whose premises the plaintiff's injury was received, and, therefore, I think she was an invitee of the defendants.

D It is said, finally, that, even though the plaintiff be an invitee, the defendants fulfilled their duties by employing people who are clearly competent independent contractors, namely, the manufacturers of the weighing machine. That, of course, is perfectly true in particular types of cases, the best known of which, perhaps, is *Haseldine v. Daw & Son, Ltd.* (1), but the cases where that principle applies are cases where the occupier cannot properly perform his duties, because he has not got the technical knowledge and experience, without an independent contractor. Those are cases where, by reason of the state of his knowledge, it is his clear duty to employ an independent contractor. It does not seem to me that that applies to the case suggested here, which does not concern any fault in the technical working of the weighbridge or the weighing machine, but concerns four bolts and nuts sticking up through the pavement outside the vertical edge of the machine. I cannot give effect in those circumstances to the principles enunciated in *Haseldine v. Daw & Son, Ltd.* (1).

F HIS LORDSHIP found that there was no contributory negligence on the part of the plaintiff, assessed the damages at £766 4s. 6d., and gave judgment for the plaintiff for that amount.

G *Judgment for the plaintiff.*
Solicitors: *Silverman, Miller & Fraser* (for the plaintiff); *M. H. B. Gilmour* (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

WABE v. TAYLOR.

[COURT OF APPEAL (Somervell, Birkett and Hodson, L.JJ.), July 4, 7, 1952.]

Rent Restriction—Possession—Dwelling-house let to husband—Subsequent desertion by husband—Wife remaining in occupation—Adultery by wife—No step by husband to revoke wife's authority to occupy.

The tenant of a dwelling-house within the Rent Restrictions Acts deserted his wife who remained in the house and continued to pay the rent. Subsequently, she committed adultery with a man whom she had taken as a lodger in the house, but the husband took no steps to revoke the permission he had given her to reside therein. On a claim by the landlord for the possession of the house on the ground that the husband had abandoned possession and the wife was a trespasser,

Held: assuming that the commission of adultery by the wife gave the husband the right to revoke her authority to reside in the house, it was irrelevant on a question between her and the landlord, and, therefore, in the absence of such revocation by the husband, the landlord was not entitled to possession.

Old Gate Estates, Ltd. v. Alexander ([1949] 2 All E.R. 822), and *Middleton v. Baldock* ([1950] 1 All E.R. 708), considered.

Observation of SIR RAYMOND EVERSHED, M.R., in *Middleton v. Baldock* ([1950] 1 All E.R. 710), considered.

AS TO STATUTORY TENANTS, see HALSBURY, Hailsham Edn., Vol. 20, p. 334, para. 400; and FOR CASES, see DIGEST, Replacement, Vol. 31, pp. 692-706, Nos. 7829-7946, and Digest Supps.

Cases referred to:

- (1) *Skinner v. Geary*, [1931] 2 K.B. 546; 100 L.J.K.B. 718; 145 L.T. 675; 95 J.P. 194; 31 Digest, Replacement, 659, 7612.
- (2) *Old Gate Estates, Ltd. v. Alexander*, [1949] 2 All E.R. 822; [1950] 1 K.B. 311; 31 Digest, Replacement, 726, 8090.
- (3) *Middleton v. Baldock*, [1950] 1 All E.R. 708; [1950] 1 K.B. 657; 31 Digest, Replacement, 698, 7894.
- (4) *Brown v. Brash & Ambrose*, [1948] 1 All E.R. 922; [1948] 2 K.B. 247; [1948] L.J.R. 1544; 31 Digest, Replacement, 660, 7619.
- (5) *Govier v. Hancock*, (1796), 6 Term Rep. 603; 101 E.R. 726; 27 Digest 75, 598.

APPEAL by the landlord from an order of His Honour JUDGE CAMPBELL at Wisbech County Court dated Apr. 28, 1952, refusing to make an order for possession of a dwelling-house.

The landlord sought an order for possession of a house situate at 131 Norwich Road, Wisbech, on the ground that the tenant had abandoned the premises and that his wife, who was sued as second defendant, remained in occupation as a trespasser. When the landlord bought the house in 1950 he knew that the tenant was not living there and was only a nominal tenant and that the wife had been in occupation since 1946 when her husband, the tenant, had deserted her. Evidence was given to show that the wife admitted that she was living in adultery with a lodger and had had a child by him. The county court judge refused to make a possession order. The landlord appealed.

Dare for the landlord.

Widgery for the wife.

SOMERVELL, L.J.: This is an appeal from a decision of His Honour JUDGE CAMPBELL. The landlord claimed possession of a house the lease of which had been entered into between the landlord and the first defendant who was the

husband of the second defendant. A notice to quit had been served, expiring on Sept. 28, 1950. In the particulars of claim it was alleged that the husband had ceased to reside in the dwelling-house and had neglected or refused to deliver up possession, and the wife was proceeded against as a trespasser. The landlord bought the premises in 1950, and at that time the husband had left the wife for some years. She lived in the house and had taken in a lodger, and there was evidence called on behalf of the landlord of an admission by the wife that the lodger was the father of a child she had borne in 1948. The rent book had continued in the name of the husband, and the rent had been continuously paid. No evidence was called for the wife and the husband did not appear.

Since *Skinner v. Geary* (1) what I may call the general principle, as expounded in later cases, has been established that a non-occupying tenant cannot claim the protection of the Rent Restrictions Acts. On the other hand, it is clear that the protection of the Acts is not lost if, although a tenant is absent, he is regarded in law as still occupying in, possibly, more ways than one. In the present case we are concerned with whether the husband is occupying through his wife. In *Old Gate Estates, Ltd. v. Alexander* (2) the husband had left his wife and furniture in a flat, and he wrote to the landlords saying that he had given up possession of the flat to them and he enclosed the key. He ceased to pay rent and later he handed to the landlords, for their use, a document by which he purported to revoke any authority or leave which he might at any time have given to his wife to occupy the flat. The wife refusing to leave the flat at the landlords' request and the husband's furniture still remaining there, the landlords sued the husband and wife for the recovery of possession of the flat. Between the date of the entry of the plaint and the hearing of the action, the husband returned to his wife and the flat. It was held that, at the time of the entry of the plaint, his wife and furniture remaining at the flat, the husband was still in possession of it as a statutory tenant and, therefore, within the protection of the Rent Restrictions Acts. Later cases have shown the special position of a deserted wife and her right to claim the protection of the Acts, subject to a suggested limitation which I will now consider.

In *Middleton v. Baldock* (3) the house was let on a weekly tenancy to a husband who deserted his wife. She remained in occupation of the house, which contained some of his furniture, and she paid the rent out of money received from him. In the present case the money for the rent was not received from the husband, but I do not think that makes a difference. In *Middleton v. Baldock* (3) notice to quit was served and, as here, an action was brought against husband and wife for possession—as against the husband on the ground that the contractual tenancy was at an end and as against the wife as a trespasser. The husband was offering immediate possession if he was in a position to do so, the county court judge having made an order for possession against him and against the wife, it was held that the order for possession made against the husband was without jurisdiction and was erroneous in that a landlord seeking to recover possession against a tenant protected by the Rent Restrictions Acts must establish the right to possession on one of the grounds stated in the Acts, unless, after possession had been claimed on such a ground, the tenant admitted facts to support it, in which event the court need not itself investigate the matters of fact admitted, whereas the husband there could not yield possession to the landlord seeing that his wife was rightfully in possession vis-à-vis her husband, and his offer of possession was, accordingly, futile as being one which he was unable to perform in the absence of either the wife's consent to go out of the house or an order for ejectment against her. In the present case counsel for the landlord relies on passages in the judgment of SIR RAYMOND EVERSHED, M.R., in which, in relation to the special position of a deserted wife, he says ([1950] 1 All E.R. 710):

“If matters had been otherwise and the wife had wronged the husband, or if, though not the guilty party, an appropriate court, on the husband's

application, had ordered the wife to go out, the wife's right to say she was lawfully there would, of course, have come to an end . . . "

Later in his judgment he quotes a statement by DENNING, L.J., in *Old Gate Estates, Ltd. v. Alexander* (2) ([1949] 2 All E.R. 825):

"The reason [why the husband cannot give possession] is because the wife has a very special position in the matrimonial home . . . He is not entitled to turn her out without an order of the court . . . "

In the case now before us the main point of counsel for the landlord was that the rights of the wife came to an end after her commission of a matrimonial offence and he relied on the passages to which I have referred. We were referred to *Brown v. Brash & Ambrose* (4), but, as that authority did not deal with the case of a wife who has a special position, I do not think it assists. I will accept, for the purposes of this appeal, that a matrimonial offence would, if the husband was so minded, entitle the husband to revoke the licence under which a deserted wife can claim the protection of the Rent Restrictions Acts on the ground that her occupancy was her husband's occupancy. If there was a withdrawal of that licence as a result of a matrimonial offence and there was satisfactory evidence from which it could be inferred (as I think it could probably be inferred in the present case) that the husband did not intend to return, I think the landlord would succeed, but that is as between the defendants as husband and wife. I do not think that this matrimonial offence can be relied on by the landlord. The husband having taken no action to revoke his permission to the wife to reside in the house, I think the position remains the same as it was in *Old Gate Estates, Ltd. v. Alexander* (2). There was no evidence that the husband had left the country or that his whereabouts were unascertainable. Indeed, the landlord had seen him since he bought the house in 1950. In my opinion, as the wife is still his wife and he has done nothing to revoke her licence, the conclusion that the county court judge came to—that the landlord was not entitled to possession—was right.

I think the same conclusion might be arrived at by reason of the facts that the landlord bought with full knowledge that the husband had deserted the wife and that he subsequently accepted the rent from the wife. It might well be said he accepted her occupancy as that of the tenant husband. I think that this appeal must be dismissed.

BIRKETT, L.J.: I am entirely of the same opinion. [His Lordship stated the facts.] The point raised by counsel for the landlord was that the wife has committed what he called a matrimonial offence, but, assuming that she has, I cannot see what the landlord has to do with it. I can see the husband might have much to do with it. Counsel for the landlord really based his case on the argument that, once the matrimonial offence is proved, the rights of the husband in respect of that matter come into being and he can exercise them. He is no longer responsible for his wife, she cannot pledge his credit for necessities, and so on, and counsel for the landlord said by that same token her right to remain in the premises comes to an end. I do not think it does. I think her conduct is irrelevant so far as the landlord is concerned; it is a matter entirely between the husband and the wife.

On the other point, namely, that the course of conduct was such that the landlord had accepted the personal occupancy of the wife as equivalent to the occupancy of the husband, I do not entertain any doubt, and I agree that this appeal ought to be dismissed.

HODSON, L.J.: The landlord's case was that the husband had abandoned possession of the premises and that the wife remained on the premises as a trespasser. Counsel for the landlord, starting from the proposition that he had established adultery by the wife, as I think he is entitled to do, argued that the

wife, having committed adultery, could no longer say, either as against her husband or against the landlord, that her possession was the possession of her husband. He relied on *Middleton v. Baldock* (3), and, particularly, the passage in the judgment of SIR RAYMOND EVERSLED, M.R., in which he said ([1950] 1 All E.R. 710):

A “ If . . . the wife had wronged the husband, or if, though not the guilty party, an appropriate court, on the husband’s application, had ordered the wife to go out, the wife’s right to say she was lawfully there would, of course, have come to an end . . . ”

As to the husband, counsel for the landlord said that he had abandoned possession and had had no intention of returning. He relied on *Brown v. Brash & Ambrose* (4) as showing that the tenant must prove both corpus possessionis and animus possidendi to avoid the result of the position in *Skinner v. Geary* (1). He argued there was here no animus possidendi in the tenant himself and the inference in favour of the wife that she was in lawful possession could only be drawn so long as she was rightly there as against her husband. Counsel for the wife conceded that that would be the case if the husband had revoked his wife’s licence to remain on the premises since then she would not be in a position to assert that

C her position was that of an agent of necessity or anything analogous thereto. Counsel for the wife went on to say, however, that the wife’s conduct becomes relevant only if the husband seeks to revoke the licence and if the possession is lawful vis-à-vis the husband it is lawful vis-à-vis the landlord. He pointed out that there was here no evidence that the husband had ever revoked the licence, and he contended that there was no reason to treat the wife as a wrongdoer

D when the husband had not done so. I think that contention is well founded. It is well established that in an action against the husband he would be entitled to set up the wife’s adultery as a defence to a claim by a plaintiff who had provided her with such necessities. *Govier v. Hancock* (5) is authority for that proposition if authority is necessary, but that does not involve the proposition that a landlord is entitled to rely on a matrimonial offence which the husband

E does not himself set up. As SOMERVELL, L.J., pointed out in the course of the argument, the husband might have condoned the adultery. I think that the husband, not having revoked the wife’s licence, remains in possession through her, and this is so whether or not there is locked in his bosom the intention to return. I think, therefore, the judgment of the county court judge can be sustained on that ground. On the ground also that the landlord was aware of the position

F at the time he bought the premises I think that the judgment of the judge was right.

Appeal dismissed.

Solicitors: *Jaques & Co.*, agents for *Ollard, Ollard & Sessions*, Wisbech (for the landlord); *Metcalfe, Copeman & Pettefar* (for the wife).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

BARNARD AND OTHERS v. NATIONAL DOCK LABOUR BOARD AND OTHERS.

[QUEEN'S BENCH DIVISION (McNair, J.), July 2, 3, 4, 7, 1952.]

Employment—Regulation—Registration of workers—Suspension of workers—Appeal to statutory body—Confirmation of suspension—Action for declaration and injunctions against suspension—Dock labour—Dock Workers (Regulation of Employment) Order, 1947 (S.R. & O., 1947, No. 1189), sched., cl. 5 (7).

In the case of statutory bodies exercising a judicial or quasi-judicial function there may be both a remedy by certiorari, or in appropriate cases by mandamus, and also a remedy by way of declaration or injunction.

Workmen registered by a local board of the National Dock Labour Board under the Dock Workers (Regulation of Employment) Order, 1947, sched., made under the Dock Workers (Regulation of Employment) Act, 1946, s. 1 (1), for allocation to employment by employers were suspended by the local board or their port manager. They appealed to an appeal tribunal set up under the order, but their suspension was confirmed. They sought a declaration that they were improperly suspended and injunctions against the dock board and employers restraining them from carrying out the suspension.

HELD: the action for a declaration and for injunctions would lie.

Cooper v. Wilson ([1937] 2 All E.R. 726) and dictum of DENNING, L.J., in *Lee v. Showmen's Guild of Great Britain* ([1952] 1 All E.R. 1183), applied.

Cases referred to:

- (1) *General Medical Council v. Spackman*, [1943] 2 All E.R. 337; [1943] A.C. 627; 112 L.J.K.B. 529; 169 L.T. 226; 2nd Digest Supp.
- (2) *Leeson v. General Council of Medical Education & Registration*, (1889), 43 Ch.D. 366; 59 L.J.Ch. 233; 61 L.T. 849; 34 Digest 544, 30.
- (3) *Allinson v. General Council of Medical Education & Registration*, [1894] 1 Q.B. 750; 63 L.J.Q.B. 534; 70 L.T. 471; 58 J.P. 542; 34 Digest 544, 24.
- (4) *Lee v. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175.
- (5) *Maclean v. Workers' Union*, [1929] 1 Ch. 602; 43 Digest 101, 1046.
- (6) *Osgood v. Nelson*, (1872), L.R. 5 H.L. 636; 41 L.J.Q.B. 329; 13 Digest 317, 507.
- (7) *R. v. Northumberland Compensation Tribunal. Ex p. Shaw*, [1952] 1 All E.R. 122; [1952] 1 K.B. 338; 116 J.P. 54.
- (8) *Cooper v. Wilson*, [1937] 2 All E.R. 726; [1937] 2 K.B. 309; 106 L.J.K.B. 728; 157 L.T. 290; 101 J.P. 349; Digest Supp.
- (9) *Andrews v. Mitchell*, [1905] A.C. 78; 74 L.J.K.B. 333; 91 L.T. 537; 25 Digest 325, 266.
- (10) *Re Birkenhead Corporation's Resolutions*, [1952] 1 All E.R. 262; [1952] Ch. 359; 116 J.P. 78.

ACTION for a declaration and injunctions.

The plaintiffs were members of the Watermen, Lightermen, Tugmen and Bargemen's Union employed in the Port of London as registered dock workers under the Dock Workers (Regulation of Employment) Order, 1947, made under the Dock Workers (Regulation of Employment) Act, 1946. Under the order a local London board to whom the first defendants, the National Dock Labour Board, had delegated their powers, were charged with the duty of maintaining a register of dock workers from which they allocated men to be employed by persons occupying the position of the second defendants, Silvertown Services, Ltd. The plaintiffs had been suspended either by the port manager of the London board or by the board itself and had appealed, as persons aggrieved under the provisions of the order, against their suspension to an independent body set up under cl. 5 (7) of the schedule to the Dock Workers (Regulation of

Employment) Order, 1947. The body comprised from three to five persons, not being members of the local board, appointed from persons nominated by the local joint committee of the National Joint Council for the Port Transport Industry. It confirmed or purported to confirm the suspension, and the plaintiffs claimed a declaration that they had been improperly suspended and injunctions restraining the defendants from carrying out the suspension. The first defendants raised a plea to the jurisdiction of the court to entertain the action in the following terms:

"Unless and until the decision of the appeal tribunal is set aside by certiorari proceedings, the decision of the appeal tribunal is binding in law on all persons affected thereby, and this honourable court has no jurisdiction to inquire into the matters set out in the statement of claim."

Sir Frank Soskice, Q.C., and Platts-Mills for the plaintiffs.

Paull, Q.C., and Harold Brown for the first defendants.

Russell, Q.C., Carter, Q.C., and Geoffrey Lane, for the second defendants.

McNAIR, J., stated the facts and continued. In support of their plea counsel for the first defendants relied on an observation by LORD WRIGHT in *General Medical Council v. Spackman* (1), on the status of the General Medical Council ([1943] 2 All E.R. 342):

"[The General Medical Council] has no power to compel the attendance of witnesses or to take evidence on oath or to order discovery of documents or the production of documents. It is not bound by the laws of evidence. I have observed that Parliament has not provided for any appeal from the decisions of the council. The only control of the court to which the council is subject (apart from proceedings by way of mandamus) is the power which the court may exercise by way of certiorari. Certiorari is not an appellate power. Its use may nullify or discharge an order made by the council; but the grounds on which certiorari may be granted are very limited."

Counsel admits that that passage was not necessary to the decision in question. Counsel for the plaintiffs drew my attention to the fact that LORD WRIGHT refers to two cases, *Leeson v. General Council of Medical Education & Registration* (2) and *Allinson v. General Council of Medical Education & Registration* (3), in which the court exercised a jurisdiction by way of injunction or declaratory judgment over similar statutory bodies. There is further the recent observation of DENNING, L.J., in *Lee v. Showmen's Guild of Great Britain* (4) which, as I read it, was also not necessary for the decision of the case. He says ([1952] 1 All E.R. 1183):

"It has sometimes been said in these cases that absence of evidence is not itself a ground for the intervention of the court, but only goes to show bad faith in the tribunal: see *Leeson's* case (2) (43 Ch.D. 377, 384) and *Maclean v. Workers' Union* (5) ([1929] 1 Ch. 623); but I do not think those statements can stand in the light of *Osgood v. Nelson* (6), which was not cited to the court in either case. Those cases, it is true, concerned statutory tribunals, but I see no reason why the power of the court to intervene should be any less in the case of domestic tribunals. In each case it is a question of interpretation, in the one of a statute, in the other of the rules, in order to see whether the tribunal have observed the law. In the case of statutory tribunals, the injured party has a remedy by certiorari, and also a remedy by declaration and injunction."

It was argued that that passage in DENNING, L.J.'s judgment was inconsistent with what he had said in *R. v. Northumberland Compensation Tribunal. Ex p. Shaw* (7). I have read with care the lord justice's judgment in that case, where he traces how the remedy by way of certiorari, which at one time was thought to be confined to controlling cases of excess of jurisdiction, had rightly been held

by the Divisional Court to extend to control of cases where there had been error of law on the face of the record, but I cannot find anything, either in the express language used by DENNING, L.J., or in the reasoning, which leads me to think that it is inconsistent with his subsequent observations in *Lee v. Showmen's Guild* (4).

More important and more decisive for my purpose is *Cooper v. Wilson* (8), in which it seems to me that the point of principle on which counsel for the defendants relies has been expressly decided by the Court of Appeal in a way which binds me. The appellant, who was a sergeant in the Liverpool police force, after he had given notice of his resignation was purported to have been discharged by the watch committee, the body which alone, under the relevant statutes, as it was held by the Court of Appeal, had power of dismissal. One of the arguments advanced by counsel on behalf of those who were supporting the watch committee's decision was this (I quote from the argument of Sir David Maxwell Fyfe):

"... the watch committee having adjudicated on that appeal its decision can be questioned only by prerogative writ and not by an action claiming a declaration."

GREER, L.J., dealt with that point expressly in these words ([1937] 2 All E.R. 733):

"It would be idle for a plaintiff who is alleging that he has never been dismissed to appeal to the Secretary of State, nor do I think that the fact that that is a remedy which he could take prohibits his access to the court for a declaration that his dismissal was invalid, nor do I think that the power which he undoubtedly possessed of obtaining a writ of certiorari to quash the order for his dismissal prevents his application to the court for a declaration as to the invalidity of the order of dismissal."

GREER, L.J., later uses this language (*ibid.*, 736):

"The case of *Andrews v. Mitchell* (9) seems to me to support the view that a claim for a declaration that a statutory body acted without jurisdiction can be dealt with by an action for a declaration that the decision in question was null and void."

MACNAGHTEN, J., disagreed with that view of GREER, L.J., in a dissenting judgment (*ibid.*, 750), and SCOTT, L.J. (*ibid.*, 736) does not deal with the point expressly, though it is clearly implicit in his judgment that he accepts GREER, L.J.'s view on this matter.

In these circumstances, it seems to me that, whatever view I may hold on this matter, I am bound by that decision to reject the submission as a matter of principle. *Cooper v. Wilson* (8) makes it clear that in the case of statutory bodies such as those exercising a judicial or quasi-judicial function (to use the language of GREER, L.J., in regard to the watch committee) there may be both a remedy by certiorari, or in appropriate cases by mandamus, and also a remedy by way of declaration or injunction. In the two cases accepted as accurate by LORD WRIGHT in his opinion in the *Spackman* case (1)—*Leeson v. General Medical Council* (2) and *Allinson v. General Medical Council* (3)—a remedy by way of certiorari might have been used, but the point of jurisdiction was not taken in the one case and was admitted in the other and the court granted a declaration and injunction. A more recent illustration of the same course being taken is *Re Birkenhead Corporation's Resolutions* (10), in which ROMER, L.J., sitting as an additional judge of the Chancery Division, entertained the plea raised on the originating summons that the National Arbitration Tribunal, a similar statutory body exercising judicial or quasi-judicial powers, had no jurisdiction to make the particular award. That, no doubt, was done by agreement, but no court can properly exercise by agreement a jurisdiction which it is debarred by law

from exercising. It follows that this preliminary plea must fail. I do not at this stage express any view on the matter, which has been debated, of the extent to which the decision of the appeal committee may operate as a defence to this action, or on what documents will be admissible. The action must proceed.

Objection to jurisdiction disallowed.

Solicitors: *Silverman, Miller & Fraser* (for the plaintiffs); *G. Grinling Harris* (for the first defendants); *Linklaters & Paines* (for the second defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

MURCUTT v. MURCUTT.

B [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), July 9, 1952.]

Injunction—Restraining county court action—Jurisdiction of Divorce Court—Wife's petition for divorce pending—Application by wife to restrain proceedings against daughters of full age for eviction from matrimonial home.

C A wife, who had filed a petition for divorce against her husband on the ground of cruelty, and the two daughters of the marriage resided with the husband in the matrimonial home of which the husband was the tenant. The daughters were both of full age, but the younger was an invalid and needed attention from her mother. The husband instituted proceedings in the county court to evict the daughters. On an application by the wife for an injunction to restrain those proceedings on the ground that, if they succeeded, she would be forced to leave the matrimonial home to accompany the invalid daughter,

D HELD: the court had jurisdiction to restrain the proceedings in the county court although they were between different parties from those to the petition, but in the circumstances no injunction would be granted.

E AS TO RESTRAINT OF LEGAL PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 18, pp. 86, 87, para. 119.

SUMMONS for injunction.

F The husband had instituted proceedings in the county court to evict from the matrimonial home the daughters of the marriage, both of whom were of full age but one of whom was an invalid and relied on the wife for attention. The wife contended that, if this daughter were evicted, she (the wife) would be forced to go with her, and she sought an injunction restraining the husband (i) from molesting her or seeking to evict her from the matrimonial home, and (ii) from proceeding in the county court with the actions against the daughters. The husband, by counsel, gave an undertaking in respect of (i), and the issue left to be decided was in respect of (ii).

G *E. B. Gibbens* for the wife.

R. H. W. Dunn for the husband.

H WILLMER, J.: The wife seeks an injunction against her husband under two heads. She has already launched a petition against her husband, based on allegations of cruelty, to which, so far, the husband has not appeared or filed an answer. In the meantime she seeks an injunction restraining him, in the first place, from molesting her or seeking to evict her from the matrimonial home, where both of them still reside together with two daughters and two grandchildren. Secondly, she seeks to restrain him from proceeding with two actions in the county court, in which he is plaintiff and the two daughters respectively are the defendants, whereby he is seeking to evict the daughters from the matrimonial home. The daughters are both of age. The older is a married woman with two children, whose husband is in Her Majesty's forces serving abroad. The younger one is over twenty-one, but is unmarried and has always lived at

home. It is said that she is not very bright mentally (it is not put any higher than that) and that she suffers severely from asthma so as to need a good deal of attention from her mother. The husband, through his counsel, has expressed willingness to undertake not to molest the wife and not to seek to evict her from the matrimonial home pending the hearing of the suit, but the wife says that that undertaking on his part is, in the peculiar circumstances of this case, a barren one, for his actions against the daughters, if allowed to proceed, will inevitably succeed, because the daughters have no defence in law, and she says that, if the daughters go, particularly the invalid, she will be forced to leave the matrimonial home and go with them. It is said, therefore, that the husband, by prosecuting these proceedings in the county court, is indirectly proceeding against the wife to obtain her eviction. A

It is in those circumstances that I am asked to grant an injunction restraining the husband, not only from evicting the wife, but also from proceeding with the county court action to evict his daughters. The matrimonial home is the husband's house in the sense that he is the tenant of it. The order I am asked to make is admittedly of a most unusual nature. In my opinion, I have undoubtedly got jurisdiction to restrain the husband from proceeding with the action which he is pursuing in the county court, but it would be a very unusual order to make, particularly having regard to the fact that the county court is the appropriate court having jurisdiction to deal with matters of that sort and also to the fact that the proceedings which I am asked to restrain in that court are not proceedings between the parties to this suit, but are between different parties. B C

A number of cases has been cited to me, and I think I am right in saying that in none of them has an injunction been granted to restrain proceedings between different parties in a court having jurisdiction to deal with them. I apprehend that an unusual, and, indeed, extreme, order of the kind sought in this case ought only to be made if I am satisfied on the evidence put before me that in the absence of any such order the wife would suffer irreparable harm between now and the trial of her petition. I have to ask myself the question whether anything approaching that has been shown by the wife in this case. In the first place it is to be observed that, if the husband succeeds against the daughters, the result will be legally binding on the daughters, but in no way will the wife, the present petitioner, be legally bound to leave the matrimonial home or to go with her daughters or either of them. She will be free to go or to stay as she may be advised. It may very well be that the bonds of affection that exist between her and her younger daughter will have the result that she would go wherever that daughter went, but that would be, not in pursuance of any legal duty, but merely in pursuance of normal human affection. If it is right to stay proceedings in the case of daughters, I ask myself where the line is to be drawn. Suppose that the person sought to be evicted was not a blood relation, but somebody of whom the wife was known to be very fond, somebody, perhaps, with whom she had lived for a great length of time and who was very dependent on her. Is it competent to restrain proceedings against some such defendant as that? It seems to me that, if I admit the right to an injunction in a case like this, where the person sought to be evicted is a daughter, it would be very difficult to draw any line beyond which the court would not in appropriate circumstances go. That is the first point that troubles me. How far am I to consider the question whether of her own volition she is or is not likely to go—a matter which depends, not on any legal duty, but only on the bonds of ordinary human affection? E F G H

The next question which troubles me is this. If I assume that the actions will succeed, I apprehend that the daughters will not be ordered on to the streets forthwith, but that they will be given a reasonable time in which to find alternative accommodation. If, therefore, the wife makes up her mind that she wants to leave with the younger daughter, she will have an opportunity of finding alternative accommodation, whether in rooms or where I do not know. What

she will be able to get depends largely, I suspect, on the financial support which the husband is prepared, or may be forced, to accord to her, and it may be that on any view the wife would be well advised to press ahead with all speed to obtain an order for alimony pending suit, if she is not already doing so. I am not apprised of what the situation in regard to that is, nor have I any information as to what her husband's means may be, but, if the husband by his conduct in effect forces the wife to leave the matrimonial home and live elsewhere at greater expense, that is a matter which, it seems to me, will have to be taken into consideration in fixing the amount which he ought to pay. The point I am concerned with at the moment is that there will be time to consider that, because the daughters will not be turned into the street immediately even if the actions against them succeed.

The third thing which troubles me is this. I must assume for the purposes of this application the truth of the wife's statements and the virtue of the wife's case. She is entitled to be judged on what she says herself, and, if what she says is right, she will, I should have thought, inevitably obtain a decree in the present suit. If she obtains a decree, she will cease to have any right to live in the matrimonial home, and it will not avail her then to say that her daughter suffers from asthma or anything else. In other words, assuming the truth of the wife's case, the moment is inevitably and inexorably approaching when she will in any case have to leave the matrimonial home. The only question is whether the husband should be stopped from taking steps which may indirectly produce that result now, or whether they should be postponed until the time when the wife has obtained the decree which she says she is entitled to have. That seems to me to be the sum total of merit of this application.

In view of the considerations which I have mentioned, it seems to me that the circumstances fall far short of anything which would warrant the very unusual remedy which I am asked to grant in this case. In my judgment, therefore, this application, so far as it concerns the restraining of the proceedings in the county court, ought not to be granted. The first part of the application, I understand, is covered by the undertaking that counsel for the husband is ready to give.

Summons dismissed.

Solicitors: *Flint & Co.*, Southend-on-Sea (for the wife); *Shelton, Cobb & Co.*, agents for *H. V. Cooper*, Southend-on-Sea (for the husband).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

EDWARDS AND ANOTHER *v.* RAILWAY EXECUTIVE.

[HOUSE OF LORDS (Lord Porter, Lord Goddard, Lord Oaksey, Lord Morton of Henryton and Lord Reid), May 5, 6, 7, 8, July 11, 1952.]

Negligence—Child—Licensee or trespasser—Proof of licence—Onus—Rebuttal of inference—Injury on railway line adjacent to recreation ground—Access to line through hole made by children in fence—Duty of railway executive.

While on a railway company's property, a boy aged nine years was run over by an electric train and injured. The railway line was laid on an embankment at the foot of and adjacent to which was situated a public recreation ground. Between the foot of the embankment and the recreation ground the company had erected a fence consisting of concrete posts between which ran strands of wire fixed to the posts by split pins. For many years children had been accustomed to climb through the fence by pulling out the split pins and removing the wire, and to toboggan down the embankment. The fence was repaired by the company's servants whenever it was seen to have been interfered with. The accident occurred when the boy, looking for a ball which had been propelled on to the embankment, went through an opening in the fence, climbed the embankment, and, while crossing the line, slipped and fell between the rails and was run over. Until the day of the accident the boy had never been through the fence and on the embankment, and he had been warned by his father not to go through the fence. He had no knowledge of the practice of other boys' sliding down the embankment, and had not wanted to do so himself. In an action by the boy and his father against the respondents for negligence,

HELD: to establish that the boy was on the embankment as a licensee, the onus was on those claiming it to show, either express permission by the railway company or that the company had so conducted itself that it could not be heard to say that it did not assent to the use of the premises by children; a licence was not to be lightly inferred, and the onus was not discharged by showing that, in spite of the fence, children constantly broke through; even assuming that the company had knowledge of the intrusion, that of itself did not constitute the children licensees, nor was the company bound to take every possible step to keep out intruders, but so long as it took some steps to show that it resented and would try to prevent the intrusion that was strong evidence to rebut the inference of a licence; in this connection it was material to consider the state of mind of the boy and whether in the circumstances he thought that he was on the premises with the leave of the company; on the facts there was no evidence from which it could reasonably be inferred that the railway company acquiesced in the use of the embankment by the children; and, therefore, the boy was a trespasser, and, as such, the company did not owe him the duty which they would have owed to a licensee.

AS TO DEGREE OF CARE REQUIRED IN RELATION TO ACTS BY CHILDREN, see HALSBURY, Hailsham Edn., Vol. 23, p. 584, para. 836; and FOR CASES, see DIGEST, Vol. 36, pp. 68-71, Nos. 433-462.

Cases referred to:

- (1) *Cooke v. Midland Great Western Ry. of Ireland*, [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 36 Digest 70, 450.
- (2) *Lowery v. Walker*, [1911] A.C. 10; 80 L.J.K.B. 138; 103 L.T. 674; 13 Digest 507, 571.
- (3) *Latham v. Johnson (R.) & Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 36 Digest 38, 223.
- (4) *Addie (R.) & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358; 98 L.J.P.C. 119; 140 L.T. 650; Digest Supp.

APPEAL by the appellants, plaintiffs in the action, from an order of the Court of Appeal (SINGLETON and MORRIS, L.JJ., and ROXBURGH, J.), dated July 25, 1951, setting aside an order of JONES, J., sitting with a jury, dated Feb. 13, 1951, in an action for damages for personal injuries.

A On July 15, 1947, the infant appellant, aged nine years, was run over by an electric train on a line the property of the respondents, the successors in title of the Southern Railway Co. The accident occurred on a section of the respondents' railway where there was a double track laid on a steep embankment, also the property of the respondents, at the bottom of which was a public recreation ground provided and maintained by a local authority. At the boundary of the embankment and the recreation ground a wire fence had been erected by the respondents. Children had for many years climbed through the fence by breaking the wire to slide down the embankment, but the existence of the slide and its use by other children were unknown to the infant appellant until the day of the accident. The respondents' servants had regularly repaired the fence and the infant appellant had been warned by his father, the second appellant, not to go through it. On the day of the accident the infant appellant went through the fence to fetch a ball and while crossing the lines slipped and fell between the lines and was subsequently struck by a train, suffering the loss of an arm. On a claim by the infant appellant through his father as next friend, and by the father on his own account, it was contended that the embankment and lines constituted a lure or attraction for children, and that the respondents, well knowing this, failed to take any proper steps to prevent the children from going on the embankment. They further contended that the driver of the train was negligent in failing to see the infant appellant on the line and in failing to stop in time to avoid him. The respondents contended that the infant appellant was a trespasser, and was not on the respondents' premises with their express or tacit permission and that there was no evidence that he was attracted to the premises. The jury awarded the infant appellant £6,000 damages. On appeal by the respondents, the Court of Appeal, in allowing the appeal, held that the infant appellant was a trespasser at the time of the accident and that there was no evidence that he was attracted by any allurement on the respondents' premises or that the respondents' servants, including the driver of the train, were in breach of any duty owed to him.

Platts-Mills for the appellants.

Beney, Q.C., and *Neil Lawson* for the respondents.

F The House took time for consideration.

July 11. The following opinions were read.

G LORD PORTER: My Lords, this is an appeal by the appellants from an order of the Court of Appeal allowing an appeal by the respondents from and setting aside the verdict and judgment directed to be entered in favour of the appellants against the respondents on the trial of an action before JONES, J., and a jury. The appellants were plaintiffs and the defendants were the mayor, aldermen, and councillors of the metropolitan borough of Woolwich as first defendants, and the respondents, the Railway Executive, as second defendants. The first defendants were successful in both courts below and are not concerned in this appeal.

H The appellants' claim arose from an accident suffered by the infant appellant, Terence Edwards, on July 15, 1947, while he was on the respondents' railway line at Eltham in the county of Kent. He was then aged nine years and he sustained electric burns and shock from contact with a live electric rail on the up line of the respondents' railway and lost his right arm close to the shoulder owing to the subsequent passage over it by a train of the respondents which was travelling along that line. The place at which the accident occurred was a section of the respondents' railway between Eltham in the east and Kidbrooke in the

west where there was a double track of lines laid on the top of a steep embankment which formed part of the premises of the respondents. At the foot of this embankment on its northern side there ran immediately alongside the railways' property for a distance of about one thousand yards a public recreation ground and children's playground controlled by the mayor and corporation of Woolwich. Between the embankment and the recreation ground a fence had been erected by the respondents consisting of concrete posts holding strands of wire which were passed through the posts and fixed in position by split pins.

The appellants based their claim on an allegation that the respondents knew that the embankment and lines constituted a lure or attraction for children, that children frequently passed from the recreation ground to the embankment and lines to play and slide, and that, notwithstanding this knowledge, they failed to take any proper steps to prevent children from going on to the embankment and the lines or to warn children against the danger of so doing; that in these circumstances the respondents permitted children to come on their premises as licensees and failed to guard them against dangers of which they well knew; and that they were in breach of duty under the Railway Clauses Consolidation Act, 1845, in failing properly to fence the railway. By amendment they further alleged that the respondents' servant, the driver of the train which passed over the infant appellant, was negligent in failing to see him or in failing to stop the train in time to avoid him. The respondents denied the appellants' allegations and contended that the infant appellant was a trespasser and that the respondents, their servants and agents, were not in breach of any duty owed to the infant appellant as such.

To establish the appellants' case evidence was called which (if believed, as it was believed by the jury) proved that for many years before the accident children had from time to time been accustomed to climb through the fence and to toboggan down the embankment near where the accident occurred. This they did by pulling out the split pins which attached the wire of the fence to its posts and by trampling on or breaking the wire itself. There was some evidence that children had been known to climb on to the embankment from other places, but it was somewhat vague in character and is, in my opinion, irrelevant to the decision of the present case. The infant appellant had never himself been previously on the embankment, and, apparently, had no knowledge of the practice of sliding down it or, indeed, that other children were accustomed to go there. The fence itself was repaired when it was observed to have been interfered with, both by the employee of the Woolwich Corporation who was in charge of the playground and by an employee of the respondents. It appears that frequent repairs were required. There was evidence, however, that on the morning of July 15, 1947, the fence was in proper repair and no evidence to the contrary. The accident occurred at about 7.30 p.m. on that day. Shortly before this time the infant appellant and three other boys, two named Connor and one named Gooch, were playing in the recreation ground with a ball. Someone then threw or kicked the ball up the embankment and the four boys went through the fence either to fetch the ball or, in the case of the infant appellant and Gooch, possibly because they had been dared by one of the Connor boys to do so. When they got through they found a number of children sliding down the embankment on tins and pieces of wood on a slide which started about three feet from the top of the embankment and ended somewhere about the fence at the bottom. They had no difficulty in getting through the fence since it is in evidence that there was a gap high enough to allow a boy to pass through without stooping though a man who afterwards rescued Terence found himself unable to reach or return from the spot without crawling.

Apparently, after the children had got through the fence, if not before, one of the Connor boys dared Gooch and Terence to go across the lines before a train came past and look for the ball. The two Connors then, it seems, went to slide

with the other children, whereas Terence and Gooch went on up the embankment, under a sort of low wire fence at the edge, passed about twelve feet across the top of the embankment and then reached and crossed both the up and down lines. The line was electrified so that in doing so they had to cross seven sets of metals, i.e., four rails constituting the running track and three live rails. When they got to the other side of the track they failed to find the ball and turned to run back at the moment at which the down train was just starting to leave Kidbrooke station. Bryan Gooch got over the rails safely, but Terence slipped or tripped and fell on the up track, between the most southern of the lines (which was a live rail) and the running line which lies immediately next to and about a distance of one foot distant from it. In that position he lay in contact with the live rail unable to move, and shortly afterwards was run over by an up train before any one could reach and rescue him. After his arm had been severed he was rescued with considerable courage and skill by a Mr. O'Neill and handed over to an ambulance. Before this day Terence had never been through the fence from the recreation ground, and, apparently, never knew of the gaps in it or of the tobogganing and never wanted to or did toboggan when he got there. There was no allurements in his case. He went on to the embankment to get his ball and over the rails because he was dared to do so. He had, it seems, been scolded for going through the fence at another point by the corporation's employee in charge of the recreation ground and warned by his father not to do so. He knew that the fence was there to keep him and the other children out, that it was wrong to go on the embankment, and that he had no right to do so. He further knew that it was dangerous to cross the lines, but he may not have appreciated the danger of the live rail.

For the appellants it was urged that children, and, in particular, adventurous children, are not readily deterred by fences which it is easy to get through; that the evidence showed that a ganger and five men passed along the top of the embankment every week day, and that on Saturdays the ganger passed along the bottom and saw and repaired the damage; that, even if he did not see the children tobogganning, which was unlikely, he must have seen the signs of the slide, as, indeed, he confessed he did after the accident; that the engine drivers, whether of motor or steam engines, must have seen the tobogganing as they passed; that the jury were entitled to disbelieve them when they said they did not; and that the failure to take steps more strenuous than merely repairing the fence amounted, in the case of persons whose knowledge of the children's habits a jury was entitled to infer, to a licence to the children to be there. It was further contended that, if he had been looking, the driver of the train which passed over the boy's arm must have, or, at any rate, ought to have, seen the boy and could have stopped in time. At the end of the appellants' case the respondents submitted that there was no evidence from which a jury could find either licence or negligence, and that the boy, being a trespasser, must take the premises as he found them. JONES, J., however, ruled that there was evidence to go to the jury and the respondents then called their witnesses. The facts set out above are those given in evidence by both sides, and as the respondents elected to give evidence they are bound by anything emerging in the course of the trial whether from their own or their opponents' witnesses.

At the end of the case the learned judge put certain questions to the jury with the assent of counsel and these must be set out in full with the answers.

Q.1 (A).—Did the infant plaintiff go on to the defendants' railway embankment with the tacit permission of the defendants' servants?

A.—Yes. (B).—Did the infant plaintiff go on to the defendants' railway line with the tacit permission of the defendants' servants? A.—Yes.

Q.2.—If the infant plaintiff went on to the defendants' railway embankment or line with the express or tacit permission of the defendants' servants

—(A).—Did the defendants' servants expose him to any trap or concealed

danger of which they knew but of which he did not know? A.—Yes. (B). Did the defendants' servants expose him to any object of attraction that contained danger that would not have been a trap to an adult but with which a child was particularly likely to be tempted to meddle? A.—Yes. (C).—What (if any) was the trap or concealed danger or object of attraction to which the defendants' servants exposed the infant plaintiff? A.—(i) Live rail; (ii) The "slide". (D).—Was the driver of the up train negligent in failing to stop the train before it ran over the infant plaintiff's arm? A.—Yes. (E).—Was the driver of the down train negligent in not seeing the infant plaintiff on the up line and could he have prevented the accident if he had seen him? A.—(i) No; (ii) Yes.

Q.3.—If the infant plaintiff went on to the defendants' line without the express or tacit permission of the defendants' servants, was the driver of the up train that injured the infant plaintiff guilty of reckless disregard of the infant plaintiff's safety? A.—See 1 (B).

Q.4 (A).—Was the infant plaintiff negligent in going on to the line? A.—In view of his age, no. (B). If so, was his negligence the sole cause of his injuries? [No answer.] (C).—Did the infant plaintiff realise that it was dangerous to go on to the line? A.—No.

Q.5 (A).—Damages (if any) on the basis of the defendants' servants having been negligent, but the infant plaintiff not having been negligent in any respect? A.—£6,000.

The learned judge had already ruled that there was no breach of the statutory duty to fence, but on the verdict of the jury he entered judgment for the sum of £6,000. From this verdict and judgment the respondents appealed to the Court of Appeal on the ground that there was no evidence on which the jury could find as they did, and that there was no evidence of any allurement, or that the infant appellant was a licensee or other than a trespasser, or that the driver of the train was negligent. The Court of Appeal allowed the appeal, holding that there was no such evidence and that, even if it could be held that a licence must be inferred for the children who were tobogganing, yet no such licence could be inferred for this child nor was there any allurement to him.

My Lords, if there was evidence to justify the jury's findings the appellants must succeed. The only question, therefore, for your Lordships is whether the case should or should not have been withdrawn from the jury. The first matter for decision, accordingly, is whether there was any evidence from which it could be inferred that children from the recreation ground had become licensees to enter the respondents' premises and toboggan down the embankment.

The appellants support their claim on the authority of such cases as *Cooke v. Midland Great Western Ry. of Ireland* (1), and *Lowery v. Walker* (2). I refrain from referring to the many cases which have not reached your Lordships' House inasmuch as the principle is, I think clear—the application alone difficult. There must, I think, be such assent to the user relied on as amounts to a licence to use the premises. Whether that result can be inferred or not must, of course, be a question of degree, but, in my view, a court is not justified in lightly inferring it. In *Cooke's* case (1) there was an open and well worn pathway leading to a turntable on which children could ride and which was an allurement to them. Apparently, the whole station staff in that case knew of the practice of children to congregate there and ride on the turntable and no attempt was made to stop them. Similar considerations apply to *Lowery v. Walker* (2). The ground of the decision is best set out in the words of LORD LOREBURN, L.C. The facts of the case were that the defendant put a dangerous horse into a field through which he knew the public were accustomed to pass as a short cut to the station. LORD LOREBURN says ([1911] A.C. 12):

" . . . I think in substance it [i.e., the county court judge's finding] amounts to this: that the plaintiff was not proved to be in this field as of

right; that he was there as one of the public who habitually used the field to the knowledge of the defendant; that the defendant did not take steps to prevent that user; and in those circumstances it cannot be lawful that the defendant should with impunity allow a horse which he knew to be a savage and dangerous beast to be loose in that field without giving any warning whatever, either to the plaintiff or to the public, of the dangerous character of the animal."

A I mention these cases because they deal with circumstances having some resemblance to the present case, but each case must be determined on its own facts. The onus is on the appellants to establish their licence, and, in my opinion, they do not do so merely by showing that in spite of a fence, now accepted as complying with the Act requiring the respondents to fence, children again and again broke their way through. What more, the appellants were asked, could the respondents do? Report to the corporation? But their caretaker knew already. Prosecute? First you have to catch your children, and, even then, would that be more effective? In any case I cannot see that the respondents were under any obligation to do more than keep their premises shut off by a fence which was duly repaired when broken and obviously intended to keep intruders out.

C It will be observed that in expressing this opinion I have assumed that the servants of the Railway Executive had knowledge that children were accustomed to go there. I am not convinced that they had this knowledge, but it may have been legitimate for the jury to find that the ganger who repaired the fence must have known, although I am not prepared to accept the proposition that any inference can be drawn from the fact that trains passed up or down or to hold that their drivers ought or must be taken to have seen the children. However that may be and even assuming that the respondents had knowledge of the intrusion of children on to the embankment, the suggestion that that knowledge of itself constitutes the children licensees, in my opinion, carries the doctrine of implied licence much too far. No doubt, the owner of the premises must take steps to show that he resents and will try to prevent the invasion. An open pathway, as in *Cooke's* case (1), or a knowledge that a track is and has long been constantly used, coupled with a failure to take any steps to indicate that ingress is not permitted, as in *Lowery v. Walker* (2), may well amount to a tacit licence. But I do not accept the theory that every possible step to keep out intruders must be taken and, if it is not, a licence may be inferred. The whole question has been elaborately discussed in *Latham v. R. Johnson & Nephew, Ltd.* (3) by HAMILTON, L.J., and in your Lordships' House in *R. Addie & Sons (Collieries) v. Dumbreck* (4), where the plaintiff failed though the circumstances were at least as favourable to success as those in the present case. In the latter case there was a contrivance actually dangerous to children in a field, surrounded, it is true, by a hedge, but by a hedge totally inadequate to keep out the public. The field itself was, as the respondents knew, used as a playground by young children and the contrivance was dangerous and attractive to children. The accident occurred because the contrivance (a wheel) was set in motion without any precaution being taken to avoid an accident to persons frequenting the field. There, as here, some of the children at times were warned—there, as here, the injured boy had been warned by his father—but no adequate fencing existed nor were any deficiencies continuously renewed. Nevertheless it was held that the boy, though only four years old, was a trespasser and went on the premises at his own risk.

H My Lords, I quote these cases, not because the facts and circumstances of one case can be applied to another, but rather to show the attitude which has been adopted in dealing with cases of this kind. It is for the appellants to establish a licence, and, notwithstanding the finding of the jury in this case, I do not think they have done so. In my view, there was no evidence to justify that finding.

This conclusion is decisive of the case, but one or two further matters were argued which ought, I think, to be mentioned.

It was submitted on behalf of the respondents that, even if it must be taken that children were licensed to go on the embankment, yet they were not even tacitly permitted to go on the track. There was no evidence that they did so and no allurement to take them there. My present inclination is to regard this contention as correct since there was no evidence that any child had been seen passing on to the track from the slide, and the evidence of one instance in which a child had been killed on the line in the neighbourhood had no bearing on the question. The best way in which it could be put on behalf of the infant appellant would be that, finding a number of children playing on the embankment and no proper fence keeping him from the lines, it would be reasonable to infer that the licence, if there was one, extended over the whole embankment from one side to the other. Whether, however, such an argument could prevail at all, and whether it could do so in face of the fact that the infant appellant knew he was not allowed even to go on the embankment, need not be determined in the present action.

There only remains to be considered the allegation that the driver of the train concerned was negligent—recklessly negligent indeed—if the boy was a trespasser. I can discover no evidence to justify such a finding. Even to his rescuer who had been notified of his presence and was looking for him he was half hidden where he lay between the running and live rail. The engine driver had to watch the signals and be generally alert. No doubt he would have seen the boys if they had been running across the line. As it was, there was nothing to draw his attention to what, at most, may have been an arm across a rail, and even a careful watch might well have missed it. Nor, indeed, is there any sufficient evidence to lead to the conclusion that, even if the boy had been seen, the train could have been pulled up in time. It was an unfortunate accident in which one's sympathies must go out to the injured boy, but sympathy is an inadequate reason for imputing blame. I would dismiss the appeal.

LORD GODDARD: My Lords, when a person is injured on land or in a place where he has no business to be, efforts are frequently made, sometimes with success due perhaps largely to sympathy, to establish that the injured person was where he was with the leave and licence of the landowner or occupier, even though by every canon of common sense it is perfectly plain that the latter, had he been asked before the accident, would have said that he objected strongly to the uninvited person coming on his land. If it be a child that is injured, reliance is sure to be placed on that hard-worked case, *Cooke v. Midland Great Western Ry. of Ireland* (1), which was, in fact, decided on points as unusual and special as any could be. If an owner, whether a railway company or a private individual, for years has allowed part of his premises to be used as a children's playground, some care must be taken for the safety of those who will take advantage of the facility or amenity that appears to be offered them. If a landowner allows them to play in proximity to a dangerous thing that he maintains on his land, he must guard it or make it safe. But repeated trespass of itself confers no licence. The owner of a park in the neighbourhood of a town knows probably only too well that it will be raided by young and old to gather flowers, nuts, or mushrooms whenever they get an opportunity, but because he does not crown his park wall with chevaux de frise or post a number of keepers to chase away intruders it is not to be said that he has licensed what he cannot prevent. Nor can I see, if he knows that the trespassers are children, that he is under any obligation to ask their schoolmasters to lecture them on the subject, and he would surely be an optimist if he supposed that would do any good. In this respect children, small boys especially, resemble burglars. If they want to get in they will, take what precautions you may.

To find a licence there must be evidence either of express permission or that the landowner has so conducted himself that he cannot be heard to say that he did not give it. To suppose that a railway company consciously gave permission to small boys to wander or play on their embankments or lines which are in active use by electric trains is so absurd that no one would suggest it. What, then, have they done in this case to lead anyone to suppose that they may go on their property to play? They put up a fence which is repaired as often as their linesmen see it broken. No one can pretend that the embankment itself is an allurement, which only means a form of invitation. What is said is that because children have from time to time used part of it as a slide, so that the place where they have indulged in this pastime can be seen, that constitutes an allurement, or so I understand the argument. The railway company provided neither slide nor toboggan. That they did not use every method that could be devised for keeping children off the embankment may well be true. Had they to provide watchmen to guard every place on the railways of the Southern Region where children may and do get on to embankments and lines, railway fares would be a great deal higher than they are already. Had I thought that there was any evidence of a licence to go on the embankment I should, for myself, not distinguish between the embankment itself and the railway lines which run along the top of it. If railway authorities were to invite or to allow children to play on the embankment it seems to me as certain as anything can be that they will go on to the lines and at least they ought to be protected by some additional fence from so doing. I can see no evidence at all of any licence in this case, and, the injured child was a mere trespasser. He went on to the embankment and thence on to the lines because another boy had thrown his ball over and he was then dared to go after it. It follows, therefore, that, unless there is evidence of wilful or reckless behaviour on the part of the motorman in failing to stop the train before it ran over the boy, he can have no case. There is no evidence to support such a charge against the driver. A man can only act recklessly with regard to the safety of another if he knows of, or has reason to believe in, the presence of that other. I can well understand that as trial by jury had been ordered in this case JONES, J., thought it better to take a verdict so as to guard against the possibility of a new trial being ordered, but, in my opinion, he ought to have entered judgment for the respondents non obstante and I agree with the Court of Appeal that the action fails. I would dismiss the appeal.

LORD OAKSEY: My Lords, I agree that this appeal should be dismissed. In spite of the able argument of counsel for the appellants I have come to the conclusion that there was no evidence that the appellant, Terence Edwards, was a licensee on any part of the respondents' premises, and that, as there is, in my opinion, no evidence of any reckless disregard of his safety by any of the respondents' servants, he cannot recover any damages for the accident from which he suffers. It is true that there was evidence that children from the recreation ground were in the habit of using the embankment for a sort of toboggan slide, and there was some evidence that this habit had continued for several years. On the other hand, the railway company had erected and maintained and repaired a strong wire fence between the recreation ground and the embankment, and, although this fence was often broken and showed obvious signs of having been broken for the purpose of obtaining access to the toboggan slide on the embankment, yet it was, according to the appellants' own witness, Griffiths, continually being repaired.

In these circumstances the question appears to me to be whether there was evidence from which it could reasonably be inferred that the railway company acquiesced in this use of the embankment by children from the recreation ground. In my opinion, in considering the question whether a licence can be inferred, the state of mind of the suggested licensee must be considered. The circumstances must be such that the suggested licensee could have thought, and did think, that

he was not trespassing, but was on the property in question by the leave and licence of its owner. In the present case, in view of the fact that the children must have known that the fence was being continually repaired and were being continually warned by Griffiths not to go on the embankment, they could not have thought that they had the leave and licence of the owners to go on the embankment. The only way in which the appellants' argument can, in my opinion, be put is to suggest that, although they knew of Griffiths' warnings and Griffiths' repairs to the fence, they did not know, and had no reason to think, that the railway company objected. I do not, however, consider that children can be thought to have made any such distinction between the attitude of Griffiths and the attitude of the railway company, and there is the uncontradicted evidence of Bell, the respondents' ganger, that he and his men continually repaired the fence. It is, therefore, in my opinion, impossible to draw the inference that the railway company, which was repairing the fence, was acquiescing in its being broken down and the embankment used for the slide.

LORD MORTON OF HENRYTON: My Lords, in my view, there was no evidence in this case to justify the finding by the jury that the infant appellant went on the respondents' railway embankment and railway line with the tacit permission of the respondents' servants. This being so, this small boy was nothing but a trespasser. His serious injuries must necessarily awake our sympathy, but the respondents were in no way to blame for those injuries. The duty of an occupier of premises towards a trespasser are set out as follows by **LORD HAILSHAM, L.C.**, in *R. Addie & Sons (Collieries) v. Dumbreck* (4) ([1929] A.C. 365):

"Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser."

In the present case it was not, and could not be, suggested that the driver of the train which cut off the boy's arm had a deliberate intention of doing harm to him, and there is, in my opinion, no evidence that he acted "with reckless disregard of the presence of the trespasser". I agree that this appeal must be dismissed.

LORD REID : My Lords, I have had an opportunity of reading the speech of my noble and learned friend **LORD GODDARD**, and I agree with it.

Appeal dismissed.

Solicitors: *Walter O. Stein* (for the appellants); *M. H. B. Gilmour* (for the respondents).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

HAYNES v. HAYNES.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Pearce, J.), June 24, 1952.]

Justices—Husband and wife—Separation order—Variation—Deletion of non-cohabitation clause—Husband's desire to make amends and resume married life—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 7.

A On Mar. 31, 1952, justices found the husband guilty of persistent cruelty and made a separation order in favour of the wife. On appeal by the husband,

HELD: it was open to the justices to make the order, which, therefore, would not be set aside, but, if the husband were to satisfy the justices that he realised that the separation was his fault and that he wished to make amends, that would be fresh evidence within the meaning of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, on which the justices could vary the order by deleting the non-cohabitation clause.

B Per LORD MERRIMAN, P.: It is open to the husband, if he has learned his lesson, if he is prepared to realise that it is his fault that this marriage has been broken up and that this separation order has been made, to approach

C the wife and the court in that frame of mind, and I know of no legal impediment to an application under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, for a variation of the order by eliminating the non-cohabitation clause.

FOR THE SUMMARY JURISDICTION (MARRIED WOMEN) ACT, 1895, s. 7, see HALSBURY'S STATUTES, Second Edn., Vol. 11, p. 852.

Cases referred to:

- D (1) *Hutchison v. Hutchison*, [1951] W.N. 296; 2nd Digest Supp.
(2) *Edwards v. Edwards*, [1948] 1 All E.R. 157; [1948] P. 268; [1948] L.J.R. 670; 112 J.P. 109; 2nd Digest Supp.

E APPEAL by the husband against a decision of the Banbury, Oxfordshire, justices dated Mar. 31, 1952, whereby they found him guilty of persistent cruelty and made a separation order in favour of the wife with an award of maintenance. The husband contended that, even if the justices' finding of persistent cruelty could not be upset, this was not a proper case in which to make a separation order.

Lermon for the husband.

A. L. Gordon for the wife.

F LORD MERRIMAN, P.: This is a husband's appeal against an order made on Mar. 31, 1952, by the Banbury borough justices in favour of the wife on the ground of the husband's persistent cruelty. It is conceded that it is very difficult to argue that there was not evidence which, if accepted, justified the finding of the justices that the wife had been subjected to a constant course of conduct of such a kind as to make her continuously miserable and cause her seriously to lose her health, but it is said, on the assumption that it is not possible to upset that finding, that it was not right to make a separation order, even though the finding was one of persistent cruelty.

G [HIS LORDSHIP stated the facts and continued:] I am not going to describe this as a case of extreme cruelty; it is obviously a case which is near the line. The justices have found the facts, and it was virtually admitted that it would be very difficult for us to reverse their finding. I think so, too. That brings me to what I think is the real difficulty in this case, which has caused me some anxiety. It is the question whether it is or is not a proper case for a separation order, particularly bearing in mind, that, except for a laudable attempt on the part of the solicitors on both sides to bring about a reconciliation, which lasted a few weeks before the final parting, no outside influence has been brought to bear in an attempt to save this marriage. So long as the non-cohabitation clause remains in the order it is a bar to any serious attempt by the husband to get his wife

back, because she is not obliged to receive him. The justices have given the matter a very patient and careful hearing and have obviously come to the conclusion that a separation order was the proper order to make, and I feel great diffidence in saying that they were wrong. But, though I am not prepared to modify the order by eliminating the non-cohabitation clause, I think it is highly desirable that it should be understood by everybody that the door need not necessarily be bolted and barred for ever.

Reference has been made to some observations which I am reported as having made in *Hutchison v. Hutchison* (1), where, after adhering to what I am reported to have said in *Edwards v. Edwards* (2) in relation to the kindred topic of constructive desertion, I was trying to point out that every case must be dealt with on its merits and that it is a question of degree what amends it must be open to the husband to make and the wife to insist on before any question of a resumption of cohabitation arises. I am reported to have said ([1951] W.N. 297):

"I do not take the view that as a matter of degree the circumstances of this particular case entitle the wife to sit down on her order for all time, and refuse ever to consider approaches, however humble, however contrite, however real, on the part of the husband to resume this all-too-brief married life. But they must be approaches which are made with a very clear realisation that he has learned his lesson, and with the very clear realisation that if that sort of conduct is repeated the wife will have a clear-cut case for reviving the charge of cruelty which she established before the condonation."

I think that describes my view about this case, although, of course, I recognise that, so long as this non-cohabitation clause stands, the wife can resist any overtures. In my opinion, however, it is open to the husband, if he has learned his lesson and is prepared to realise that it is his fault that this marriage has been broken up and that this separation order has been made, to approach the wife and the court in that frame of mind, and I know of no legal impediment to an application to the court under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, for a variation of the order by eliminating the non-cohabitation clause. I am certainly not going to lay down or dictate what the justices should do if that situation arises beyond calling their attention to the general observations to which I have referred. I do not think it is open to us to say that they were wrong in including the non-cohabitation clause in this order. I am merely pointing out that, given a new set of circumstances which, of course, will clearly amount to fresh evidence and good cause under s. 7, it is open to them to vary the order in this respect, as in other respects, and I merely add the obvious comment that probably, if that case is presented to them, they would think it was the right moment, before coming to any final decision, to invoke the assistance of their probation officer to see what could be done about pulling this marriage together before it is too late. It only remains to add that, as I see no reason for interfering with the decision of the justices, the appeal must be dismissed.

PEARCE, J.: I agree. There was ample evidence on which the justices could come to the conclusion at which they arrived, but if the husband can realise the error of his ways, can see his wife's point of view, and can provide some reasonable assurance that in future he will respect her natural desire for independence both as a wife and as a mother, I see no reason why they should not be able to resume married life together. If his conduct gives reason to believe that that result can be achieved I think the justices would favourably consider an application for the removal of the non-cohabitation clause.

Appeal dismissed.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Dawe & Co.*, Kingston-on-Thames (for the husband); *Preston, Lane-Claypon & O'Kelly*, agents for *Cole & Cole*, Oxford (for the wife).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

CHURCH v. CHURCH.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), June 30, July 1, 2, 1952.]

Divorce—Desertion—Confession of adultery by deserted spouse—Effect on deserting spouse's mind—Burden of proof—Continuance of desertion—Petitioner's need to prove desire for return of deserting spouse.

A In 1946 the wife deserted the husband. In 1949 the husband committed adultery and by letter dated July, 1949, made a full confession thereof to his wife. He was still living in adultery on Aug. 15, 1951, when he filed a petition for divorce on the ground of his wife's desertion. By her answer the wife cross-prayed for a dissolution on the grounds of desertion and adultery.

B HELD: the husband had discharged the burden which was on him of proving that his adultery had not affected the wife's state of mind, and, therefore, she had continued in a state of desertion; that being so, it was not necessary for the husband to show that he actually wanted his wife to return to him; and, notwithstanding his own adultery during the statutory period and his confession to his wife, nothing had happened to preclude him from asserting that his wife had continued in a state of desertion. In the circumstances there would be a decree in favour of each party against the other.

C *Richards v. Richards* ([1952] 1 All E.R. 1384), and *Sifton v. Sifton* ([1939] 1 All E.R. 109), applied.

Dictum of LORD MACMILLAN in *Pratt v. Pratt* ([1939] 3 All E.R. 438), not applied.

D AS TO DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 654-659, paras. 963-970, and 1952 Supp.; and FOR CASES, see DIGEST, Vol. 27, pp. 306-323, Nos. 2837-3015, and Digest Supps.

Cases referred to:

- E (1) *Richards v. Richards*, [1952] 1 All E.R. 1384; 116 J.P. 358.
 (2) *Herod v. Herod*, [1938] 3 All E.R. 722; [1939] P. 11; 108 L.J.P. 27; 159 L.T. 530; Digest Supp.
 (3) *Pratt v. Pratt*, [1939] 3 All E.R. 437; [1939] A.C. 417; 108 L.J.P. 97; 161 L.T. 49; Digest Supp.
 (4) *Sifton v. Sifton*, [1939] 1 All E.R. 109; [1939] P. 221; 108 L.J.P. 131; Digest Supp.
 F (5) *Blunt v. Blunt*, [1943] 2 All E.R. 76; [1943] A.C. 517; 112 L.J.P. 58; 169 L.T. 33; 2nd Digest Supp.

PETITION by the husband for dissolution of marriage on the ground of the wife's desertion with a prayer for the discretion of the court to be exercised in his favour, and CROSS-PRAYER by the wife for dissolution on the grounds of the husband's desertion and adultery.

G The parties were married on June 16, 1942. They were both serving in His Majesty's forces, and during such periods as they had leaves together they lived at the wife's home in county Durham. On Jan. 4, 1946, the husband was discharged on medical grounds and went to live in Surrey with the intention of finding employment and setting up a home there. The wife, who had already returned to civilian life, was at that time living in county Durham, and, apart from a visit by the husband to her in May, 1946, the parties never lived together again. In February, 1949, the husband went to live in a house belonging to another woman and had ever since lived with her in that house as man and wife, the woman adopting the name of "Mrs. Church". In July, 1949, the husband wrote his wife a letter in which he made a full confession of his adulterous association and in effect suggested that his wife should use that information for the purpose of instituting divorce proceedings against him. The wife, however, ignored it. It was now contended for the wife that by his

actions in (i) forming this adulterous association and (ii) confessing it to the wife, the husband had given her just cause for not living with him, and that, therefore, he could not prove that she had been guilty of desertion for the statutory period.

Abdela for the husband.

D. Henderson for the wife.

WILLMER, J.: This is a husband's petition praying for the dissolution of his marriage on the ground of desertion on the part of the wife. The husband asks that the discretion of the court may be exercised in his favour, having regard to an adulterous association which he admits. The wife by her answer denies that she has been guilty of desertion, and in turn alleges desertion on the part of the husband, and on that ground, as well as on the ground of the husband's admitted adultery, she cross-prays for a decree of dissolution in her favour.

[HIS LORDSHIP stated the facts and continued:] It is contended on behalf of the wife that, even if she was in a state of desertion before July, 1949, the husband's action, first, in forming an adulterous association, and, secondly, in informing the wife of it, effectively ended the wife's state of desertion because it gave her a good excuse for not living with the husband and from that date she was no longer bound to live with him. On that basis it is claimed that the husband cannot prove that for the three years preceding the presentation of the petition the wife was in desertion. If it were the husband who all this time had been in desertion, the fact of his committing adultery and informing his wife about it would really add nothing to the existing case against him, but, if it was the wife who was up to then the deserting party, this letter of July, 1949, would raise a serious question as to what effect (if any) it had on the wife's mind. That being so, it seems to me necessary to go back over the years and decide which of these two parties really was the deserting party in 1946. [HIS LORDSHIP dealt with the evidence and continued:] I think that at any rate in November, 1946, and immediately afterwards it was the wife who was in desertion, because she was unjustifiably refusing the husband's offer to resume cohabitation. The question then arises whether anything has since happened to terminate that state of affairs. The wife relies on the husband's admitted adultery and on the letter which he wrote in July, 1949, which, she says, materially affected her mind and made it impossible for her to contemplate the possibility of returning to her husband. That is what she said in examination in chief, but she did not stand up to it by any means in cross-examination, when she was forced to admit that long before that letter of July, 1949, in which the husband told her that he was carrying on an adulterous association, she had made up her mind irrevocably that she would not go back to him.

On the authorities it is for the husband to satisfy me affirmatively that his adulterous conduct, and his disclosure to his wife of that adulterous conduct, did not in any way affect the wife's state of mind. It is for him to prove affirmatively that she had already arrived at an unshakable determination not to live with him again independently of the adulterous conduct. That seems to me to be the effect of the recent decision in *Richards v. Richards* (1) where it was decided by the Court of Appeal that the adulterous party failed to discharge the burden of proof which was on him. In the present case I think the husband does discharge the burden of proof. I find that long before the husband's adultery commenced this marriage was irrevocably broken by the wife's desertion, which dated from at least as early as November, 1946. I am satisfied that she had irrevocably arrived at the decision that she would never live with her husband again, and that in the circumstances her conduct was quite unaffected when she learned of her husband's adulterous association. That being so, the often-quoted decision of SIR BOYD MERRIMAN, P., in *Herod v. Herod* (2) applies to this case so far as concerns the husband's claim for relief—that is to say, the fact of his committing adultery is no obstacle to his saying that

the wife's offence of desertion was continuing. It becomes a matter for my discretion whether, having regard to his adultery, I ought to grant him the relief which he asks on the ground of the wife's desertion.

A In saying that I am not forgetting the argument that, to obtain relief on the ground of desertion, a petitioner always has to prove that during the statutory period the absence of his or her spouse was without his or her consent. It is said that when you find an adulterous association continuing for some years before the presentation of the petition, it becomes impossible for the husband to prove desertion because he cannot say that during the statutory period the absence of the wife was without his consent. This is an argument which at first sight appears to obtain some support from a dictum of LORD MACMILLAN in *Pratt v. Pratt* (3) to which I was referred. LORD MACMILLAN is reported as having said this ([1939] 3 All E.R. 438):

B "In fulfilling its duty of determining whether, on the evidence, a case of desertion without cause has been proved, the court ought not, in my opinion, to leave out of account the attitude of mind of the petitioner. If, on the facts, it appears that a petitioning husband has made it plain to his deserting wife that he will not receive her back, or if he has repelled all the advances which she may have made towards a resumption of married life, he cannot complain that she has persisted without cause in her desertion."

C It is said that that sentence aptly applies to the present case, because ever since 1949 this petitioning husband had made it plain to his deserting wife that he would not receive her back. What LORD MACMILLAN said was only a dictum and was not necessary for the decision of that particular case, but, coming from that source, it is a dictum to which one naturally pays a good deal of respect. D On the other hand, counsel for the wife frankly says he cannot find any authority which fully supports that proposition, and it seems to me that I am bound by authority to the contrary. To my mind, the point under discussion is concluded so far as I am concerned by the decision in *Sifton v. Sifton* (4), which seems to me to be authority for the proposition that once desertion has been started by the E fault of the deserting spouse it is no longer necessary for the deserted spouse to show that during the three years preceding the petition he actually wanted the other spouse to come back. It will, I think, be helpful if I read part of the head-note, which seems to me admirably to sum up what was the effect of HENN COLLINS, J.'s, decision in the case. It reads as follows:

F "When a spouse is deserted, he or she is in the position that the presumption is in his or her favour and against the deserting spouse. It is not until some offer to return is made by the deserting spouse that the question arises whether it is an offer which ought, in all the circumstances, to be accepted. Notwithstanding that the husband did not expect or really want his wife to come back, it was not incumbent on him to show that he was G at all times during the three years next preceding the petition ready and willing to receive her."

It seems to me that that concludes this question in favour of the husband. Nothing has happened here to stop the wife's desertion, which started in 1946, from continuing to run, and nothing has happened to disentitle the husband from asserting that his wife has continued in a state of desertion. Had there H been a bona fide and genuine offer to return on the part of the wife, which the husband had refused because of his new association with this other woman, matters might have been very different, but that is not this case.

I am, therefore, satisfied that this wife was in desertion, and that her desertion continued during the statutory period. I am also satisfied, on the other side, from the husband's own evidence, that he in his turn was guilty of the matrimonial offence of adultery. The question, therefore, arises what I ought to do in the circumstances. Clearly it is within my discretion to grant relief to the

husband, notwithstanding his adultery, which was subsequent to the time of the wife's desertion, and equally it is within my discretion to grant relief to the wife on the ground of the husband's adultery, notwithstanding that for three years or so before the adultery began she had been in a state of desertion which still continues. It is within my discretion, if I think it is right in all the circumstances, to withhold relief from both parties. Finally, it is within my discretion, as was suggested by the House of Lords in *Blunt v. Blunt* (5), and as has since been ordered from time to time in this court, to grant relief to both parties. It is interesting to observe that in *Sifton v. Sifton* (4), having decided the point about desertion in the way that he did, HENN COLLINS, J., after some hesitation, decided to exercise his discretion in favour of the deserting party. The decision on the facts of one case does not in the least govern the decision on the facts of another, but I am faced with the same sort of problem in this case which he obviously found difficult to decide in the *Sifton* case (4). As he pointed out in that case, from a financial point of view it probably makes very little difference what actual decree is pronounced. My view of the conduct of the parties sufficiently appears from what I have already said, and I do not think that the question whether the wife ought or ought not to be granted some allowance will really be affected in the least by the way in which I exercise my discretion as to granting or refusing a decree. I have endeavoured to bear in mind the serious nature of the faults committed on both sides. I wish to stress that, because desertion is always a serious offence, and the adultery in this case is no casual lapse—it is a course of conduct consciously and deliberately pursued over the years. Bearing in mind, therefore, the serious nature of the faults committed on both sides, I think I shall best give effect to the realities of the case if I say that in my discretion each party ought to be entitled to a decree against the other, and I propose to order accordingly.

Decrees accordingly.

Solicitors: *Joynson-Hicks & Co.*, agents for *W. Davies & Son*, Woking (for the husband); *G. Parry Jones*, agent for *Norman Barwick*, Newcastle-upon-Tyne (for the wife).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

McINTOSH (INSPECTOR OF TAXES) v. MANCHESTER CORPORATION.

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), July 14, 1952.]

Income Tax—Industrial building allowances—“Cutting”—Excavation of land by water undertaking—Income Tax Act, 1945 (c. 32), s. 14 (1) (b), and proviso.

A corporation incurred capital expenditure on the construction of buildings or structures in use for the purposes of its water undertaking, which were admittedly industrial buildings or structures within Part I of the Income Tax Act, 1945. Part of the expenditure, relating to the excavation of land for extending reservoirs, deepening flood channels, making a new weir, making settling pools, and constructing an aqueduct, was disallowed for the purpose of claiming industrial building allowances, on the ground that the work was “cutting” within the meaning of s. 14 (1) (b) of the Income Tax Act, 1945, and the proviso to the sub-section.

HELD: the word “cutting”, which had the same meaning both in s. 14 (1) (b) and in the proviso, meant “excavating” and was not limited to cutting in the sense of making a cutting or way through the land, and, accordingly, the corporation's expenditure on excavation was properly disallowed in computing its claim to industrial building allowances.

Decision of VAISEY, J. ([1952] 1 All E.R. 763), affirmed.

FOR THE INCOME TAX ACT, 1945, s. 14 (1) (b), see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 626.

APPEAL by the corporation from an order of VAISEY, J., dated Mar. 5, 1952, disallowing the corporation's claim to annual allowances under s. 2 of the Income Tax Act, 1945, on capital expenditure incurred on excavation work in connection with its waterworks undertaking. The corporation contended that the word "cutting" in s. 14 (1) (b) of the Income Tax Act, 1945, and the proviso thereto, referred only to operations which resulted in "cuttings" in the sense of open ways through land, such as railway cuttings.

Burton, Q.C., and Senter for the corporation.

The Solicitor-General (Sir Reginald Manningham-Bulwer, Q.C.), and Sir Reginald Hills for the Crown.

SOMERVELL, L.J.: This is an appeal by Manchester Corporation, as taxpayers, against a decision of VAISEY, J. Allowances were claimed by the Manchester Corporation in respect of moneys expended by way of capital expenditure in connection with their supplies of water. The Income Tax Act, 1945, provided for initial and annual allowances in respect of capital expenditure on the construction of industrial buildings and structures, as defined by the Act. The allowance with which we are concerned, under s. 2 (1), is an annual allowance equal to one-fiftieth of so much of the expenditure as was within the Act. It is not disputed that Manchester Corporation and the waterworks, speaking generally, apart from the disputed items, are within the Act. The question is whether certain items claimed fall to be disallowed under s. 14 (1) (b) of the Act. Section 14 (1) reads as follows:

"References in this Part of this Act to expenditure incurred on the construction of a building or structure do not include—(a) any expenditure incurred on the acquisition of, or of rights in or over, any land; or (b) any expenditure incurred on preparing, cutting, tunnelling or levelling any land: Provided that para. (b) of this sub-section shall not apply to expenditure on work done on the land to be covered by a building or structure for the purposes of preparing the land to receive the foundations of the building or structure, being work which may be expected to be valueless when the building or structure is demolished and not being work which consists of cutting or tunnelling."

There is no dispute that the words "work which may be expected to be valueless when the building or structure is demolished" apply with regard to the items in question. The works as a whole consisted of extending reservoirs, deepening flood channels, making a new weir, making settling pools, and constructing an aqueduct. The items which the Special Commissioners had allowed, but which have been disallowed by VAISEY, J., are the amounts of the expenditure attributable to excavating the soil for these works.

Counsel for the Manchester Corporation submits that the cost of this work should be allowed as

"expenditure on work done on the land to be covered by a building or structure for the purposes of preparing the land to receive the foundations of the building or structure."

He further submits that the work did not consist of cutting or tunnelling. The Solicitor-General submits that the work did consist of cutting and tunnelling. The two rival constructions are set out in the judgment of VAISEY, J., as they were submitted to him, and, substantially, submitted to us. He says this ([1952] 1 All E.R. 764):

"Counsel for the corporation submits that 'cutting', although he agrees it is a participle of a verb, means making cutting in the sense in which

'cutting' (a noun) is used, somewhat colloquially as I think, in reference to railway cuttings in contrast with tunnels."

Then he refers to the view taken by the Special Commissioners, who accepted the view that "cutting" meant the cutting of an open way through land. Then he gives his conclusion on the construction of the words, and he says this (*ibid.*):

"In my judgment, the words 'preparing', 'cutting', 'tunnelling' and 'levelling' land are all descriptive of processes applied to land, and do not describe the results or consequences of operating those processes. It is on this short ground that I prefer the unrestricted definition which the commissioners have rejected. The words describe things which are being done and not things which would be produced. Thus 'tunnelling' is not, as described there, making a tunnel, and 'cutting' is not the same as making a cutting. 'Cutting' and 'tunnelling' are really, I think, only an extended way of describing excavating, the former being an operation more or less in a downward direction and the latter an operation more or less horizontal. I do not find any inconsistency between the body of s. 14 (1) and the proviso, when it is observed that the proviso deals with what I may call foundation works for which allowances may be made on a special basis and on special terms."

I agree with that, but I will add a few words of my own on the words of the section. I agree with the Solicitor-General that the general lay-out of the section is designed to exclude expenditure preparatory to the building or structure. It seems also to me clear that "cutting", where it first appears, cannot mean making a cutting, and it is agreed that the words "cutting" and "tunnelling" must have the same meaning in s. 14 (1) (b), where they first appear, as in the proviso. I think also it would be curious if one regarded "cutting" and "tunnelling" as what are popularly described, in the case of railways, as railway cuttings and railway tunnels. It might be difficult to understand why bridges are not also referred to.

If, as counsel for the corporation submitted, the words "preparing the land to receive the foundations of the building or structure" mean excavating—removing the soil—there would be great force in his contention that the last words of the proviso "not being work which consists of cutting or tunnelling" would, on the Crown's construction, in nine cases out of ten take away what had already been given. I do not myself regard those words as apt to describe excavating in the sense of the removal of soil. It seems to me they are apt to cover preparation of the ground, when excavated, for the foundations. In the course of the argument some examples were given which, as it seemed to me, might well be within them—the strengthening of the soil, when excavated, by ballast or concrete—in other words, expenditure on work which might have been held to be, or argued to be, preparatory within the earlier words. That, of course, is precisely the type of subject-matter which one might expect to find dealt with in a proviso, and on this view the latter words "not being work which consists of cutting or tunnelling" are inserted, perhaps *ex abundanti cautela*, to make it clear that excavation of soil simpliciter is excluded from the benefit of the proviso. It was pointed out in the course of the argument that the word "levelling", which occurs in the earlier formula, does not occur at the end of the proviso. The explanation of that would seem to me to be that "levelling" means levelling of the site, and it was apparently thought, having regard to the drafting of the section, at any rate as I construe it, that it could not be suggested that that was or could be within the earlier words of the proviso "preparing the land to receive the foundations of the building or structure". For those reasons I would dismiss the appeal.

DENNING, L.J.: The word "cutting" is sometimes used as a noun to denote the result of work done, as for example, a railway "cutting". At other

times it is used as a verb to denote the actual doing of the work, as, for example, "cutting" the first sod. In this section I think it is used as a verb to denote the work of cutting into land. A good illustration is the "cut and cover" by which an aqueduct takes water from Hawes Water to Manchester. The cutting of the trench to take the pipes is "work which consists of cutting" within the section. I agree that the appeal should be dismissed.

A ROMER, L.J.: I also agree. A point which carries considerable weight with me is that on the most elementary principles of construction the word "cutting" in s. 14 (1) (b) must have the same meaning when it is used in the operative part of the section as it has in the proviso. In the operative part you find reference to expenditure incurred on cutting land. I should have thought, as VAISEY, J., thought, that that word "cutting" in relation to land can reasonably only mean digging the land or making an incision into the land. To read it, as counsel for the corporation has invited us to read it, as though it had the same meaning as the phrase "making a cutting in the land" is to attribute to the word an unnatural, and, as I think, quite wrong, interpretation. Therefore, when you find that "cutting" should have, as I think it should, in the first part of the section its plain meaning, you must apply that same meaning to the word "cutting" as used in the proviso. If so, there is no doubt the appeal fails. In my view, for that and for the reasons which SOMERVELL, L.J., has given, it does fail. I would only add that there might have been some force in the argument of counsel for the corporation if there was no way of "preparing the land to receive the foundations of the building or structure" which did not involve cutting, but many examples of doing so have been given us. Therefore, there is no force, as I thought myself at one time there was, in that argument. I agree the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Philip B. Dingle*, town clerk, Manchester (for the corporation); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

TEPER v. REGINAM.

[PRIVY COUNCIL (Lord Normand, Lord Oaksey and Lord Tucker), May 26, 27, 28, July 1, 1952.]

F Criminal Law—Evidence—Admissibility—Hearsay—Evidence of identification—Part of *res gestae*.

G The rule that in a criminal trial hearsay evidence is admissible if it forms part of the *res gestae* is based on the propositions that the human utterance is both a fact and a means of communication and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words and the dissociation of the words from the action would impede the discovery of the truth. It is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it that they are part of the thing being done, and so an item or part of the real evidence and not merely a reported statement. Where the words are sought to be proved for the purpose of identification in a criminal trial the action or event with which the words must be associated is the commission of the crime itself, and the evidence shall only be admitted if it satisfies the strictest test of close association with the crime in time, place and circumstances.

H On a charge of maliciously setting fire to a shop with intent to defraud, the prosecution called a witness who deposed that after hearing the fire alarm he heard a woman's voice shouting: "Your place burning and you

going away from the fire ", and immediately afterwards he saw a car being driven away by a man resembling the appellant. The words were spoken some 220 yards from the site of the fire and about twenty-six minutes after the fire was started.

HELD: the evidence was inadmissible.

AS TO STATEMENTS FORMING PART OF THE RES GESTAE, see HALSBURY, Hailsham Edn., Vol. 9, p. 183, para. 268; and FOR CASES, see DIGEST, Vol. 14, pp. 397, 398, Nos. 4172-4181.

Cases referred to:

- (1) *R. v. Bedingfield*, (1879), 14 Cox, C.C. 341; 14 Digest 397, 4175.
- (2) *O'Hara v. Central S.M.T. Co., Ltd.*, 1941 S.C. 363; 2nd Digest Supp.
- (3) *R. v. Christie*, [1914] A.C. 545; *sub nom. Public Prosecutions Director v. Christie*, 83 L.J.K.B. 1097; 111 L.T. 220; 78 J.P. 321; 14 Digest 360, 3811.
- (4) *R. v. Gibson*, (1887), 18 Q.B.D. 537; 56 L.J.M.C. 49; 56 L.T. 367; 51 J.P. 742; 14 Digest 521, 5856.
- (5) *Ibrahim v. R.*, [1914] A.C. 599; 83 L.J.P.C. 185; 111 L.T. 20; 14 Digest 411, 4308.
- (6) *Renouf v. A.-G. for Jersey*, [1936] 1 All E.R. 936; [1936] A.C. 445; 105 L.J.P.C. 84; 155 L.T. 1; Digest Supp.
- (7) *Kannangara Aratchige Dharmasena v. R.*, [1951] A.C. 1; 2nd Digest Supp.
- (8) *Dal Singh v. King-Emperor*, (1917), L.R. 44 Ind. App. 137; 86 L.J.P.C. 140; 116 L.T. 621; 17 Digest 489, 534.
- (9) *Stirland v. Public Prosecutions Director*, [1944] 2 All E.R. 13; [1944] A.C. 315; 113 L.J.K.B. 394; 171 L.T. 78; 109 J.P. 1; 2nd Digest Supp.
- (10) *Johnson v. R.*, [1904] A.C. 817; 73 L.J.P.C. 113; 91 L.T. 234; 17 Digest 494, 598.
- (11) *Wagh v. R.*, [1950] A.C. 203; 2nd Digest Supp.

APPEAL by special leave from a verdict and sentence of the Supreme Court of British Guiana, dated Feb. 7, 1951, whereby the appellant was convicted of arson of a shop with intent to defraud.

The grounds of appeal were that hearsay evidence was admitted to identify the appellant as the person who set fire to the premises, that this evidence was highly prejudicial, and that apart from it there was no evidence on which the jury could properly have convicted the appellant. The Crown contended that the evidence was properly admitted as part of the *res gestae*, that even if it was inadmissible the appellant suffered no prejudice, and that there was other evidence sufficient to entitle the jury to convict.

G. D. Roberts, Q.C., *Foot, C. Lloyd Luckhoo* and *M. P. Solomon* for the appellant. *Gahan, Q.C.*, and *J. G. Le Quesne* for the Crown.

JULY 1. LORD NORMAND: This is an appeal by special leave against the conviction of the appellant in the Supreme Court of British Guiana on the charge that he maliciously and with intent to defraud set fire on Oct. 9, 1950, to a shop belonging to his wife in Regent Street, Georgetown, in which he carried on the business of dry goods store. It was clearly proved that the shop had been maliciously set on fire. On the intent to defraud the Crown's case was that the appellant, having insured the building and stock for sums considerably above their real value, set fire to them with the intention of claiming against the insurance companies. The grounds of the appeal are that hearsay and incompetent evidence was admitted for the purpose of identifying the appellant as the man who set the premises on fire, that this evidence was in a high degree prejudicial to the appellant, and that the other evidence against him was such that no reasonable jury, properly directed, could have convicted him on it alone, or, at least, that it was so flimsy and inconclusive that it must have been outweighed

by the hearsay evidence in the jury's consideration of the evidence as a whole. The contentions for the Crown were that the impugned evidence was properly admitted as part of the *res gestae*; that, even if it was inadmissible, the appellant suffered no real prejudice; and that the other evidence was amply sufficient to entitle a reasonable jury to convict. An important question of principle is involved in the issue on the admission of the evidence, and their Lordships propose to deal with it at once. That approach to the appeal carries with it no inconvenience for this evidence is concerned with an incident which stands apart from the matters dealt with in the rest of the evidence.

The witness is Police-constable Cato. He came on duty about 2 a.m. on Oct. 9 and then went along a street named Camp Street towards Regent Street. He heard a shout of "Fire", and then one fire engine passed and after it a second fire engine both going along Regent Street. He stopped at the corner of Regent and Camp Street. His evidence continues,

"There were crowds going east and west along Regent Street to and from the fire. I heard a woman's voice shouting: 'Your place burning and you going away from the fire'. Immediately then a black car which was proceeding west along Regent Street turned north into Camp Street. In the car was a fair man resembling accused. I did not observe the number of the car. I could not see the fire from where I was standing."

In cross-examination he said he did not know who or where the woman was. She was not a witness at the trial. It is common ground that the incident took place at a distance of more than a furlong from the site of the fire and that it happened not less than twenty-six minutes after the fire was started.

In British Guiana provision has now been made for a Court of Criminal Appeal, but at the date of this conviction the only means of bringing it under judicial review was by a Case stated by the judge of the court before whom the cause had been tried for the opinion of the Court of Appeal (Criminal Law (Procedure) Ordinance, s. 174 (Laws of British Guiana, 1930, c. 18)). The appellant applied to the judge to state a Case on the admissibility of Cato's evidence, but the application was refused. It is not necessary to consider the reasons for the refusal, and the decision of the learned judge is not under appeal.

The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross examination, and the light which his demeanour would throw on his testimony is lost. Nevertheless, the rule admits of certain carefully safeguarded and limited exceptions, one of which is that words may be proved when they form part of the *res gestae*. The rules controlling this exception are common to the jurisprudence of British Guiana, England and Scotland. It appears to rest ultimately on two propositions—that human utterance is both a fact and a means of communication, and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words and the dissociation of the words from the action would impede the discovery of truth. But the judicial applications of these two propositions, which do not always combine harmoniously, have never been precisely formulated in a general principle. Their Lordships will not attempt to arrive at a general formula, nor is it necessary to review all of the considerable number of cases cited in the argument. This, at least, may be said, that it is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it, in time, place and circumstances, that they are part of the thing being done, and so an item or part of real evidence and not merely a reported statement: *R. v. Bedingfield* (1); *O'Hara v. Central S.M.T. Co., Ltd.* (2). How slight a separation of time and place may suffice to make hearsay evidence of the words spoken incompetent is well illustrated by the two cases cited. In *Bedingfield's* case (1) a woman rushed

with her throat cut out of a room in which the injury had been inflicted into another room where she said something to persons who saw her enter. Their evidence about what she said was ruled inadmissible by COCKBURN, C.J. In *O'Hara's* case (2), a civil action, the event was an injury to a passenger brought about by the sudden swerve of the omnibus in which she was travelling. The driver of the omnibus said in his evidence that he was forced to swerve by a pedestrian who hurried across his path. Hearsay evidence of what was said by a man on the pavement at the scene of the accident as soon as the injured party had been attended to was held to be admissible in corroboration of the driver's evidence. But what was said twelve minutes later and away from the scene by the same man was held not part of the *res gestae*. In *R. v. Christie* (3) the principle of the decision in *Bedingfield's* case (1) was approved by LORD READING with whom LORD DUNEDIN concurred, and no criticism of it is to be found in the speeches of the other noble and learned Lords who sat with them. In *R. v. Gibson* (4) the prosecutor gave evidence in a criminal trial that, immediately after he was struck by a stone, a woman going past, pointing to the prisoner's door, said: "The person who threw the stone went in there." This evidence was not objected to at the trial, but it was admitted by counsel for the prosecution in a Case Reserved that the evidence was incompetent. The conviction was quashed, and from their judgments it is clear that the learned judges who took part in the decision were far from questioning the correctness of counsel's admission. In *Gibson's* case (4) the words were closely associated in time and place with the event, the assault. But they were not directly connected with that event itself. They were not words spontaneously forced from the woman by the sight of the assault, but were prompted by the sight of a man quitting the scene of the assault and they were spoken for the purpose of helping to bring him to justice.

The special danger of allowing hearsay evidence for the purpose of identification requires that it shall only be allowed if it satisfies the strictest test of close association with the event in time, place and circumstances. In *Christie's* case (3) LORD MOULTON said ([1914] A.C. 558):

"Identification is an act of the mind, and the primary evidence of what was passing in the mind of a man is his own testimony, where it can be obtained. It would be very dangerous to allow evidence to be given of a man's words and actions, in order to show by this extrinsic evidence that he identified the prisoner, if he was capable of being called as a witness and was not called to prove by direct evidence that he had thus identified him."

There is yet another proposition which can be affirmed, viz., that for identification purposes in a criminal trial the event with which the words sought to be proved must be so connected as to form part of the *res gestae* is the commission of the crime itself—the throwing of the stone, the striking of the blow, the setting fire to the building, or whatever the criminal act may be. Counsel for the Crown submitted that any relevant event or action may be accompanied by words which may have to be proved in order to bring out its true significance. There is a limited sense in which this is true, but it is not always true, and much depends on the use to be made of the evidence. In *Christie's* case (3) hearsay evidence of certain words uttered by a child, the victim of an indecent assault, in the presence and hearing of the accused were held to be admissible in explanation of the demeanour of the accused in response to them. But the evidence was held inadmissible for the purpose of showing that the child identified the accused as his assailant. In the present case identification is the purpose for which the hearsay was introduced, and its admission goes far beyond anything that has been authorised by any reported case.

Before assessing the prejudice caused by the wrongful admission of the hearsay evidence and deciding whether it affected the substantial justice of the trial, the

nature and effect of the other evidence must be looked at. [His Lordship reviewed the evidence and continued:] The circumstantial evidence falls short of conclusiveness and a properly instructed jury, having it alone before it, would have had a more than usually difficult decision to make. There were several circumstances pointing to the appellant's guilt, and though not one of them alone was of great moment, yet *juncta juvant*, and it could not have been said that there was no legal evidence to support a verdict of Guilty. That, however, does not decide the issue of the appeal. It is now necessary to consider whether the admission of Cato's hearsay evidence was, having regard to the weakness of the other evidence, "something which deprived the accused of the substance of fair trial and the protection of the law": *Ibrahim v. R.* (5); *Renouf v. A.-G. for Jersey* (6); *Dharmasena v. R.* (7). It is a principle of the proceedings of the board that it is for the appellant in a criminal appeal to satisfy the board that a real miscarriage of justice has occurred. In *Dal Singh v. King-Emperor* (8) it was observed, in a case where this board had no ground for doubting that the appellant had been properly convicted, that the mere admission of incompetent evidence, not essential to the result, is not a ground for allowing an appeal against conviction. In the same case it was stated that: "The dominant question is the broad one whether substantial justice has been done" and that in the particular case the question was "whether, looking at the proceedings as a whole, and taking into account what has properly been proved, the conclusion come to has been a just one."

Their Lordships have, therefore, in the end to decide whether the appellant has shown that the improper admission of the hearsay evidence of identification was so prejudicial to the appellant, in a case where the rest of the evidence was weak, that the proceedings as a whole have not resulted in a fair trial. The test is whether on a fair consideration of the whole proceedings the board must hold that there is a probability that the improper admission of hearsay evidence turned the scale against the appellant. Their Lordships are satisfied that the hearsay evidence was in a high degree prejudicial. Its effect may be gauged by considering what Cato's evidence would have amounted to if it had been excluded. He could then only have said that in consequence of something heard by him his attention was directed to a man driving a black car who resembled the appellant. This evidence would have been worthless for the purpose of identifying the appellant with the man who set fire to a building a furlong away and twenty-six minutes earlier. It is the hearsay and the hearsay alone which gives dramatic force to Cato's otherwise valueless evidence of identification, and confers on it a specious importance. It is impossible to avoid the conclusion that the jury might well, and probably did, regard Cato's hearsay evidence as sufficient to turn the scale. Counsel for the Crown sought to belittle the prejudice. It was said that the fact that no objection was taken to it at the trial should be allowed "to have some bearing on the question whether the accused was really prejudiced": *Stirland v. Public Prosecutions Director* (9). That is a consideration which weighs in a case where the evidence improperly admitted would not by its nature cause serious prejudice or where the other evidence left little or no reasonable doubt of the appellant's guilt. But it is of no real moment in the present case. It was also submitted that the direction of the learned judge in his charge sufficiently safeguarded the appellant. The jury were directed that the evidence was not conclusive, but that it could be taken along with other evidence, and that if from other facts the jury found that the accused was there, this evidence "tied up with it." Cato's whole evidence was accordingly left to the jury's consideration to make of it what they could along with the other evidence. It is not necessary to decide what would have been the result if there had been a clear direction to disregard entirely the hearsay evidence. But no direction short of that could avail to save the verdict, and the appeal must succeed.

The result was intimated to the parties at the conclusion of the argument. Thereupon, the appellant's counsel asked for the costs of the appeal and of the proceedings in the Supreme Court. The practice of the board is against giving expenses to the successful appellant in a criminal appeal save in very special circumstances: *Johnson v. R.* (10) ([1904] A.C. 825), and special circumstances were found in *Waugh v. R.* (11). In the present case there are no circumstances which would justify a departure from the ordinary rule of practice. Their Lordships have, therefore, humbly advised Her Majesty that the appeal should be allowed. There will be no order as to costs.

Appeal allowed.

Solicitors: *Hy.S. L. Polak & Co.* (for the appellant); *Burchells* (for the Crown).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

AMALGAMATED BUILDING CONTRACTORS, LTD. v. WALTHAM HOLY CROSS URBAN DISTRICT COUNCIL.

[COURT OF APPEAL (Singleton, Denning and Romer, L.JJ.), June 10, 11, July 1, 1952.]

Building Contract—Extension of time—Extension granted by architect after completion of work.

By a building contract contractors agreed with building owners to build houses, to complete the work by Feb. 7, 1949, and to pay liquidated damages in the event of delay in completion. The contract provided that "if in the opinion of the architect the works be delayed . . . by reason of labour and material not being available as required . . . the architect shall make a fair and reasonable extension of time for completion of the works . . . " On Jan. 19, 1949, the contractors asked for a twelve months' extension of time on account of difficulties relating to labour and material, and they repeated their request on Jan. 27, but the architect did not reply beyond a formal acknowledgment. The contractors completed the work on Aug. 28, 1950. On Dec. 20, 1950, the architect wrote extending the time for completion to May 23, 1949. On the question whether the extension was valid,

HELD: the time fixed for completion of the work had been validly extended.

AS TO EXTENSION OF TIME FOR COMPLETION OF CONTRACT, see HALSBURY, Hailsham Edn., Vol. 3, p. 281, para. 513; and FOR CASES, see DIGEST, Vol. 7, pp. 343, 344, Nos. 52-55

Cases referred to:

- (1) *Sattin v. Poole*, (1901), 2 Hudson's B.C. 4th ed. 306; 7 Digest 344, 55.
- (2) *Miller v. London County Council*, (1934), 151 L.T. 425; 50 T.L.R. 479; Digest Supp.
- (3) *Roberts v. Bury Improvement Comrs.*, (1870), L.R. 5 C.P. 310; 39 L.J.C.P. 129; 22 L.T. 132; 34 J.P. 821; 7 Digest 346, 59.

APPEAL by the contractors from an order of GORMAN, J., dated Mar. 12, 1952, allowing the building owners' counterclaim for liquidated damages for delay in completion of building work.

Under the building contract it was a condition of the contractors' liability for liquidated damages that, on failure to complete by the stated date or within any extended time fixed by the architect, the architect should certify that the work ought reasonably to have been so completed. The architect purported, by an ex post facto authorisation, to extend the time, and certified that the work ought reasonably to have been completed within that extended time. As he had not certified that it ought reasonably to have been completed by the date stated in the contract, his certificate would have been a nullity if he had not effectively extended the time.

GORMAN, J., held that the time had been validly extended, that a certificate had been duly given in relation to that extended time, and that, as completion of the work was delayed until later, the contractors were liable for the liquidated damages. The contractors appealed.

Lloyd-Jones, Q.C., and J. W. Russell for the contractors.

John Thompson for the building owners.

A SINGLETON, L.J.: I will ask DENNING, L.J., to give the first judgment.

B DENNING, L.J.: This case raises an important question under the standard form of contract issued under the authority of the Royal Institute of British Architects and the National Federation of Building Trades Employers. This form is used in a great many building contracts, and, like other standard forms, it has come to resemble a legislative code. The question which has been argued before us is whether, after the works have been completed, the architect can extend the time for completion. It is said that he can only extend the time to a date in the future and not to one in the past, and that, in any event, he cannot, after the works have been completed, extend it.

C Towards the end of 1946 the defendants, the building owners, employed the plaintiffs, the contractors, to build 202 houses at Princesfield, Upshire, at a price of £230,490, or thereabouts. The contractors were given possession of the site on Nov. 7, 1946, but the formal contract was not entered into until June 15, 1948. That is the document which we have to consider. Under it the contractors agreed to complete the work by Feb. 7, 1949, and there was a provision for liquidated damages in the event of delay at the rate of £50 a week. The work was not completed by Feb. 7, 1949. The last of the houses was eventually handed over to the building owners on Aug. 28, 1950, and that date has been accepted as the date when the works were, for all practical purposes, complete. So, on the face of the matter, there was some eighteen months' delay, but on Dec. 20, 1950, the architect wrote two letters in one of which he stated that he extended the time for completion from Feb. 7, 1949, to May 23, 1949, and in the other he certified that the whole of the contract should have been completed by May 23, 1949. The building owners claimed liquidated damages of £50 a week for the period from May 23, 1949, to Aug. 28, 1950. The issue in these proceedings is whether they are entitled to these liquidated damages.

F The validity of the claim for liquidated damages depends on the wording of the contract of June 15, 1948. Clauses 16, 17 and 18 provide that the contractors

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H “(16) . . . shall thereupon begin the works forthwith and regularly and diligently proceed with the same and shall complete the same on or before the date for completion stated in the said appendix subject nevertheless to the provisions for extension of time contained in cl. 18 of these conditions. (17) If the contractor fails to complete the works by the date stated in the appendix to these conditions or within any extended time fixed under cl. 18 of these conditions and the architect certifies in writing that in his opinion the same ought reasonably so to have been completed, the contractor shall pay or allow to the employer a sum calculated at the rate stated in the said appendix as liquidated and ascertained damages . . . (18) If in the opinion of the architect the works be delayed (i) by force majeure, or (ii) by reason of any exceptionally inclement weather . . . or (ix) by reason of labour and material not being available as required . . . then in any such case the architect shall make a fair and reasonable extension of time for completion of the works. Upon the happening of any such event causing delay the contractor shall immediately give notice thereof in writing to the architect, but he shall nevertheless use his best endeavours to prevent delay and shall do all that may reasonably be required to the satisfaction of the architect to proceed with the works.”

On Jan. 19, 1949, the contractors wrote to the architect:

"As you are aware the completion date upon the above contract expires on Feb. 7, 1949. In view of labour and material difficulties, it will obviously be impossible for us to complete the contract by the date named. We should, therefore, be glad if you would kindly grant twelve months' extension thereof."

They based their request on difficulties relating to labour and material, thus clearly invoking cl. 18 (ix) of the contract. The architect did not reply. On Jan. 27 the contractors gave him a reminder, and on Feb. 1, he wrote that the matter was receiving attention and he would write further in due course. He did not write himself, but the building owners wrote and refused any extension of time. The work was completed on Aug. 28, 1950. Four months later the architect wrote the two important letters of Dec. 20, 1950. In one of them the architect wrote to the contractors:

"I have now been able to give consideration to the question of extending the time of the above contract. The present expiry date is Feb. 7, 1949, and I have decided that an addition of fifteen weeks bringing the completion date to May 23, 1949, would be a fair and reasonable extension. After careful consideration I cannot see any reason why your whole contract should not have been completed by this date."

That letter is said to be an extension of time. On the same day the architect wrote another letter, this time to the building owners:

"In accordance with cl. 17 of the R.I.B.A. form of contract, I certify that in my opinion the whole of the contract should have been completed by May 23, 1949."

Those are the two letters which are relied on, the one under cl. 18 and the other under cl. 17, making, as the building owners say, liquidated damages payable for the period from the time when the works ought reasonably to have been completed, May 23, 1949, to the date of completion, Aug. 28, 1950.

The contractors say that the extension of time was invalid. It seems strange that the contractors should say that the extension (which was in their favour) was invalid, but they do so because, if the extension of time was invalid, they will be able to avoid paying the liquidated damages altogether. The building owners are not able to rely on the original contract time, Feb. 7, 1949, because they have not a certificate under cl. 17 that the works ought reasonably to have been completed by that date. In order to make good their claim to liquidated damages, they must show that the time was validly extended under cl. 18 to May 23, 1949.

The point in the case is therefore: Was the extension, given on Dec. 20, 1950, extending the time to May 23, 1949, valid or not? The contractors say that the words in cl. 18

"the architect shall make a fair and reasonable extension of time for completion of the works"

mean that the architect must give the contractors a date at which they can aim in the future, and that he cannot give a date which has passed. I do not agree with this contention. It is only necessary to take a few practical illustrations to see that the architect, as a matter of business, must be able to give an extension even though it is retrospective. Take a simple case where the contractors, near the end of the work, have overrun the contract time for six months without legitimate excuse. They cannot get an extension for that period. Now suppose that the works are still uncompleted and a strike occurs and lasts a month. The contractors can get an extension of time for that month. The architect can clearly issue a certificate which will operate retrospectively. He extends the time by one month from the original completion date, and the extended time will

obviously be a date which is already past. Or take a cause of delay, such as we have in this case, due to labour and materials not being available. That may cause a continuous delay operating partially, but not wholly, every day, until the works are completed. The works do not stop. They go on, but they go on more slowly right to the end of the works. In such a case, seeing that the cause of delay operates until the last moment, when the works are completed, it must follow that the architect can give a certificate after they are completed. These practical illustrations show that the parties must have intended that the architect should be able to give a certificate which is retrospective, even after the works are completed.

In support of this view I would refer to *Sattin v. Poole* (1) where there was a building contract with two clauses which are indistinguishable from those before us. It was certainly assumed by the Divisional Court, consisting of BRUCE and PHILLIMORE, JJ., that a certificate granting an extension of time could be granted after the works were completed, and it was so granted in that case. *Miller v. London County Council* (2) is distinguishable. I regard that case as turning on the very special wording of the clause which enabled the engineer "to assign such other time or times for completion as to him may seem reasonable." Those words, as DU PARCQ, J., said, were not apt to refer to the fixing of a new date for completion ex post facto. I would also observe that on principle there is a distinction between cases where the cause of delay is due to some act or default of the building owner, such as not giving possession of the site in due time, or ordering extras, or something of that kind. When such things happen the contract time may well cease to bind the contractors, because the building owner cannot insist on a condition if it is his own fault that the condition has not been fulfilled. That was decided in *Roberts v. Bury Improvement Comrs.* (3) and many other cases.

In the present case there was nothing of that kind. No one could suggest that the building owners were in any way responsible for the delay. The people responsible for the delay were the contractors, and it was for them to invoke cl. 18 for their own protection. They did so invoke it. They asked the architect for an extension, and he did not grant it at first. If they were dissatisfied, they should have asked for arbitration under the provisions in that behalf, but they did not do so. Later on the architect allowed them the extension. He allowed it, indeed, after the date of completion, but I do not see that they can say there is anything invalid in it. In my opinion, therefore, there was a valid extension under cl. 18 to May 23, 1949. In addition the architect gave the requisite certificate under cl. 17 saying that the works ought reasonably to have been completed by May 23, 1949. So all the conditions of the contract had been fulfilled entitling the building owners to their liquidated damages. I ought to say that on the pleadings and at the hearing the only point raised by the contractors was whether the extension was invalid in law. No point was taken that the architect had not acted as he should have done, or that the building owners had told him not to grant an extension, or that he had held up the matter for an unreasonable time. If it was desired to raise matters of that kind, they should have been specifically pleaded and fully investigated. As it was, however, no evidence was taken at the trial at all. The only point in issue is the point of law whether there had been a valid extension of time, and, therefore, I have not gone into those other matters. In my opinion, the judgment of GORMAN, J., was right, and this appeal should be dismissed.

ROMER, L.J.: I agree. Counsel for the contractors levelled some criticism at this purported extension of time which the architect granted on Dec. 20, and said that the letter ought not to be regarded as a document the effect of which was to bring into play the powers conferred by cl. 18 of the contract, because the document was quite informal and no reference is made to the clause. It is to be observed that the extension contemplated and authorised by cl. 18

may be given quite informally and need not be in writing. Apart from that, unless the document is referable to cl. 18 and was intended by the architect to be so referable, I cannot see to what it is referable. In it he purports to exercise some powers connected with extending the contract, and the only powers he possessed in that regard were conferred by cl. 18. Then it was said that this extension ought not to be regarded as valid unless it were shown to be the result of some application or some action on behalf of the contractors. It was said not to be so shown, but, in view of the correspondence, it seems to me not to be possible to say that this extension was not given at the instance of the contractors.

SINGLETON, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Corner & Co.* (for the contractors); *Field, Roscoe & Co.*, agents for *Jessop & Gough*, Waltham Abbey (for the building owners).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

PHARMACEUTICAL SOCIETY OF GREAT BRITAIN *v.* BOOTS CASH CHEMISTS (SOUTHERN), LTD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), July 16, 1952.]

Poison—Sale by retail—Sale by or under supervision of registered pharmacist—Chemist's "self-service" shop—Pharmacist supervising transaction at time of payment—Pharmacy and Poisons Act, 1933 (c. 25), s. 18 (1) (a) (iii).

A chemist's "self-service" shop comprised a single room with shelves round the walls and on an "island" fixture on which were stocked drugs and proprietary medicines which were specified in Part I of the Poisons List compiled under s. 17 (1) of the Pharmacy and Poisons Act, 1933, in packages and other containers with the prices marked on them. A customer entering the shop took a wire basket, selected the articles he required from the shelves, put them in the basket, and carried them to the cashier at one of the two exits. The cashier scrutinised the articles, stated the total price, and accepted payment, a registered pharmacist employed by the chemist supervising the transaction at this stage and being authorised to prevent any customer from removing any article if he thought fit.

—HELD: the taking of the articles from the shelves constituted an offer by the customer to buy and not the acceptance by him of an offer by the chemist to sell, and the sale was, therefore, completed on the acceptance of the price which took place "under the supervision of a registered pharmacist" as required by s. 18 (1) (a) (iii) of the Pharmacy and Poisons Act, 1933.

FOR THE PHARMACY AND POISONS ACT, 1933, s. 18 (1) (a) (iii), see HALSBURY'S STATUTES, Second Edn., Vol. 15, p. 276.

Case referred to:

(1) *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256; 62 L.J.Q.B. 257; 67 L.T. 837; 57 J.P. 325; 12 Digest, Replacement, 59, 323.

SPECIAL CASE stated by the parties under R.S.C., Ord. 34, r. 1, in an action by the plaintiffs for a declaration that sales of poisons made by the defendants at their premises at 73, Burnt Oak Broadway, Edgware, in the county of Middlesex, on Apr. 13, 1951, were effected otherwise than by or under the supervision of a registered pharmacist as required by s. 18 (1) (a) (iii) of the Pharmacy and Poisons Act, 1933.

The defendants carried on a business of retail sellers of drugs at their shop premises at 73, Burnt Oak Broadway, Edgware, which were entered in the register of premises kept under s. 12 (1) of the Act of 1933. The premises comprised a single

room so adapted that customers might serve themselves. There was accommodation for some sixty customers at one time, and a printed notice displayed at the entrance described the business as "Boots Self Service". The principal part of the room contained shelves round the walls and on an "island" fixture in the centre, one part being described on a printed notice as "Toilets dept." and the other part as "Chemist's dept." On the shelves in the chemist's department drugs, including proprietary medicines, were displayed in packages or other containers with a conspicuous indication of the retail price of each. The drugs and proprietary medicines covered a wide range and one section was devoted exclusively to drugs, including proprietary medicines, which were included in or contained substances included in Part I of the Poisons List referred to in s. 17 (1) of the Act of 1933. No such drugs were displayed on any shelves outside the section and a shutter was fitted to the section so that at any time all the articles in the section could be securely enclosed and excluded from display. None of the drugs came within sched. I to the Poisons Rules, 1949 (S.I., 1949, No. 539). The staff employed at the premises comprised a manager, a registered pharmacist in personal control of the chemist's department subject to the directions of a superintendent in accordance with s. 9 (1) (b) of the Act, three assistants, and two cashiers. When the premises were open for the sale of goods the manager, the pharmacist, and one or more assistants were present in the room. A customer entering the premises would pick up an empty wire basket at a barrier, select from the shelves the packages or other containers of drugs and proprietary medicines required, put them in the wire basket, and take them to one of the two exits. At each exit one of the cashiers under the supervision of the pharmacist scrutinised the articles selected, told the customer the total price, and accepted payment. The pharmacist supervised that part of every transaction involving the sale of a drug which took place at the cash desk and was authorised by the defendants at that stage, if he thought fit, to prevent any customer from removing any drugs from the premises. Customers were not informed of this authorisation. On Apr. 13, 1951, two customers purchased respectively a bottle of medicine known as compound syrup of hypophosphites, containing 0.01 per cent. W/V strychnine, and a bottle of Famel syrup, containing 0.023 per cent. W/V codeine, both being poisons included in Part I of the Poisons List, but, owing to the small percentage of strychnine and codeine, not coming within the Poisons Rules, 1949, sched. I. They followed the procedure outlined.

The question for the opinion of the court was whether each sale was effected by or under the supervision of a registered pharmacist in accordance with s. 18 (1) (a) (iii) of the Pharmacy and Poisons Act, 1933.

Lloyd-Jones, Q.C., and T. Dewar for the plaintiffs.

Glyn-Jones, Q.C., and Everington for the defendants.

LORD GODDARD, C.J.: This is a Special Case stated under R.S.C., Ord. 34, r. 1, and agreed between the parties and it turns on s. 18 (1) of the Pharmacy and Poisons Act, 1933, which provides:

"Subject to the provisions of this Part of this Act, it shall not be lawful—

(a) for a person to sell any poison included in Part I of the Poisons List, unless—(i) he is an authorised seller of poisons; and (ii) the sale is effected on premises duly registered under Part I of this Act; and (iii) the sale is effected by, or under the supervision of, a registered pharmacist."

The defendants have adopted what is called a "self-service" system in some of their shops—in particular, in a shop at 73, Burnt Oak Broadway, Edgware. The system of self-service consists in allowing persons who resort to the shop to go to shelves where goods are exposed for sale and marked with the price. They take the article required and go to the cash desk, where the cashier or assistant sees the article, states the price, and takes the money. In the part of the defendants' shop which is labelled "Chemist's dept." there are on certain

shelves ointments and drugs, some of which contain poisonous substances but in such minute quantities that there is no acute danger. These substances come within Part I of the Poisons List, but the medicines in the ordinary way may be sold without a doctor's prescription and can be taken with safety by the purchaser. There is no suggestion that the defendants expose dangerous drugs for sale. Before any person can leave with what he has bought he has to pass the scrutiny and supervision of a qualified pharmacist.

The question for decision is whether the sale is completed before or after the intending purchaser has paid his money, passed the scrutiny of the pharmacist, and left the shop, or, in other words, whether the offer out of which the contract arises is an offer of the purchaser or an offer of the seller.

In *Carlill v. Carbolic Smoke Ball Co.* (1) a company offered compensation to anybody who, having used the carbolic smoke ball for a certain length of time in a prescribed manner, contracted influenza. One of the inducements held out to people to buy the carbolic smoke ball was a representation that it was a specific against influenza. The plaintiff used it according to the prescription, but, nevertheless, contracted influenza. She sued the Carbolic Smoke Ball Co. for the compensation and was successful. In the Court of Appeal BOWEN, L.J., said ([1893] 1 Q.B. 269):

"... there can be no doubt that where a person in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification."

Counsel for the plaintiffs says that what the defendants did was to invite the public to come into their shop and to say to them: "Help yourself to any of these articles, all of which are priced", and that that was an offer by the defendants to sell to any person who came into the shop any of the articles so priced. Counsel for the defendants, on the other hand, contends that there is nothing revolutionary in this kind of trading, which, he says, is in no way different from the exposure of goods which a shop-keeper sometimes makes outside or inside his premises, at the same time leaving some goods behind the counter. It is a well-established principle that the mere fact that a shop-keeper exposes goods which indicate to the public that he is willing to treat does not amount to an offer to sell. I do not think I ought to hold that there has been here a complete reversal of that principle merely because a self-service scheme is in operation. In my opinion, what was done here came to no more than that the customer was informed that he could pick up an article and bring it to the shop-keeper, the contract for sale being completed if the shop-keeper accepted the customer's offer to buy. The offer is an offer to buy, not an offer to sell. The fact that the supervising pharmacist is at the place where the money has to be paid is an indication that the purchaser may or may not be informed that the shop-keeper is willing to complete the contract. One has to apply common sense and the ordinary principles of commerce in this matter. If one were to hold that in the case of self-service shops the contract was complete directly the purchaser picked up the article, serious consequences might result. The property would pass to him at once and he would be able to insist on the shop-keeper allowing him to take it away, even where the shop-keeper might think it very undesirable. On the other hand, once a person had picked up an article, he would never be able to put it back and say that he had changed his mind. The shop-keeper could say that the property had passed and he must buy.

It seems to me, therefore, that it makes no difference that a shop is a self-service shop and that the transaction is not different from the normal transaction

in a shop. The shop-keeper is not making an offer to sell every article in the shop to any person who may come in, and such person cannot insist on buying by saying: "I accept your offer". Books are displayed in a bookshop and customers are invited to pick them up and look at them even if they do not actually buy them. There is no offer of the shop-keeper to sell before the customer has taken the book to the shop-keeper or his assistant and said that he wants to buy it and the shop-keeper has said: "Yes." That would not prevent the shop-keeper, seeing the book picked up, from saying: "I am sorry I cannot let you have that book. It is the only copy I have got, and I have already promised it to another customer". Therefore, in my opinion, the mere fact that a customer picks up a bottle of medicine from a shelf does not amount to an acceptance of an offer to sell, but is an offer by the customer to buy. I feel bound also to say that the sale here was made under the supervision of a pharmacist. There was no sale until the buyer's offer to buy was accepted by the acceptance of the purchase price, and that took place under the supervision of a pharmacist. Therefore, judgment is for the defendants.

Judgment for the defendants.

Solicitors: *A. C. Castle* (for the plaintiffs); *Masons* (for the defendants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

KING AND ANOTHER v. PHILLIPS.

[QUEEN'S BENCH DIVISION (McNair, J.), June 20, 23, July 16, 1952.]

Damages—Mental shock—Accident to child—Mother hearing scream and seeing something of accident while seventy to eighty yards away.

A driver negligently backed his taxicab into a child who was on a tricycle immediately behind him, slightly injuring him. The child's mother, who was in her house seventy or eighty yards away, heard the child scream and saw the cab back into the tricycle, but she could not see the child. In an action for damages for shock suffered by the mother,

HELD: in the circumstances the taxi-driver could not reasonably have anticipated that to back the cab in the way he backed it would cause to the mother the injury complained of, and he was, therefore, not liable to her for negligence.

Principles laid down in *Hay (or Bourhill) v. Young* ([1942] 2 All E.R. 396), applied.

AS TO NERVOUS SHOCK, see HALSBURY, Hailsham Edn., Vol. 23, pp. 730, 731, para. 1022; and FOR CASES, see DIGEST, Vol. 36, pp. 123, 124, Nos. 816-824.

Cases referred to:

(1) *Hay (or Bourhill) v. Young*, [1942] 2 All E.R. 396; [1943] A.C. 92; 111 L.J.P.C. 97; 167 L.T. 261; 2nd Digest Supp.

(2) *Re Polemis & Furness, Withy & Co.*, [1921] 3 K.B. 560; *sub nom. Polemis v. Furness, Withy & Co.*, 90 L.J.K.B. 1353; 126 L.T. 154; 36 Digest 29, 151.

(3) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.

(4) *Hambrook v. Stokes Brothers*, [1925] 1 K.B. 141; 94 L.J.K.B. 435; 132 L.T. 707; 36 Digest 123, 819.

ACTION for damages for negligence.

The plaintiffs were Michael Charles King, aged five or six years, who sued by his mother, Kathleen Clara King, and the mother herself. On Aug. 2, 1951, the infant plaintiff, unaccompanied by his mother or any adult person, was on a tricycle on the highway at Birstall Road where it joined Greenfield Road, Tottenham, when a taxicab driven by Henry King, the servant or agent of the

defendant, stopped at the first house in Greenfield Road beyond the junction with Birstall Road to pick up a passenger. The infant plaintiff asked King whether he was going to take someone for a ride, and then, so far as King saw, disappeared. The passenger entered the cab, and King resumed his position in the driving seat, started the engine of the cab, looked round, and, thinking that the infant plaintiff had gone some minutes before, began to back the cab. The infant plaintiff, who was just behind the cab, was knocked off the tricycle which was pushed a short distance. Hearing a shout King got down and found the tricycle damaged and the infant plaintiff running towards his home some seventy or eighty yards distant on the other side of Birstall Road. He had suffered some grazing of his side, and for a month he suffered from nightmares and loss of appetite. At the time of the accident the adult plaintiff was in her house and was looking out of a window when she heard a scream which she identified as that of the infant plaintiff. She saw the cab backing into the tricycle, and then saw the tricycle under the cab, but she could not see the infant plaintiff. She ran into the road, met the infant plaintiff, and took him indoors. She suffered from shock.

The plaintiffs claimed that their injuries and shock were due to King's negligence. The defendant contended that there was no evidence of any breach of duty towards the adult plaintiff and that the damage consequent on her special susceptibility to shock in so far as she was so susceptible was too remote.

F. G. Paterson for the plaintiffs.

Wiggins for the defendant.

Curr. adv. vult.

July 16. **McNAIR, J.**, read a judgment in which he stated the facts and found that the injuries to the infant plaintiff were directly due to King's negligence and that the adult plaintiff's condition was directly caused by what she saw and heard at the time of the accident, but that she was not abnormally susceptible to shock, and he continued: It is now no longer open to dispute that the duty to take reasonable care not to cause injury to another includes the duty to take reasonable care not to cause injury by shock, although no direct impact or lesion occurs: see *Hay (or Bourhill) v. Young* (1), per LORD THANKERTON ([1942] 2 All E.R. 399), and see the opinion of LORD MACMILLAN (*ibid.*, 402):

"It is no longer necessary to consider whether the infliction of what is called mental shock may constitute an actionable wrong. The crude view that the law should take cognizance only of physical injury resulting from actual impact has been discarded, and it is now well recognised that an action will lie for injury by shock sustained through the medium of the eye or the ear without direct contact."

Bearing in mind that the problem at present under consideration is one of "culpability, not . . . compensation", to use the language of BANKES, L.J., in *Re Polemis & Furness, Withy & Co.* (2) ([1921] 3 K.B. 571), the critical question is the test of culpability in the circumstances. This question was fully discussed in the speeches delivered in *Bourhill's* case (1), a case against the driver of a motor cycle, from which I take the following extracts. LORD THANKERTON, dealing with the duty of a driver of a motor cycle on the highway, said ([1942] 2 All E.R. 399):

"Clearly this duty is to drive the cycle with such reasonable care as will avoid the risk of injury to such persons as he can reasonably foresee might be injured by failure to exercise such reasonable care . . . If then the test of proximity or remoteness is to be applied, I am of opinion that such a test involves that the injury must be within that which the cyclist ought to have reasonably contemplated as the area of potential danger which would arise as the result of his negligence, and the question in the present case is whether the appellants were within that area."

LORD RUSSELL OF KILLOWEN quotes with approval the test stated by LORD JAMIESON in the case then before the House in the following words (ibid., 402):

"No doubt the duty of a driver is to use proper care not to cause injury to persons on the highway or in premises adjoining the highway, but it appears to me that his duty is limited to persons so placed that they may reasonably be expected to be injured by the omission to take such care."

A LORD MACMILLAN states the duty as follows (ibid., 403):

"The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed."

B LORD WRIGHT quotes (ibid., 404) the language used by SCRUTTON, L.J., in the *Polemis* case (2) that ([1921] 3 K.B. 577):

"To determine whether an act is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage . . . " ;

C and the classic definition of "neighbours" by LORD ATKIN in *M'Alister (or Donoghue) v. Stevenson* (3) ([1932] A.C. 580) as

"persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

D He then discusses ([1942] 2 All E.R. 404) whether the criterion of reasonable foresight extends beyond people of ordinary health or susceptibility (a question which, on my finding of fact, does not strictly arise in this case) and concludes (ibid., 406) that he could not accept that the driver

" . . . could reasonably have foreseen, or, more correctly, the reasonable hypothetical observer could reasonably have foreseen, the likelihood that anyone placed as the appellant was, could be affected in the manner in which she was ",

E and adds that the issue of duty or no duty is indeed a question for the court, but it depends on the view taken of the facts.

F Applying these principles, I have reached the conclusion that in the circumstances of this case it cannot be held that the driver of the taxicab (or, to adopt LORD WRIGHT's expression, the reasonable hypothetical observer) could reasonably have anticipated that to back the cab in the way in which it was backed, admittedly negligently vis-à-vis the small boy, would cause the injury complained of or any injury to the boy's mother in her home seventy or eighty yards or so away. The mother, in my judgment, was wholly outside the area or range of reasonable anticipation, and if I am asked where the line is to be drawn I should humbly reply in the language of LORD WRIGHT, used admittedly in a slightly different context, that it should be drawn (ibid., 406):

G " . . . where in the particular case the good sense of the jury, or of the judge, decides."

H It seems to me to be contrary to common sense to say that a taxi-driver ought reasonably to have contemplated that, if he backed his taxi without looking where he was going, he might cause injury by shock, or any other injury, to a woman in a house some seventy or eighty yards away up a side street.

It was urged by counsel on behalf of the plaintiff that so far as this court was concerned the matter was concluded against the view which I have adopted by the decision of the Court of Appeal in *Hambrook v. Stokes Brothers* (4). I am unable to accept this submission, as it is plain that in that case the breach of duty was admitted in the pleadings and in so far as there are any differences in

the statement of legal principles in the judgments of BANKES, L.J., and ATKIN, L.J., from the views expressed in *Bourhill's* case (1) in the House of Lords, I am bound to follow the latter. Accordingly, there will be judgment for the infant plaintiff for £15, and judgment for the defendant on the claim of the adult plaintiff.

Order accordingly.

Solicitors: *Darracotts* (for the plaintiffs); *Alfred E. Johnson* (for the defendant).
[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

CONLON v. CONLONS, LTD.

[COURT OF APPEAL (Singleton and Morris, L.JJ.), July 16, 1952.]

Discovery—Privilege—Interrogatory—Communication between solicitor and client—Authority to solicitor to settle claim—Interrogatory as to whether authority given.

The plaintiff having claimed damages from the defendants for personal injuries, his solicitors wrote to the defendants' insurers offering terms of settlement. Later the plaintiff issued a writ, and in their defence the defendants pleaded that the terms of settlement offered by the plaintiff's solicitors had been accepted and that the plaintiff's claim had thus been compromised by way of accord and satisfaction. In his reply the plaintiff denied having made any agreement to compromise his claim, and pleaded that, if any such agreement purported to have been entered into, his solicitors had no authority to enter into it. The defendants administered interrogatories asking whether the plaintiff had not authorised his solicitors to negotiate for the settlement of his claim or to hold themselves out as having authority to do so, and whether he had not authorised them to offer terms of settlement. The plaintiff declined to answer the interrogatories on the ground that they were inquiries as to communications passing between him and his solicitors confidentially and in their professional character, and were, therefore, privileged.

HELD: the rule as to privilege did not extend to communications between a client and his solicitor which the client instructed his solicitor to repeat to the other party, for such communications were not confidential, and, therefore, the plaintiff was bound to answer the interrogatories.

AS TO LEGAL PROFESSIONAL PRIVILEGE, see HALSBURY, *Hailsham Edn.*, Vol. 10, pp. 381-394, paras. 462-475; and FOR CASES, see DIGEST, Vol. 18, pp. 120-148, Nos. 705-982.

Cases referred to:

- (1) *Anderson v. Bank of British Columbia*, (1876), 2 Ch.D. 644; 45 L.J.Ch. 449; 35 L.T. 76; 20 Digest 291, 482.
- (2) *Greenough v. Gaskell*, (1833), 1 My. & K. 98 (39 E.R. 618); *Coop. temp. Brough*, 96 (47 E.R. 35); 18 Digest 125, 743.
- (3) *Reid v. Langlois*, (1849), 1 Mac. & G. 627; 19 L.J.Ch. 337; 41 E.R. 1408; 18 Digest 132, 828.
- (4) *Welsh v. Roe*, (1918), 87 L.J.K.B. 520; 118 L.T. 529; 42 Digest 67, 594.
- (5) *Macaulay v. Polley*, [1897] 2 Q.B. 122; 66 L.J.Q.B. 665; 76 L.T. 643; 42 Digest 67, 589.

APPEAL by the plaintiff from an order of DONOVAN, J., dated June 17, 1952, dismissing the plaintiff's appeal from an order of the master that he should answer interrogatories.

Platts-Mills for the plaintiff.

Lord Hailsham for the defendants.

SINGLETON, L.J.: The question at issue is directed to the admissibility of certain interrogatories which the defendants sought to administer to the plaintiff. The action by the plaintiff is one in which he claims damages against his employers for personal injuries which, he alleges, were caused by their negligence or breach of duty. The defendants denied negligence, and, by para. 3 of their defence, they said:

A "Further or in the alternative, by letters passing between the plaintiff's solicitors and the defendants by their duly authorised agents dated Mar. 17 and 23 and Apr. 3, 1950, and by two cheques from the defendants or their said agents enclosed in the last letter the plaintiff's claim was compromised by way of accord and satisfaction for £1,000 and twenty-one guineas costs which sums the defendants by the said letter of Apr. 3, 1950, and by the said cheques enclosed therein duly tendered to the plaintiff's solicitors and
B now bring into court."

The defendants' "agents" were the insurance company by whom they were covered against risks of this kind. A reply was delivered on Oct. 25, 1951, which said:

C "2. The plaintiff denies that he agreed to compromise his claim as in para. 3 of the defence alleged or at all. 3. If any such agreement purported to have been entered into as alleged, which is denied, the plaintiff's solicitor had no authority to make the same. 4. If there were any agreement as alleged, which is denied, there was no satisfaction thereof and the sum of £1,000 and twenty-one guineas costs were not paid. 5. In the further
D alternative, if there were any such agreement as alleged, the same was rescinded by mutual consent and the cheques referred to in the defence were returned by letter dated Sept. 21, 1950, and the return thereof was accepted by the defendants who thereupon made a further offer of £1,250 and twenty-one guineas costs to the plaintiff which offer likewise was rejected by the plaintiff."

E In due course the defendants delivered to the plaintiff's solicitors interrogatories which they desired should be answered by the plaintiff. It is obvious that one issue to be tried, which might dispose of the action, is whether or not there was a binding agreement between the plaintiff's solicitors and the defendants' agents settling the action on terms agreed between the parties. The interrogatories which the defendants sought to administer to the plaintiff covered those points. It may be that in one sense they go a little further than necessary, though
F the submission of counsel for the plaintiff has not been directed to that. His submission was that the proposed interrogatories were inadmissible by reason of the fact that they sought to ascertain from the plaintiff communications between him and those who were acting as his solicitors at the time when, it is said, an agreement was entered into.

G The proposed interrogatories are based on letters from those who were acting as the plaintiff's solicitors to the defendants' insurance company. The first of those letters, dated Feb. 10, 1950, ends in this way:

"[The plaintiff] has intimated to us that in order to finalise this matter he would be prepared to accept £1,000 clear."

The next letter dated Mar. 17, 1950, contains this passage:

H "Further to your representative's call upon us yesterday we confirm that we have seen our client and he states that provided he receives the sum mentioned in our letter to you of Feb. 10, namely, £1,000 clear, he will accept. Any sum less than this will not be acceptable."

The third letter, of Mar. 23, 1950, begins:

"Further to our telephone conversation with you yesterday we confirm that our client is prepared to accept £1,000 in full and final settlement of this matter plus our costs."

Each of those letters contains an intimation from the plaintiff's then solicitors to the defendants that the plaintiff has instructed them to say that he will accept £1,000 in settlement. Having brought those letters to the notice of the plaintiff, the defendants by the first interrogatory which they seek to administer ask:

"At the dates of the said letters or some or one and which of them were not Messrs. Hanchett, Copley and Hails acting as solicitors on your behalf?"

Counsel for the plaintiff has submitted to this court that that interrogatory was unnecessary having regard to the defendants' pleading. I do not think it can be said that there is an admission in his reply that those solicitors were at the material time acting as the solicitors for the plaintiff. The answer which was put on the file is in these terms:

"(i) As to this question I object to answer the same on the ground that it is an inquiry as to the communications passing between me and a solicitor confidentially and in his professional character and is thereby privileged. If the question were limited to asking whether Messrs. Hanchett, Copley and Hails were acting as my solicitors in relation to the matters referred to in the letters inquired about, then it is a request for information about my actual instructions to the said solicitors and is likewise privileged."

I find it difficult to understand that answer. That interrogatory admitted of a single answer "Yes" or "No". In my view, the master was quite right in saying that the plaintiff must deliver a further answer to that interrogatory.

The second, third and fourth of the proposed interrogatories were:

"2. Had you not authorised Messrs. Hanchett, Copley and Hails to negotiate with the defendants or their insurers for the settlement of your claim and/or to hold themselves out as having authority to do so? 3. Had you not authorised them to make all or some or one and which of the offers therein contained? 4. On what date, and, if you can state it, at what time, if at all, were their instructions withdrawn?"

Counsel for the plaintiff today tells us that he is ready and willing to answer the first and fourth interrogatories, but not the others. His answer to these interrogatories was:

"2. I raise the same objection as to the first one. I likewise draw attention to the fact that the letters are all marked without prejudice which I respectfully submit is a further ground for saying that any instructions I may have given in relation to them are privileged. 3. As to this question, I raise the same objections as above. 4. As to this question, I raise the same objection."

Thus, it will be seen from what counsel said in his reply in this court that he is ready and willing now to give a better answer to interrogatories nos. 1 and 4, though he still objects to nos. 2 and 3. If I understand his submission correctly, his objection is not to the form of those interrogatories, but, put generally, it is that any inquiry as to what took place between the plaintiff and those who were acting as his solicitors cannot be the subject-matter of an interrogatory or of a question at any time because by the well-recognised rule it is privileged. Thus it becomes necessary to consider the question of privilege. Counsel for the plaintiff stated the principle in this way, that it was based on the requirement that proper professional advice demands that the client should be able to speak without restraint knowing that his words may never be disclosed.

In *Anderson v. Bank of British Columbia* (1) SIR GEORGE JESSEL, M.R., in a judgment which was approved in this court, said (2 Ch.D. 648):

"What is the rule [as to privilege] and what is the meaning of the rule? The meaning of the rule is, I understand, truly laid down by LORD BROUGHAM in the case of *Greenough v. Gaskell* (2), and is thoroughly well explained, if I may use the phrase in reference to so great a judge as LORD COTTENHAM, in the case of *Reid v. Langlois* (3), followed in every case in

A equity, not excepting the case before STUART, V.-C., in which a dictum has been strained to an extent which, if the Vice-Chancellor's attention has been drawn to it, I think, he would not have thought warranted. The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule."

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The privilege which exists between a solicitor and his client has been zealously guarded by the courts as long as the history of the law goes. Counsel for the plaintiff told us that there are only two instances in which it is lost. One is if something of a criminal nature is involved, and the second is if there be waiver by the client.

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There is another rule of equal importance, and that is a rule as to public policy. If two parties come to an agreement, *prima facie* they ought to be bound by the agreement at which they have arrived. Equally, if two parties come to an agreement through their authorised agents the agreement ought to be binding between the principals of agents who had authority to enter into the agreement. If the agents be solicitors on each side, there may be a danger of the two rules or principles appearing to be in conflict. That which the client says to the solicitor normally is privileged, but if the client says to the solicitor: "Settle this case for me on these terms", and the solicitor does so, a different position arises, for it may be that that which the client says to the solicitor is an instruction to the solicitor: "Tell this to the other side", and, if the solicitor, acting on his client's instructions, tells the solicitor on the other side: "I have my client's instructions to accept £1,000 and costs", and as a result of that an agreement is arrived at between the two solicitors in complete accord and satisfaction of the claim, I do not think that the first client can claim privilege in respect of that which he has said to his solicitor and at the same time has told his solicitor to communicate to the other side.

In *Welsh v. Roe* (4) McCARDIE, J., had before him a question as to the authority of a solicitor, and it was held:

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"After issue of the writ the solicitor of a party to the action has an implied general authority to compromise and settle the action, and the client cannot avail himself of any limitation by him of the implied general authority unless it has been brought to the notice of the other side."

The learned judge said (87 L.J.K.B. 521):

H

"It is clear that a solicitor cannot compromise a claim before writ issued even though he be retained to bring an action in respect of it: *Macaulay v. Polley* (5), in the Court of Appeal. The party claiming to support the compromise must in such a case prove the actual authority of the solicitor. It is always a matter of evidence in each case."

McCARDIE, J., stated with complete accuracy that a solicitor cannot compromise a claim before writ issued, and added that, if a party claims to support such a compromise, he must prove the actual authority of the solicitor, and that depends on the evidence. Clearly he supposed that it was possible to do that in such a case. The submission of counsel for the plaintiff in this court seems to me to go

so far as to say that that could never be proved, or never in an ordinary case. I think it can. The interrogatories in the present case were put forward by the defendants to ascertain what the plaintiff's case was. It was quite simple for the plaintiff to answer these interrogatories if he was so advised. As to nos. 1 and 4, there is no question now. I confess that I thought at one time that no. 2 was in a little wider form than was necessary, though objection was not taken to its form. Counsel for the plaintiff indeed said that he would prefer to have either no. 2 or no. 3 in its present form rather than in a form which I suggested. It seems to me it would be legitimate and proper to put to the plaintiff in these circumstances a question of this nature:

"Did you authorise your solicitors to accept £1,000 and costs, or to settle the case for £1,000 and costs?"

I do not think that the putting of interrogatories on those lines or the putting of a question on those lines would go against the rule of privilege in any sense whatever. The very object of the plaintiff in so instructing his solicitors would be that they should make that communication to the other side. If he had not instructed them so to do the answer is simply "No". If he had instructed them, to the plain question which I suggest the answer would be "Yes". I do not think that the rule as to privilege which has been brought to our notice applies to the interrogatories which the defendants seek to administer to the plaintiff, and for these reasons I consider that this appeal should be dismissed.

MORRIS, L.J.: I am fully in agreement with the judgment which SINGLETON, L.J., has delivered. The words used in objecting to answer the first interrogatory are that the question constitutes an inquiry as to communications passing between the plaintiff and his solicitor confidentially and in his professional capacity, which, therefore, are said to be privileged. In my judgment, these are not inquiries as to communications passing between the plaintiff and his solicitor confidentially. It is, I think, plain that, if there are professional communications between a solicitor and his client of a confidential character for the purpose of getting legal advice, then, in general, there is privilege and protection. But that is not the case here. The interrogatories are directed to the three letters, and the plaintiff is invited to look at the three letters. When those letters are examined a fair and reasonable reading of them is: "My client authorises me to say to you that he will accept such and such an amount in settlement". That being so, an inquiry whether the plaintiff did or did not authorise his solicitor to write those letters is not an inquiry as to communications passing between the plaintiff and his solicitor confidentially. There is no suggestion in this case of asking for the disclosure of anything that the solicitors may have said to the plaintiff in regard to his claim generally or by way of giving advice as to the prospects of the action. The inquiry that is raised is whether the plaintiff did or did not authorise his solicitor to write certain letters which state that the plaintiff will accept a certain sum. In my opinion, therefore, the learned master and the learned judge arrived at the correct conclusion.

Appeal dismissed.

Solicitors: *Seifert, Sedley & Co.* (for the plaintiff); *Berryman*s (for the defendants).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

Re F. T. HAWKINS & CO., LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), July 14, 1952.]

Company—Winding-up—Costs—Profit costs of solicitor to liquidator—Appointment of solicitor by committee of inspection—Clerk employed by solicitor a member of committee—Companies (Winding-up) Rules, 1949 (S.I., 1949, No. 330), r. 163.

A At the request of the petitioning creditor in the winding-up of a limited liability company a clerk to a firm of solicitors was appointed a member of the committee of inspection. By a resolution of the committee of inspection, the firm were appointed solicitors to the liquidator. On the taxation of the liquidator's costs all profit charges of the firm were disallowed. The liquidator applied for an order that the taxation be reviewed and that the objections of the firm to the disallowance be allowed.

B HELD: the word "by" in the phrase "by himself, or any employer" in the Companies (Winding-up) Rules, 1949, r. 163, ought to be construed as meaning "in the person of", and, therefore, the firm were precluded by r. 163 from deriving any profit from any transaction arising out of the winding-up, or, alternatively, the clerk must be said to derive from the firm some part of the profit earned by the firm, and, therefore, even if the word "by" were construed as meaning "through", the firm would fall within the mischief of r. 163, and the items were properly disallowed.

C Dictum of LORD ESHER, M.R., in *Re Gallard. Ex p. Gallard* ([1896] 1 Q.B. 71), applied.

D AS TO COSTS OF LIQUIDATOR, see HALSBURY, 1949 Edn., Vol. 5, pp. 674-676, paras. 1082, 1083; and FOR CASES, see DIGEST, Vol. 10, pp. 882-886, Nos. 5996-6025.

FOR THE COMPANIES (WINDING-UP) RULES, 1949, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 4, p. 125.

Case referred to:

E (1) *Re Gallard. Ex p. Gallard*, [1896] 1 Q.B. 68; 65 L.J.Q.B. 199; 73 L.T. 457; 4 Digest 242, 2293.

F SUMMONS for order that the taxation of the costs of the solicitors to the liquidator of F. T. Hawkins & Co., Ltd., appointed by a resolution of the committee of inspection dated Jan. 3, 1951, be reviewed, and that objections made by the liquidator's solicitors to the disallowance of all profit charges be allowed. The argument was heard in chambers, but the judgment was delivered in open court.

Richmount for the liquidator.

Denys B. Buckley for the Official Receiver.

G WYNN-PARRY, J.: By this summons the liquidator of a company asks for an order that the taxation of the costs of his solicitors, who were appointed by a resolution of the committee of inspection on Jan. 3, 1951, may be reviewed, and that the objections made by the liquidator's solicitors to the disallowance of the several items specified in the objections (being all profit charges) be allowed. A member of the committee of inspection was a clerk in the employment of the solicitors. I am told that it was at the request of the petitioning creditor that this clerk was nominated to the committee of inspection, the petitioner in question residing at a considerable distance from London. I desire to make it clear that at the most what can be said against the firm of solicitors in question is that, to use the words of LORD ESHER, M.R., in *Re Gallard. Ex p. Gallard* (1), they made a mistake in allowing themselves to be retained by the committee of inspection of which a clerk in their employment was a member, and that, if they desired to accept that retainer, the clerk in question ought to have resigned from the committee, but I make no imputation whatsoever against their bona fides in the matter.

This application is made under the Companies (Winding-up) Rules, 1949, r. 163, which, so far as material, provides:

“No member of a committee of inspection shall, except under and with the sanction of the court, directly or indirectly, by himself, or any employer, partner, clerk, agent, or servant, be entitled to derive any profit from any transaction arising out of the winding-up or to receive out of the assets any payment for services rendered by him in connection with the administration of the assets, or for any goods supplied by him to the liquidator for or on account of the company.”

That rule was considered, as regards the then material rule in bankruptcy (which is in similar language), in *Re Gallard* (1). In that case the subject of the decision was different from that which is raised in this summons. The trustee in bankruptcy, with the permission of the committee of inspection, appointed Messrs. Ashurst, Morris & Co. to be solicitors to the trustee. One of the members of the committee was a Mr. Hunt, who was a managing clerk of Messrs. Ashurst, Morris & Co., and another member was a Mr. Williams, a solicitor at Brighton, whom Messrs. Ashurst, Morris & Co. employed as their agent in some proceedings in the bankruptcy which were taken at Brighton. No prior sanction of the court to his employment had been obtained. A bill of costs was delivered by Messrs. Ashurst, Morris & Co. which included a sum for the costs of Mr. Williams. The taxing master, acting under the Bankruptcy Rules, 1886, r. 317, disallowed the whole of this sum except a small amount for disbursements out of pocket, holding that the remainder represented the profits derived by Mr. Williams from the business. VAUGHAN WILLIAMS, J., held that Mr. Williams was also entitled to an allowance for the proportion of his office expenses (such as clerks' salaries, rent, etc.) attributable to the particular business, and he disallowed only the sum of £40 as representing the profit derived by Mr. Williams from the business, allowing, therefore, a substantial sum out of the amount which the taxing master had disallowed. The matter was taken to the Court of Appeal, and the decision in the Court of Appeal turned on the question how a solicitor's profit costs should be calculated. The actual decision, therefore, does not touch the point which I have to decide in this case, but LORD ESHER, M.R., in delivering a judgment reversing the judgment of VAUGHAN WILLIAMS, J., on the point before the court, added ([1896] 1 Q.B. 71):

“I desire to add that this case appears to me to raise even a larger question than that which has been brought before us. Messrs. Ashurst, Morris & Co. (I say again without any wrong intention) accepted a retainer from a committee of inspection one member of which was their own clerk. In my opinion that was not good practice, and I think they made a mistake in so doing. I think that under the circumstances they ought, at least, to have obtained the sanction of the court before they accepted the retainer. In my view, if a solicitor accepts a retainer when a member of a committee of inspection stands to him in the relation in which one of the committee stood here, and an application were made to the court of bankruptcy immediately to set aside and disallow that retainer, the inherent power of the court ought to be exercised in setting it aside.”

It is true that that paragraph is obiter dictum, but it is obiter dictum to which the greatest respect is due and one which has been before the profession since 1896 when the judgment was delivered. So far as the researches of counsel have been able to ascertain, it has met with no criticism whatsoever, and, in my respectful view, it enunciates a proposition the propriety of which is beyond dispute. It frowns (and frowns in no uncertain terms) on the practice which, I say again in all good faith, was followed in this case. It is a practice which, in my view, ought to terminate as soon as possible, and it is as much for that reason as any other that I have desired to give a reasoned judgment on this

summons. The basis of that obiter dictum is quite clearly that, if the practice is followed, there must result a conflict between interest and duty—a conflict which this court never allows to arise if it can help it.

A It is to be observed that LORD ESHER, M.R., carries his view so far as to say that under the inherent power of the court, had an application been made to disallow the retainer, the court ought to have exercised it in setting aside that retainer. In this case, who could be expected to do it? The liquidator shared the same view as the committee of inspection. It was the committee of inspection who appointed the firm of solicitors in question, and there appears to me to have been no one who could have been expected in the circumstances to take the course which LORD ESHER, M.R., indicates would have been possible. It is against that background that I have to consider r. 163, and in considering the language of that rule, I propose (and I say it quite openly) to be as astute as I B can to bring the present case within the mischief of that rule, as it is so clearly within the mischief of the last concluding paragraph of the judgment of LORD ESHER. To return to the rule, it begins:

C “No member of a committee of inspection shall, except under and with the sanction of the court, directly or indirectly, by himself, or any employer, partner, clerk, agent, or servant, be entitled to derive any profit from any transaction arising out of the winding-up . . . ”

D The prior sanction of the court was admittedly not obtained in the present case. As has been stated by counsel for the Official Receiver, at first sight the presence in that list of persons of the employer is somewhat strange, but I think that when the character of the other persons mentioned is considered and it is appreciated that the phrase is introduced by the preposition “by” and not by the preposition “through”, the proper way of construing the phrase is to treat the word “by” as equivalent to the phrase “in the person of”, and the rule, therefore, is satisfied if through the activities of the member of the committee in question his employer makes a profit.

E Alternatively, if that construction be wrong, I should be prepared—construing this rule, as I frankly intend to do, as strictly as I can against the liquidator—to say that, no doubt in a very indirect way, the member of the committee, being an employee of the solicitor who has derived the profit, must be said to have derived some part, however indefinable, of that profit made by his employer. If he were employed on a commission basis, clearly the matter would be beyond argument. It is said that he escapes, and, therefore, his F employer, the solicitor, also escapes, from the mischief of the rule because the employee is not remunerated by commission, and receives a flat rate of payment, but, as a result of the transaction, the funds of the employer with which he is enabled to pay the employee are swollen, and as an alternative view I think that would be sufficient to cover the case. For those reasons I propose to refuse this application. I am told that the position which has been disclosed in the summons G is not by any means infrequent, and, as I have said, I acquit the solicitors and the liquidator and the committee of inspection of anything more than a mistake. In those circumstances, I think the proper order as to costs would be that the liquidator shall pay the costs of the Official Receiver, who appeared in this court to argue the case against the claim. The liquidator may recover those costs and his own costs out of the assets.

H *Application refused.*

Solicitors: *Lesser, Fairbank & Co.* (for the liquidator); *Solicitor, Board of Trade* (for the Official Receiver).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

GDYNIA AMERYKA LINIE ZEGLUGOWE SPOLKA AKCYJNA
v. BOGUSLAWSKI AND ANOTHER.

[HOUSE OF LORDS (Lord Porter, Lord Oaksey, Lord Morton of Henryton, Lord Reid, Lord Tucker), March 17, 18, 19, 20, 25, 26, 27 28, 31, April 1, 2, July 11, 1952.]

International Law—Recognition of foreign government—Retroactive effect—Payment of compensation to officers and men of Polish merchant navy on their leaving their ships—Offer made in London on July 5, 1945, by Minister of old Polish government, on behalf of Polish shipping company—Recognition by British government of new Polish government from midnight on July 5/6, 1945—Offer accepted and acted on, in England, after recognition of new Polish government. A B

In 1940 the government of the Polish State, which had escaped from Poland when that country was occupied by Germany, established itself in London and was recognised by the British government as the government of Poland. Under a Polish statute of 1939 it controlled the Polish merchant navy which now had its home ports in England. By the middle of 1945 it became apparent that the British government would withdraw its recognition of the Polish government in London (hereafter called the old Polish government) and accord recognition to a new government which was being formed in Poland, and on July 3, 1945, K., the Minister of Industry, Commerce and Shipping of the old government, acting as supreme manager of the Polish shipping companies, informed the representatives of the Polish Captains' and Officers' Union and the Polish Seamen's Union that any officers and men of the Polish merchant navy who should leave their ships on account of the change of government would be entitled to a gratuity of three months' salary. On July 5 a telegram in those terms was sent by the Minister, through the curator of the appellant shipping company (one of the Polish shipping companies), to the master of the Morska Wola, a motor vessel belonging to the company, which was then lying in the Manchester Ship Canal. It was read to the officers on the same day and to the seamen on the following day. At midnight on July 5/6 the British government recognised the new Polish government, the Polish Provisional Government of National Unity, as the government of Poland. The certificate of the Secretary of State for Foreign Affairs which proved this fact stated: "1. Up to and including midnight of July 5/6, 1945, His Majesty's government in the United Kingdom recognised the Polish government having its headquarters in London as being the government of Poland, and as from midnight of July 5/6, 1945, His Majesty's government in the United Kingdom recognised the Polish Provisional Government of National Unity as the government of Poland, and as from that date ceased to recognise the former Polish government having its headquarters in London as being the government of Poland". Paragraph 2 of the certificate contained a statement that on June 29, 1945, a message to the Prime Minister was received from the head of the new Polish government, and the terms of the message were then set out. It stated, inter alia, that the new government was formed on June 28 and sought the establishment of diplomatic relations with the British government. In para. 3 of the certificate the Secretary of State said: "I am advised that the question of the retroactive effect of recognition of a government is a question of law for decision by the courts." Acting on the telegram of July 5, the respondents, an officer and a seaman in the Polish merchant navy who were then serving on the Morska Wola, left the ship on account of the change of government. In an action by them against the appellant company for payment of the compensation alleged to be due to them, the company denied liability and contended inter C D E F G H

alia that the recognition of the new Polish government by the British government on midnight of July 5/6, 1945, operated retroactively to June 28, 1945, with the result that the British government would not recognise as valid the acts of the old Polish government done after that date.

HELD: (per LORD PORTER, LORD OAKSEY, LORD REID and LORD TUCKER) although from June 28, 1945, the new Polish government was the de facto government of metropolitan Poland, between June 28 and July 5/6, 1945, it was not in de facto control of the members of the old government then resident in London, and then recognised as the de jure government of Poland, or of the Polish merchant navy and its personnel present in this country; even assuming that the British government's recognition of the new Polish government dated back to June 28 in Poland where that government had effective control, it was not a recognition that the new government had sovereign powers outside Poland between June 28 and July 5/6, 1945, and, as expressly certified by the Secretary of State, the recognition of the old government remained effective until it was withdrawn as from midnight of July 5/6, 1945; and, therefore, K. was still Minister of Industry, Commerce and Shipping until that date, and, under the Polish Act of 1939, was supreme manager of the appellant company and was entitled to act on its behalf.

Per LORD MORTON OF HENRYTON: there was no ambiguity in para. 1 of the certificate of the Secretary of State, the effect of para. 1 was not altered by para. 2 or para. 3, and no principle of retroactivity came into operation.

Questions of Polish law having been decided in favour of the respondents, it was held that they were entitled to the compensation claimed.

Decision of the COURT OF APPEAL ([1950] 2 All E.R. 355), affirmed.

AS TO RECOGNITION OF FOREIGN STATES, see HALSBURY, Hailsham Edn., Vol. 13, p. 619, para. 691, and *ibid.*, Vol. 26, p. 254, para. 568; and FOR CASES, see DIGEST, Vol. 22, pp. 148-150, Nos. 1262-1273.

Cases referred to:

(1) *Guaranty Trust Co. v. United States*, (1938), 304 U.S. 126.

(2) *Aksionairnoye Obschestvo A. M. Luther v. Sagor (James) & Co.*, [1921] 3 K.B. 532; 90 L.J.K.B. 1202; 125 L.T. 705; 11 Digest 309, 17.

(3) *Lazard Brothers & Co. v. Midland Bank, Ltd.*, [1933] A.C. 289; 102 L.J.K.B. 191; 148 L.T. 242; Digest Supp.

(4) *Banco de Bilbao v. Sancha*, [1938] 2 All E.R. 253; [1938] 2 K.B. 176; 107 L.J.K.B. 681; 159 L.T. 369; Digest Supp.

APPEAL by the defendant company (a Polish shipping company) from an order of the Court of Appeal (BUCKNILL, COHEN and DENNING, L.JJ.), dated June 15, 1950, and reported [1950] 2 All E.R. 355, affirming an order of FINNEMORE, J., dated July 21, 1949, whereby he ordered the defendant company to pay to each of the plaintiffs a sum representing three months' wages alleged to be contractually due to him on his leaving the company's employment, or, alternatively, a like sum as damages for breach of agreement.

By art. 19 of a Polish statute of Mar. 30, 1939, in the event of war private shipping undertakings in Poland were to be placed "under the supreme management of the Ministry of Industry and Commerce," and their boards of management were to become "executive organs of the Minister." In 1940, after Poland was occupied by the German forces, the exiled Polish government established itself in London and was recognised by the British government as the government of Poland, and under the Act of 1939 it controlled the Polish merchant navy which now had its home ports in England. In 1942, under a Polish statute of 1940 and a decree of 1942, Mr. Plinius, who was manager of the company at all material times, was appointed curator of the company, and in his dual capacity he was subject to the general control of the Minister of Industry, Commerce and

Shipping who, at the material dates, was a Mr. Kwapinski. On June 25, 1945, in view of the possibility that the British government would withdraw its recognition of the Polish government in London (hereafter called the old Polish government) and accord recognition to a body previously known as the Lublin government, the Council of Ministers of the old government passed a resolution (the provisions of which were embodied in a decree dated June 28, 1945) to determine the employment of its civil servants and to pay a gratuity of three months' salary to them. On the same day the council resolved to pay a similar gratuity to employees of Polish shipping companies on determination of their employment, the gratuity in this case to be paid out of the moneys of the companies concerned. On being informed of the council's resolution in regard to shipping companies, the board of management of the defendant company agreed to pay the gratuity to its office staff but not to the ships' personnel. On July 2, 1945, Mr. Dabkowski, the secretary of the Polish Captains' and Officers' Union, wrote to the Minister of Industry, Commerce and Shipping of the old government and to the association representing the Polish shipping companies urging that the suggested compensation should be paid to officers and crews in the event of the Polish merchant navy being taken over by the new government. On July 3, at a meeting between the Minister, the secretary of the Polish Captains' and Officers' Union, and Mr. Fliegel, the secretary of the Polish Seamen's Union, the Minister declared that, in exercise of the supreme management of the Polish merchant navy, he gave to any officers and men who should leave their ships on account of the change of government the right to compensation on an equal footing with the administrative staff of the shipping companies and civil servants. He then dictated a telegram which contained the substance of his declaration and which was to be sent to the captains of all ships of the Polish merchant navy, with a request, embodied in the telegram, that they should bring the contents thereof to the notice of their crews. On July 4 the curator of the defendant company agreed, under protest, to send the Minister's telegram to the captains of the company's ships, on July 5 it was sent, and on the same day it was received by the master of the *Morska Wola*, one of the company's ships, which was then lying at the Manchester end of the Ship Canal. On July 5 the Minister wrote to the curator formally directing him to pay the gratuity. The letter reached the curator's office on July 7, but as he was away at the time he did not receive it personally until July 10.

The first plaintiff, Jan Boguslawski, was an officer in the Polish merchant navy who had been serving in the *Morska Wola* at all material times. The second plaintiff, Stanislaw Krupka, was a seaman in the Polish merchant navy who joined the ship on July 4. Boguslawski was a member of the Captains' and Officers' Union and Krupka was a member of the Seamen's Union. The Minister's telegram was read to Boguslawski on July 5 and to Krupka on July 6. As from midnight on July 5/6 the British government ceased to recognise the old Polish government and recognised the Polish Provisional Government of National Unity, which had been set up in Poland on June 28, 1945, as the government of Poland. On account of the political situation, Krupka left his ship on July 7 and Boguslawski left it on July 11, 1945. In an action brought by them against the defendant company for payment of the compensation alleged to be due to them on their leaving the ship, they based their claims on (i) the agreement alleged to have been made on July 3 between the Minister acting on behalf of the defendant company, on the one side, and the representatives of the unions, acting on behalf of their individual members, on the other side, and, alternatively, on (ii) the offer contained in the telegram sent by the Minister on behalf of the defendant company on July 5 and accepted by the plaintiffs by their conduct in acting on it. The defendant company denied liability under Polish law, and further contended that the recognition by the British government of the new Polish government operated retroactively to June 28, 1945, and,

therefore, acts done by the old Polish government after that date would not be recognised by the British government as valid. FINNEMORE, J., found, inter alia, (i) that the Minister had power to make the alleged agreement on behalf of the defendant company, (ii) that the union officials had power to make the alleged agreement on behalf of the plaintiffs, or, if they had no such authority, they purported to do so, and the plaintiffs by leaving their ship ratified the agreement, and (iii) apart from the question of contract, the Minister had entered into a unilateral obligation on behalf of the defendants to pay the compensation claimed, and that obligation, being communicated to and accepted by the plaintiffs, became a bilateral enforceable obligation. The learned judge rejected the contention of the defendant company in regard to the retroactive effect of the recognition by the British government of the new Polish government, on the grounds (a) that the Polish merchant navy was not in the area over which the new government had control, and (b) that, as the certificate of the Foreign Secretary, which proved the fact of the recognition of the new government, expressly stated that the British government recognised the old government until midnight on July 5/6, 1945, acts done by the old government while it was still recognised must be valid, and, accordingly, the learned judge gave judgment for the plaintiffs. The defendant company appealed from his decision, and their appeal was dismissed by the Court of Appeal.

On an appeal by the company to the House of Lords from the order of the Court of Appeal, their Lordships decided the questions of Polish law in favour of the plaintiffs. This report deals only with the question of the retroactivity of the recognition of the new Polish government.

Pritt, Q.C., Scott Henderson, Q.C., and R. H. W. Dunn for the appellant company.

Elwes, Q.C., and N. MacDermot for the respondents.

The House took time for consideration.

July 11. The following opinions were read.

LORD PORTER stated the facts, agreed with the conclusions of fact at which FINNEMORE, J., arrived, and said: If, then, there had been no change of government, subject to one or two minor considerations, the respondents must have succeeded. But, undoubtedly, that change has a serious bearing on the position of the parties. In the first place, it is said that, though recognition of the new government only took place on July 5/6, 1945, yet that recognition harks back to the moment at which the new government is shown to have come into power as the established government of the country, and that moment is June 28, 1945. There cannot, it is submitted, be two governments of the same country at the same time, and from June 28 onwards the only lawful authority was that of the new government. It follows, it is contended, that Mr. Kwapinski was no longer minister or supreme controller of the appellant company or entitled to give any orders or make any contracts in its name after June 28. Admittedly, proof of recognition must depend on the production of a certificate from the Foreign Secretary of this country pronouncing the fact of recognition and the time at which it is granted. Its effect may, however, depend, at any rate to some extent, on its terms, and, therefore, it is desirable that it should be set out in full. It reads as follows:

“1. Up to and including midnight of July 5/6, 1945, His Majesty's government in the United Kingdom recognised the Polish government having its headquarters in London as being the government of Poland, and as from midnight of July 5/6, 1945, His Majesty's government in the United Kingdom recognised the Polish Provisional Government of National Unity as the government of Poland, and as from that date ceased to recognise the former Polish government having its headquarters in London as being the government of Poland. 2. On June 29, 1945, the following message to

the Prime Minister from the head of the said Polish Provisional Government of National Unity was handed by the Polish ambassador in Moscow to His Majesty's ambassador in Moscow: 'I have the honour to notify you that as a result of the understanding reached in Moscow between representatives of Warsaw Provisional Government and Polish democratic leaders invited from Poland and from abroad under the auspices of the Commission of Three set up at the Crimea Conference, the Provisional Polish Government of National Unity was formed this June 28 according to art. 45 of the constitution of Polish Republic, 1921. The Provisional Government of National Unity has realised in their entirety decisions of the Crimea Conference on the Polish question. At the same time I have the honour, in the name of the Provisional Government of National Unity, to approach His Majesty's government in the United Kingdom of Great Britain and Northern Ireland with a request for the establishment of diplomatic relations between our nations and for exchange of representatives with the rank of ambassadors'. 3. I am advised that the question of the retroactive effect of recognition of a government is a question of law for decision by the courts."

Two views of the effect of this certificate have been propounded to your Lordships. For the respondents it is argued that the certificate in plain terms specifies the moment at which the change of government took place. Up to the end of July 5, on this view, the old government was in power, thereafter the new. There is no scope for any argument as to the retroactive effect of an acknowledgment of change of government. On the other hand, the appellant company says that the certificate does not delineate the moment at which the British government recognised that one government had ceased to have authority and another had begun. It means only that at a particular moment the British government realised that the new government had come into power and recognised it as then having control, but said nothing as to when that control began except what is to be found in the statement contained in cl. 2. There is, it is true, no certificate of the British government to the effect that the new government was in de facto control of metropolitan Poland by June 28, but that circumstance seems to have been recognised. If it were not, there appears to be no reason for the insertion of cl. 2 or for the observation contained in cl. 3.

Though I am myself prepared to accept the view that the new government was the de facto government of metropolitan Poland from and after June 28, the question has yet to be answered whether it was at that time in control of Polish citizens elsewhere or of their ships wherever they might be. For the purposes of the present case, however, so wide a problem need not be considered. It is enough to ask whether between June 28 and July 6 the new government was in de facto control of the members of the old government then resident in London and then recognised as the de jure government of all Poland and of the ships and crews present in this country and elsewhere. Obviously, it was not exercising such control, but the argument presented on behalf of the appellant company maintains, as I understand it, that there can be here no question of divided control. The only Polish territory is that of metropolitan Poland and individual property or ships, whether in that country or elsewhere, are, therefore, subject to and subject only to the acknowledged government of that country. There cannot (it is said) be two governments of a single State. The proposition may in ordinary circumstances be true, but where a state of war exists it is not entirely accurate. After the old government reached this country, there were, in fact, two authorities to be taken account of even in metropolitan Poland: (i) the occupying German forces, and (ii) the old government which was recognised by this country as the de jure government of all Poland and of all Polish citizens and their property, and as the de jure and de facto authority over all Polish citizens, their property and ships outside Poland itself. It was, no doubt, an anomalous position, but the anomaly was due to the unprecedented position

under which recognition was granted to an exiled government centred in this country. Therefore, although I am prepared to accept that the recognition of the new government dates back to June 28 in Poland where that government had effective control, I am of opinion that that control did not extend to the old government or to the Polish merchant fleet and its personnel until July 6, 1945, from which date the old government accepted the change, as, indeed, it had to.

A A further suggestion was put forward, I think, for the first time in your Lordships' House, that, as the official seat of the Polish fleet is at Gdynia, the acting Polish government had from its inception control over the fleet and its members. The argument lacks substance. At best, it means no more than that between June 28 and July 6 the new government might have taken some steps which it could enforce in Gdynia. What it could have done was not suggested to your Lordships, but perhaps the simplest answer to this argument is that, in fact, it did nothing.

B The appellant company, however, puts forward the contention that, once the whole soil of Poland is shown to have been de facto controlled from June 28 by the new government, all its nationals owe allegiance to it from that date and their property is taken out of the control under which it formerly was held and became subject to the new government. It was not like a case where the territory is divided and one government controls one part and another the other part.

C On this question some light is thrown by *Guaranty Trust Co. v. United States* (1), an American decision, in which the result of the recognition of the Soviet Republic, sixteen years after it became de facto government of Russia, was discussed. The question there was whether notice of the repudiation of an obligation which had been transmitted to those representing the Kerensky government during the time at which it was recognised by the government of the United States of America was effective to bring into play a statute of limitations and so defeat the claim when ultimately presented by the Soviet government after it was recognised. It was admitted there, as it was here, that in the ordinary case recognition of a new government is retroactive to the time at which it is shown or acknowledged to have been in control, and for this the English decision in *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.* (2) was relied on, a decision which may now be reinforced by a reference to *Lazard Brothers & Co. v. Midland Bank, Ltd.* (3) and other cases. But that admission does not affect transactions carried through under the old regime. As was said by STONE, J. (304 U.S. 140), delivering the judgment of the Supreme Court of the United States of America, in *Guaranty Trust Co. v. United States* (1):

F "The argument . . . ignores the distinction between the effect of our recognition of a foreign government with respect to its acts within its own territory prior to recognition, and the effect upon previous transactions consummated here between its predecessor and our own nationals. The one operates only to validate to a limited extent acts of a de facto government which by virtue of the recognition, has become a government de jure. But it does not follow that recognition renders of no effect transactions here with a prior recognised government in conformity to the declared policy of our own government."

G It was suggested that that decision was limited to cases where the transaction took place with nationals of the recognising country. I can see no reason in principle why it should be so limited, and it must be remembered that for many years the Kerensky government had been but a shadow, whereas, in the case now under consideration, the old government had been active and both capable of controlling and in effective control of the Polish merchant fleet.

H Mr. Kwapinski was, in my view, still Minister of Industry, Commerce and Shipping. [HIS LORDSHIP then considered the Minister's powers in respect of the appellant company, and, after reading art. 2, art. 13 and art. 19 of the Polish Act of Mar. 30, 1939, art. 474 (2) of the Code of Obligations of the Polish State,

dated Oct. 27, 1933, and the relevant paragraphs of a Polish regulation, dated May 1, 1942, under which Mr. Plinius was appointed curator of the appellant company, HIS LORDSHIP came to the conclusion that there was no qualification on the Minister's powers except honesty, that under art. 19 of the Act of 1939 he was enabled to do anything that the company itself might do, and that there was no reason for limiting his authority to a state of actual warfare. After considering other questions of Polish law which he decided in favour of the respondents, HIS LORDSHIP held that the result of the meeting of July 3, 1945, was that the Minister, in his capacity as supreme manager of the appellant company, made an offer which he caused to be broadcast to each member of the crews and which they were free to accept by word or action; that, whether the acts of the respondents in leaving the ship were regarded as a ratification of the contract made on their behalf by the union leaders or as an individual acceptance of an offer made by the Minister on behalf of the appellant company, the result was the same in regard to the respondent, Boguslawski; and that, even if the Minister's declaration of July 3 originally comprehended only those actually in the service of the company on that date, the telegram which was sent on July 5 contained an offer which was never withdrawn, and which, therefore, was a valid offer when it reached the respondent, Krupka, on July 6 and was accepted by him on July 7. HIS LORDSHIP continued:] In reaching this conclusion I find myself in agreement with COHEN, L.J., in thinking that the offer made by Mr. Kwapinski remained in force, even if he had ceased to have authority to make it, from July 6 onwards. No doubt, the new government disapproved of it, but it never withdrew it, and the contention that it continued in force is supported by art. 66 of the Polish Code of Obligations. This offer, in my opinion, remained valid unless it was withdrawn, and, though I can find evidence of objection, I can find none of withdrawal. For these reasons, which, in spite of some variations, are substantially those entertained by the learned judge and the Court of Appeal, the appeal, in my opinion, fails and should be dismissed with costs.

LORD OAKSEY: My Lords, I agree that this appeal should be dismissed. I think that the judgment of FINNEMORE, J., was right. [HIS LORDSHIP considered certain questions of Polish law, which he decided in favour of the respondents, and continued:] I desire to add a few observations on the construction which should be placed on the certificate of the British Foreign Secretary. The appellant company's argument is that para. 2 of that certificate proves that the new Polish government was formed on June 28, 1945, and that the recognition of that government by the British government as from midnight of July 5/6, 1945, contained in para. 1 of the certificate, is, therefore, retroactive in all spheres to June 28, 1945. In my opinion, this construction of the certificate contradicts the express recognition of the old Polish government up to and including midnight of July 5/6, 1945, also contained in para. 1 of the certificate, and is, therefore, untenable. It is true that the recognition *de jure* by the British government of a foreign government may in certain circumstances have a retroactive effect over a period before the recognition. In the absence of any intimation from the Foreign Secretary of the length of that period or the sphere in which the retroactive effect of the recognition is to operate, it may be necessary for British courts to go into the facts on these matters. Each case must be decided on its own facts. The recognition of the two Polish governments with which your Lordships are concerned and the spheres in which those governments have exercised acts of sovereignty are not the same as those in other cases, such as those of Russia, Spain or Abyssinia. The old Polish government had exercised acts of sovereignty in England and on the high seas and elsewhere over Polish nationals and Polish ships from the time that that government came to England, and the recognition of that government in the Foreign Secretary's certificate was, in my opinion, a recognition of that sovereignty. Your Lordships are not

concerned with acts by the old Polish government, if there should be any, which trench on or conflict with the de facto sovereignty which may have been acquired by the new Polish government on its alleged formation on June 28, 1945. Nor is para. 2 of the certificate, even if read as recognising the fact of the formation of the new Polish government in Poland on June 28, 1945, a recognition that that government had sovereign powers outside Poland between June 28, 1945, and July 5/6, 1945. If it had been intended by the British government to put an end to the recognition of the old Polish government as from the alleged date of the formation of the new Polish government, the Foreign Secretary would, doubtless, have said so, but, on the contrary, he certified expressly that the British government recognised the old Polish government up to and including midnight on July 5/6, 1945.

There are two cases which, I think, support the view that retroactivity of recognition should be confined to spheres of de facto control. In *Banco de Bilbao v. Sancha* (4) General Franco's de facto control over Bilbao was held to oust the sovereignty of the Republican government, although at the material time the Republican government was recognised by the British government as the de jure government of the whole of Spain. Similarly, in the present case, even after the recognition of the new government as the de jure government of Poland, that government would not have had sovereign powers over Polish nationals in England if the old government had been still recognised as de facto in control of Polish nationals in England. And in *Guaranty Trust Co. v. United States* (1) the Supreme Court of the United States held (304 U.S. 140) that the retroactive effect of the recognition of the Soviet government by the United States government in 1933 did not extend to transactions which the provisional government of Russia had entered into with United States nationals within the United States. It is true that the decision was, in part, based on the fact that the transactions had been entered into by the provisional government with United States nationals, but it was also based on the fact that the transactions had been entered into in the territory of the United States in which the provisional government was recognised by the United States as a sovereign government and in which at the time the Soviet government enjoyed neither control nor recognition. I agree, therefore, that the appeal should be dismissed.

LORD MORTON OF HENRYTON: My Lords, in response to a request by the parties to this action, a certificate was issued by the Foreign Office and signed by the then Foreign Secretary. [HIS LORDSHIP read the certificate, and continued:] The first question which arises on this appeal is the construction and effect of this certificate, and this is a question of English law. The document must, of course, be read as a whole, but, in my view, para. 1 contains three simple and unambiguous statements. If the Foreign Secretary had certified merely that His Majesty's government recognised the Polish Provisional Government of National Unity as the government of Poland, the recognition might well have a retroactive effect, and to ascertain the date from which such recognition became effective, it would be necessary for the court to go into past history and ascertain the date on which that provisional government acquired effective control of Poland. It seems to me, however, that no principle of retroactivity can come into operation in the case of a certificate in the terms of para. 1, which states in precise terms the moment "as from" which the new government became the recognised government of Poland. As I read the document, the Foreign Secretary has been at pains to exclude any possible retroactive effect by stating (i) that up to a particular moment of time His Majesty's government recognised the old Polish government as being the government of Poland, (ii) that *as from* that moment of time His Majesty's government recognised the new Polish government as the government of Poland, and (iii) that *as from* that moment it ceased to recognise the old Polish government. The formula employed in para. 1 differs in this respect from all the other Foreign Office certificates set out in the cases

to which your Lordships were referred. The formula seems to me a most convenient one and I see no reason to doubt that it was deliberately adopted in the present case. It fixes, once and for all, the moment at which the change over took place, in the eyes of His Majesty's government.

I have carefully considered whether para. 2 and para. 3 of the certificate should lead me to form a different view as to the construction of para. 1, but I see no ambiguity in para. 1 and the following two paragraphs do not, in my view, raise any doubt as to its meaning. Paragraph 2 contains merely a statement of fact, viz., that on June 29, 1945, a message to the Prime Minister from the head of the Provisional Polish Government of National Unity, the terms of which are set out, was handed by the Polish ambassador in Moscow to His Majesty's ambassador in Moscow. The paragraph contains no comment on the contents of that letter. If the Foreign Secretary had intended to convey to the parties to these proceedings a statement that the new government was effectively in control of any particular tract of country on June 28, 1945, I cannot believe that he would have taken this method of conveying it to the parties. I have no doubt that this certificate was carefully worded, with due regard to the purpose for which it was given, and I think that para. 2 means exactly what it says and no more. Paragraph 3 is merely a statement of advice which has been given to the Foreign Secretary. I cannot see that it throws any light on the meaning of para. 1. It was strenuously contended by counsel for the appellant company that para. 2 and para. 3 must have been put in for some purpose and that they serve no useful purpose whatsoever unless they are intended to qualify in some way the meaning which would otherwise attach to para. 1. I would agree that there seems no very good reason for the insertion of these two paragraphs, but in my view, if the Foreign Secretary had intended to qualify in some way the statements made in para. 1, he would not have done it by this extremely round-about and obscure method. I can only suppose that it was thought well that the parties should have the information conveyed by para. 2, while para. 3 would appear to have been inserted, *ex abundanti cautela*, to remove any idea that the Foreign Secretary was purporting to decide a question of law.

If I am right so far, there can be no doubt that up till midnight of July 5/6, 1945, so far as the courts of this country are concerned, Mr. Kwapinski continued to hold his office as Minister. This being so, the appellant company continued to be under his "supreme management" and the board of management of that company continued to be his "executive organ" up to the same point of time. On this footing, I am satisfied that the respondents are entitled to the sums which they claim, for the reasons which are about to be stated by my noble and learned friend LORD TUCKER. I agree that this appeal should be dismissed.

LORD REID: My Lords, the case for the respondents depends, in the first place, on the courts of this country being still entitled to recognise as valid acts done in London on July 3, 1945, by Mr. Kwapinski as Minister of Industry, Commerce and Shipping in the Polish government. The essential facts which give rise to this question can be shortly stated. Early in the war the Polish government had to leave Poland. After a time it came to London where it remained until the summer of 1945. Throughout this period it was recognised by the British government as the government of Poland and it exercised sovereign powers over Polish subjects who were outside enemy-occupied territory. By virtue of pre-war Polish legislation and decrees made by it during the war it had certain powers with regard to the Polish merchant navy and this case is concerned with the exercise of those powers by Mr. Kwapinski, as a Minister of that government, over the appellant company which is a Polish shipping company. There is no doubt that the Polish government in London in fact continued to exercise its powers until midnight of July 5/6, and that thereafter it ceased to be recognised by the British government as the government of Poland and ceased to act as a government. From that time onwards the British

government recognised as the government of Poland a new Polish government which had been set up in Poland. It is said that this new government was established in Poland on June 28 and that thereafter it exercised sovereign powers in Poland. But it did not and could not exercise any powers in Britain before it was recognised by the British government.

A The argument for the appellant company is that it is a general principle of our law that the recognition of a new government of a foreign country is retrospective and dates back to the time when that new government was first established, even though at that time the new government was not, in fact, in a position to exercise sovereign powers over all the subjects of that country. It is said that the British government could not simultaneously recognise two different governments as the government of Poland, and, therefore, if the recognition of the new government has to be dated back, so also must the de-recognition (if I may use the word) of the old government be dated back to the same time. B The period between the establishment of the new government in Poland and its recognition by the British government has been conveniently called the twilight period, and the argument of the appellant company is that, because our recognition of the new government must be dated back to the beginning of the twilight period, therefore our recognition of the old government must now C be held by our courts to have been withdrawn from the beginning of that period, with the result that acts of Ministers of the old Polish government in this country during the twilight period must now be held to have been invalid and incapable of creating rights which the courts of this country can enforce. This appears to me to be a startling proposition and, indeed, the appellant company does not D seek to carry it to its logical conclusion. It says that an exception has been recognised in the United States of America: see *Guaranty Trust Co. v. United States* (1); that this exception, though far reaching, is based, not on principle, but on convenience; that this exception might well be recognised in this country also; but that if it were it would not avail the respondents in this case. I shall have to return to this matter and I shall only say at this stage that, if it is found E that a principle cannot be applied without the introduction of an anomalous and far reaching exception, one may be inclined to doubt the soundness of the principle.

The respondents' answer is two-fold. They admit that there is a general principle that recognition of a new foreign government is in certain respects retrospective, but they say, in the first place, that the form of the British government's recognition of the new Polish government in this case was such as to F exclude that principle, and, secondly, they say that the principle is much narrower than that put forward by the appellant company and that the *Guaranty Trust* case (1) is not an exception to the principle but an example of its application. They say that the principle does not involve any antedating of the withdrawal of the recognition of the old government. The first argument for the respondents G depends on the true meaning and effect of the certificate given by the Secretary of State for Foreign Affairs in connection with this case. Such a certificate is conclusive at least to this extent. The courts of this country are bound to recognise as the government of a foreign country a government which has been recognised by the British government, and cannot recognise any government H which has not been so recognised, and, where recognition has been withdrawn by the British government from one government and accorded to another, our courts are bound to accept as facts statements of the British government with regard to that change. I need not consider whether our courts are always bound to accept every statement in a Foreign Office certificate, no matter what it may be, because there is no suggestion that there is anything in this certificate which should not be accepted. But a certificate, like any other document, must be interpreted by the court to find out what it means.

This certificate contains three paragraphs. [His LORDSHIP read para. 1 of the certificate, and continued:] If this paragraph stood by itself, I should be inclined to think that it was intended to exclude any retrospective effect of the change of recognition. The certificate does not state that the new government was recognised at midnight of July 5/6. It states that it was recognised "as from midnight", and the certificate does not merely state as a historical fact that the old government was recognised up to that time: it goes on to state that "as from that date" the British government ceased to recognise the old government. This appears to me to imply that the British government still recognise that the old government was the government of Poland up to that date and to be inconsistent with any intention that the withdrawal of recognition should be in any way retrospective. But para. 1 does not stand alone. In para. 2 a message from the new Polish government is quoted in which the head of that government states that it was formed on June 28. I cannot see what the purpose of the Secretary of State could be in quoting this message if he thought that the recognition of the new government had no retrospective effect. And para. 3 seems to make it impossible to suppose that the Secretary of State intended to prevent any retrospective effect, because he said, in that paragraph, that he was advised

"... that the question of the retroactive effect of recognition of a government is a question of law for decision by the courts."

I find the interpretation of the certificate taken as a whole to be a matter of considerable difficulty, but one thing, I think, is clear. Whether or not it puts the respondents in a better position than they would be in if the certificate were in more general terms, it certainly does not put them in a worse position. So I shall assume that the certificate was not intended to modify and does not modify the general principle of the retroactivity of recognition, and I shall proceed to consider what this is. If the respondents can succeed on this issue, then it will be unnecessary to determine the precise meaning of the certificate or what effect it would have if it were intended to modify the general principle.

There is ample authority for the proposition that the recognition by the British government of a new government of a foreign country has, at least, this effect. It enables and requires the courts of this country to regard as valid not only acts done by the new government after its recognition but also acts done by it before its recognition in so far as those acts related to matters under its control at the time when the acts were done. But there appears to be no English authority which goes beyond that. I do not accept the argument for the appellant company that this necessarily or logically involves antedating for all purposes the withdrawal of the recognition of the old government. I do not see anything strange or even difficult in our saying that we still recognise that the old government was the government of Poland up to midnight of July 5/6, but that we also now accept the validity of certain acts done by the new government before that time and while it was still unrecognised by us. Apart from the distinction between recognition *de jure* and recognition *de facto*, which does not affect this case, we cannot recognise two different governments of the same country at the same time, and the British government did not, in fact, recognise both the old and the new government at the same time. But I do not think that it is inconsistent with this principle to say that the recognition of the new government has certain retroactive effects, but that the recognition of the old government remains effective down to the date when it was in fact withdrawn. I can see that there might be difficulties if the old government had purported before withdrawal of recognition to take some action with regard to matters already under the control of the new government, but that does not arise in this case.

Counsel for the appellant company criticised views expressed in the Court of Appeal that the acts of the old government are valid at any rate unless and until the new government rescinds or repudiates them, and argued that this was a

novel and unsound doctrine. There are, however, many legislative or administrative acts of a government which its successor can undo or nullify in one way or another. I doubt whether more was intended than that there might be cases in which the new government could do this. If it was intended to suggest that acts of the old government, which could not have been repudiated or rescinded if they had been done before the twilight period, can be repudiated or rescinded simply because they were done during the twilight period, although relating to matters still under the control of the old government, then I see no reason why that should be so. But it is unnecessary to decide that, because there is no evidence that the new government made any attempt to nullify the acts of the old government on which the respondents rely. I ought also to notice another argument for the appellant company. The domicile of the company is in Gdynia and it is said that the affairs of the company must be regulated by the law for the time being in force there; that on July 3, 1945, Gdynia was under the control of the new Polish government; and that the old government had no authority there. The short answer to that argument is that there is no evidence that the new government was in control of Gdynia on July 3, but apart from that I think that the argument is unsound. The respondents do not rely on any articles of association or statutes of the appellant company as conferring powers on the Minister. They rely on powers conferred on the Polish government by Polish legislation and the government entitled to operate such powers in London on July 3 was the government which was then recognised as the government of Poland by the British government.

I have derived much assistance from the judgment of the Supreme Court of the United States in the *Guaranty Trust* case (1) and I do not think that anything that I have said is in conflict with any part of it. The appellant company founds on this sentence in that judgment (304 U.S. 140):

“The argument thus ignores the distinction between the effect of our recognition of a foreign government with respect to its acts within its own territory prior to recognition, and the effect upon previous transactions consummated here between its predecessor and our own nationals.”

They fasten on the words “transactions consummated” and “our own nationals”, and argue that, if the transaction with the old government had not reached the stage at which it could be said to have been consummated, or if the transaction was not between the old government and a British subject but was between the old government and a Polish subject, then it was not within the ratio decidendi of the *Guaranty Trust* case (1). I do not so read that judgment. It appears to me that those words were used because they fitted the facts of that case and the real distinction stated in the sentence which I have quoted seems to me to be between acts of the new government “within its own territory prior to recognition” and transactions by the old government “here” while it was still recognised. So reading the judgment, I am in complete agreement with it. It follows that Mr. Kwapinski’s acts on July 3, 1945, are no less valid than they would have been if done before the beginning of the twilight period.

[HIS LORDSHIP then considered the extent of Mr. Kwapinski’s powers, as Minister, over the appellant company, and held that, under art. 19 of the Polish Act of 1939, the Minister was entitled to make a contract which bound the company. After reviewing the events which led up to the meeting of July 3, 1945, and the evidence in regard to that meeting, LORD REID said that he agreed with the findings of FINNEMORE, J. HIS LORDSHIP held that the Minister, acting for the shipping companies, made a contract with the unions’ representatives, acting for those of their members who were then employed by those companies, by which the appellant company became bound to pay compensation to those of its crews who were in its service on July 3 and who chose to leave its service on account of the situation created by the change of government, and that the telegram was intended to inform the crews of this arrangement. HIS LORDSHIP

continued:] On this view, the agreement did not cover the respondent, Krupka, because he only joined the appellant company's ship after the agreement had been made. He left on learning of the telegram, and he can only succeed if the telegram, though primarily a notification to the crews of the agreement, can also be read as a new and independent offer to persons not covered by the agreement. There are several matters about Krupka's case about which I still have some doubt, but, as we were informed that none of the cases still outstanding resembles Krupka's case, I do not think that it would be useful if I pursued this matter. I, therefore, agree with your Lordships that this appeal should be dismissed.

LORD TUCKER: My Lords, I am in complete agreement with the views expressed by my noble and learned friend on the Woolsack with regard to the interpretation and effect of the Foreign Secretary's certificate concerning the recognition by His late Majesty's government of the new Polish government.

The other issues in the case have throughout been assumed to depend on Polish law and I am content to deal with them on this basis without thereby expressing any opinion as to the correctness or otherwise of this assumption. They are, accordingly, questions of fact and have been most fully and carefully dealt with by the trial judge who had the advantage of seeing and hearing the expert and other witnesses. I accept his conclusions, but venture to think they require to be supplemented with regard to the claim by the respondent, Krupka. So far as Boguslawski is concerned, his claim was held to be justified on the basis of an agreement made on July 3, 1945, by Kwapinski on behalf of the appellant company with the representatives of the unions concerned. This agreement must, I think, having regard to the evidence and conduct of the trial, be regarded as covering only those members of the unions who were serving in Polish ships on that date. Krupka was not serving in a ship on July 3 and, therefore, was not covered by that agreement. He is none the less, in my opinion, entitled to recover. Kwapinski caused a telegram to be sent out and read to the members of the crews. He did this as the authorised agent of the appellant company, whose existence and legal status has never varied throughout. The telegram was read by a ship's officer in accordance with the instructions contained therein. Its terms covered all the members of the crew, including Krupka, who heard it. It is immaterial that, by the date when it was read, Kwapinski had ceased to represent the company. The offer, when made, was the offer of the company, and it was never withdrawn before Krupka accepted it by leaving the ship. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Constant & Constant* (for the appellant company); *Hilder, Thompson & Dunn* (for the respondents).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

Re J. BIBBY & SONS, LTD., PENSIONS TRUST DEED.
DAVIES v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Harman, J.), July 9, 10, 1952.]

Estate Duty—Passing—Property deemed to pass—Pension to widow of employee—Discretion of trustees—“Property”—“Beneficial interest”—“Purchased or provided”—Finance Act, 1894 (c. 30), s. 2 (1) (d).

A *Succession Duty—Succession—“Beneficially entitled”—Pension granted to employee’s widow—No enforceable right to pension—Succession Duty Act, 1853 (c. 51), s. 2.*

B In 1898 A. entered the employment of a firm which was subsequently incorporated as a company with limited liability. In 1924 the company adopted a pension scheme which was created by an indenture made between the company and some of its directors who were designated trustees. The scheme was non-contributory, and the pensions fund was to consist of £60,000 provided by the company and such further sums as the company should thereafter provide. The fund was vested in the trustees, and was stated to be “primarily established for the benefit of retired employees of the company and its predecessors in business whose character and length of service may in the judgment of the trustees entitle them to claims upon it.” The trustees were to have an absolute and uncontrolled discretion in the exercise of the powers conferred on them. Rules for the administration of the fund were scheduled to the deed, and referred to employees being or becoming “entitled” to pensions. The rules also provided for the amount of the pensions to be granted. The trustees had the power to reduce or suspend a pension for misconduct. In 1931 an amendment to the deed of 1924 provided for the inclusion of widows and children as objects of the pension fund. In 1942 A. died, and his widow was granted a pension. The Crown claimed estate duty under the Finance Act, 1894, s. 2 (1) (d), and succession duty under the Succession Duty Act, 1853, s. 2.

E HELD: (i) on the true construction of the deed of 1924 (as amended), the benefits were entirely in the discretion of the trustees, and, therefore, the pension was not “property” within s. 2 of the Act of 1894; the widow had no “beneficial interest” within s. 2 (1) (d) since she had no enforceable right to the pension, nor was any interest “purchased or provided” by A., the pension being a gratuitous provision by the company without any bargain or agreement between the company and A.; and, therefore, no estate duty was exigible.

F *Re Miller’s Agreement* ([1947] 2 All E.R. 78), applied.

(ii) the widow did not become “beneficially entitled to any property or the income thereof” on A.’s death within s. 2 of the Act of 1853, because she had no beneficial interest, and, therefore, no succession arose on A.’s death and no succession duty was payable.

G AS TO INTERESTS ARISING ON DEATH, see HALSBURY, Hailsham Edn., Vol. 13, p. 242, para. 233; and FOR CASES, see DIGEST, Vol. 21, pp. 15, 16, Nos. 73-80.

AS TO SUCCESSIONS UNDER DISPOSITIONS, see HALSBURY, Hailsham Edn., Vol. 13, p. 349, para. 383; and FOR CASES, see DIGEST, Vol. 21, pp. 84-86, Nos. 601-623.

H Case referred to:

(1) *Re Miller’s Agreement*, [1947] 2 All E.R. 78; [1947] Ch. 615; [1948] L.J.R. 567; 177 L.T. 129; 2nd Digest Supp.

ADJOURNED SUMMONS to determine whether the plaintiff (the widow of a deceased employee of J. Bibby & Sons, Ltd.), to whom a pension had been paid by trustees under a pension scheme constituted by the said company, was liable for estate duty and succession duty in respect of the pension under the

Finance Act, 1894, s. 2 (1) (d), and the Succession Duty Act, 1853, s. 2, respectively.

Cyril King, Q.C., and *F. N. Bucher* for the plaintiff, the taxpayer.

Sir Lynn Ungood-Thomas, Q.C., *J. H. Stamp* and *J. P. F. E. Warner* for the Crown.

HARMAN, J.: The husband of the plaintiff entered the employment of J. Bibby & Sons, Ltd., in 1898. That firm had existed for a number of years, and its business prior to its incorporation as a limited liability company had been carried on under the name of J. Bibby & Sons. James Davies, the plaintiff's husband, remained in the company's employment from 1898 until his death in 1942. In 1924, when he had already been in the company's employ for a quarter of a century, the company adopted a pension scheme. It was not a contributory scheme which called for any kind of assent by any employee or any kind of payment by any employee either new or old. It was the kind of scheme which at that time many big firms adopted as a way of regulating what had been before the unregulated practice of more or less bounty with which good employers rewarded the services of faithful employees and their widows. In order to put that on a sounder basis and also for certain fiscal reasons this kind of scheme became at that time a popular feature in the commercial world.

The indenture creating the scheme was made on Dec. 19, 1924, between the firm and a number of the directors, many of whom bear the name of Bibby, and recited that the company was

"desirous of establishing a pension fund for the benefit and assistance of its employees and the wives and children of and other persons dependent upon its employees."

"Employees" included by definition employees of the former unlimited partnership as well as of the company which was a party to the deed. The parties to the deed, of the second part, are called the trustees, and that term is to include anybody appointed to that office. Clause 2 established what is called the pensions fund. Clause 3 provided that the pensions fund should consist in the first place of £60,000 cash provided by the company and of such further money as the company should thereafter contribute. That, by cl. 4, was to be vested in the trustees, and by cl. 6 it was stated that the company proposed to contribute every year thereafter £15,000 or such sum, if any, as the company might determine, but the company was not to be bound to make any contribution at all. In other words, it was purely an act of bounty on the company's part from beginning to end. Nevertheless, of course, bounty may create rights in other people just as well as contract may create rights, and it does not end the matter that this was not a contract, nor a matter of bargain in the first place. Clause 7 is in these terms:

"The fund is primarily established for the benefit of retired employees of the company and its predecessors in business whose character and length of service may in the judgment of the trustees entitle them to claims upon it."

Those were the original classes of beneficiaries. Their wives and children were added by the amendment made in 1931 to which I refer below. Clause 9 provided that the fund should be administered according to the rules set out in sched. II and it went on in these terms:

"... the trustees shall nevertheless have an absolute and uncontrolled discretion in the exercise of the powers conferred upon them and may exercise the same from time to time and at any time."

Then it provided for an alteration of the rules by resolution of the trustees and the clause ended:

"... nothing in this clause contained shall confer upon the trustees any power to make such alterations or amendments of the rules or any of them

as shall or may divert the fund from the main purposes specified in cl. 7 of these presents."

Clause 10 entitled the company under its seal to alter the deed itself, but there again it is provided that "... no alteration shall be made which shall or may divert the fund from the main purposes specified in cl. 7". There is a provision in cl. 13 for winding-up the fund after the company ceases to make contributions, A or if it becomes for some other reason impossible to continue the trust, and it is provided that the fund shall be distributed among the employees of the company as an arbitrator shall decide. Subject to that, the scheme is to continue for a period which was designed to be within the limits of the rule against perpetuities.

When I look at the rules I find in various of them the word "entitled". Employees are spoken of as being entitled to pensions. The widows are spoken B of as being entitled to pensions and the amount of the pensions is regulated by certain rules laid down as to the length of service of the employee and the length of time he had been married to the woman he leaves as his widow, the age of the children, and so forth, and anybody looking at the rules will be able to assess the amount of his pension, if he gets one. When I look further into the rules, I find that there are a number of elaborate provisions about the length of C service. There is a provision, for instance, that if the employee's salary is over £500 it shall be deemed, for the purpose of calculating the pension, to be £500. There is a provision that bonus shall not count as part of salary. There is a provision for a reduction when the wife is ten years younger than the employee. There is a provision for reduction when the government grants a pension, and D there is a duty on the employee under r. 9 to satisfy the trustees about his circumstances and a duty on the trustees under r. 10 yearly to review the pensions and adjust them, i.e., to increase or reduce them according to the alterations in the standard rates of wages in force at the time or, indeed, in accordance with what the finances of the fund can bear. There is then a provision that no pension shall be assigned, and there is a right to the trustees at any time to reduce or suspend a pension on the ground of misconduct on the part of the recipient. E The trustees may summon before them any person or persons claiming or entitled to pensions from the fund and call for such information as they may require for the purpose of determining the eligibility of the claimants and assessing the pension to be paid, and wilful refusal or neglect to attend when summoned or failure to supply such information entitles the trustees to cancel, suspend, or reduce any pensions otherwise payable to the person or persons so refusing or F neglecting to attend.

In 1931 a new class was introduced into this pension scheme and it is into that class that the plaintiff comes. Clause 7, which is the main object of the fund, had these words added to it: "and for the benefit of their widows and children from the death of such employee". That was an alteration which, though it did not offend by diverting the fund from its main objects, viz., employees or G ex-employees, did, of course, very much widen the possible objects of the fund and reduce, therefore, the chances that the existing pensioners might get higher rates of pension which the state of the fund for the time being might be able to afford them.

Shortly after the death of the workman, his widow, the plaintiff, was granted a pension. She was granted it at so much a month in the first place, £19 or so, H and that has been increased from time to time until in January, 1950, it was raised to £36 19s. The Crown has, apparently, made no claim between 1942 and the present time to any duty in respect of this pension, but the claim has been made now. It is not urged on me that the demand is too stale, and the question is whether the plaintiff, as pensioner of the fund, is liable to either of the duties hereafter mentioned in respect of her pension, viz., estate duty under the Finance Act, 1894, s. 2 (1) (d), or succession duty under the Succession Duty Act, 1853, s. 2.

I look, therefore, first to s. 2 (1) (d) of the Act of 1894. The property which is here alleged to pass is an annuity, viz., the yearly pension

“ . . . purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest . . . arising . . . on the death of the deceased.”

The Crown argues that the pension to which this widow is entitled subject to the discretion of the trustees to withdraw it in certain contingencies as, for instance, for misconduct, is an item of property which accrued on the death of the deceased and she has a beneficial interest in it. Moreover, it is said, the annuity was provided by the deceased in the sense that, but for the fact that he was the workman of the company over his years of service, there would have been no pension for his widow. The taxpayer's answer to that is, first of all, that this is not property at all but a mere *spes* or hope of getting something, and secondly, even if it is a species of property, it is not provided by the deceased. The taxpayer says that the whole of the annuity is provided by the providers of the fund, and the deceased did not pay a penny. His work may have been the *causa sine qua non* of the granting of the pension, but not the *causa causans*. The essential provider is he who provides the money. The dead man provided nothing, nor did he bargain that anything should be provided because he had already fulfilled the necessary ten years before there ever was a pension scheme and there is no evidence that he or the company ever changed either of their positions on the strength of this voluntary offer which the company made. Thirdly, says the taxpayer, that which accrued on the death of the deceased to his widow was not a beneficial interest in property because it was nothing which the court would protect as such.

When I read the deed, without travelling outside it and looking at the fact, for instance, that everybody knows that a good employer will not see the widow of his faithful employee left in the street with nothing, I can only come to the conclusion that this is a purely discretionary trust deed. It is true it is a trust, but it is a trust under which, so far as any employee is concerned, it seems to me the trustees have an absolute discretion either to give or to withhold a pension according to their views of the desirability of paying it. They are not bound, I think, to give any reason, nor bound to do anything but honestly consider the merits of the plaintiff's case. It is true that the plaintiff, perhaps by herself or it may be, in a representation action, might come to the court for this much assistance, that she could prevent the trustees from embezzling the fund or paying it back to the company and thereby defeating what is called the main object created by cl. 7 of the deed. The whole matter is there. It is not “Who have claims upon it?” but “Who in the judgment of the trustees have claims upon it?”, and the added words about widows and children seem to me exactly in *pari materia* for this purpose. Every person wanting a share in this fund must submit himself or herself to the judgment of the trustees, and, if there was a threatened diversion of the money so that the trustees could not perform their part of that function I conceive the Court of Chancery might protect the fund, or might even administer it by way of scheme, but it would still remain *vis-à-vis* any one widow or any one ex-employee or child of an ex-employee completely discretionary in the trustees either to withhold or to give any moneys at all.

If that is right, it does not seem to me that this is property in the sense of the Finance Act, 1894, s. 2, nor is it, I think, in the sense that I must look at it in this case, a beneficial interest arising. In *Re Miller's Agreement* (1) WYNN-PARRY, J., had to deal with a case of three daughters of a deceased man who were in receipt, or might be in receipt, of annuities for their lives under covenants made by the deceased's partners with him. There was no trust in that case, and, therefore, it is not quite the same as this case. WYNN-PARRY, J., deals with this point about beneficial interest and says ([1947] 2 All E.R. 80):

“Did any beneficial interest, within the meaning of that phrase as used

in the section, accrue to the plaintiffs on the death of Mr. Noad ? In my view, the word 'interest' in the sub-section means such an interest in property as would be protected in a court of law or equity."

A He says that the interest of the daughters was not such an interest. It was argued before me that because, it may be, the court would interfere to protect this fund against an embezzler, therefore the plaintiff has an interest which would be protected in a court of equity and must come within the section. I think that is not right. I think any one person has himself or herself as an individual no rights at all although all together they have rights in the fund which may not be diverted from one purpose to another. They have a right to be considered as an object of the trustees' bounty. That is not a species of property which, in my judgment, is something which the Act can be said to B deal with. Accordingly, in my judgment, this is not a case which falls within the Finance Act, 1894, s. 2 (1) (d).

C I would add, if it be necessary, that, in my judgment, this annuity, if it be an annuity and if the interest of the plaintiff be a beneficial one, is not an annuity provided or purchased by the deceased. Certainly it is not purchased, because he did nothing to purchase it. He made no bargain, and he did not come into the company's employment under the promise, express or implied, of a pension. He had, as I say, satisfied all the conditions of the pension deed before the deed was ever in existence, and there is no evidence that he ever changed his position thereafter or stayed longer or did more work or got less pay because of the existence of the deed. It is said, however, that he provided the pension because he was, as I say, the sine qua non of its payment. That does not seem to D me to be enough. It seems to me that the person who provided it was the company. They put up all the money and through their agents, the trustees, might or might not distribute it to certain persons who were the objects of the company's bounty. Therefore, I hold also that the deceased did not provide the pension.

E The Succession Duty Act, 1853, s. 2, provides that in order to constitute a succession there must have been a "disposition of property", and there has been a disposition of property here, undoubtedly. The company has disposed of £60,000 plus £15,000 a year in favour of the trustees. That is, no doubt, a disposition of property. The section provides :

F "Every . . . disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person . . . shall be deemed . . . to confer . . . a succession . . ."

G No doubt, on the death of a person, viz., her husband, the plaintiff started to receive this pension. Did she then become beneficially entitled to the income of some part of the property for that reason ? In my judgment, no, for the same reason that it was not a beneficial interest that she took within the meaning of s. 2 (1) (d). Consequently, I hold that s. 2 of the Act of 1853 does not apply and succession duty is not payable.

Order accordingly.

Solicitors: *Jaques & Co.*, agents for *Dodds, Ashcroft & Cook*, Liverpool (for the plaintiff); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

CRAWLEY v. PARSONS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Slade, J.J.), July 21, 1952.]

Shipping—Fishing boat—Seaman—Substitute—Oral engagement—Fishing boat's running agreement not signed—Refusal to proceed to sea—Merchant Shipping Act, 1894 (c. 60), s. 376 (1) (b), (d), s. 401 (3).

On Oct. 1, 1951, a seaman was engaged to serve in a trawler as a substitute for a cook who had signed the fishing boat's running agreement (the trawler being a fishing boat to which Part IV of the Merchant Shipping Act, 1894, applied), and he was ordered to proceed on board on the morning of Oct. 3 and to sail with the trawler, but the fishing boat's agreement was not read to or signed by him. On Oct. 3 he refused to sail or to sign the agreement. On his offering to sail later, he was ordered to join the ship on the following morning, but again he failed to do so. He was charged (i) with an offence against s. 376 (1) (b) of the Act of 1894, in that, being lawfully engaged to serve as a cook in the trawler, he had refused without reasonable cause to proceed to sea with her, and (ii) with an offence against s. 376 (1) (d), in that, in the same circumstances, he had wilfully disobeyed a lawful command, viz., to proceed to sea with the trawler.

HELD: when the seaman was engaged to act as a substitute cook, there was a lawful engagement between him and the shipowner, there being no statutory requirement that the engagement of a seaman should be in writing, and, therefore, he could have been prosecuted for refusing to join the trawler; the effect of s. 401 (3) was merely that, if a fishing boat put to sea before the agreement had been signed by a substitute who had been engaged in the place of a seaman who had signed the agreement, the skipper would not be guilty of an offence against s. 399 (1) of the Act and liable to a penalty under s. 399 (2), provided that he caused the agreement to be read to and signed by the substitute as soon afterwards as possible; the sub-section did not compel a substitute to proceed to sea notwithstanding the fact that he had not signed the agreement; and, therefore, the seaman was not guilty of the offences with which he was charged.

Dictum of DARLING, J., in *Haws v. Brown* (87 L.J.K.B. 125), applied.

FOR THE MERCHANT SHIPPING ACT, 1894, s. 376, s. 399, s. 400 and s. 401, see HALSBURY'S STATUTES, Second Edn., Vol. 23, pp. 590, 603 and 604.

Cases referred to:

- (1) *Haws v. Brown*, (1917), 87 L.J.K.B. 124; 117 L.T. 408; 81 J.P. 300; 41 Digest 249, 892.
- (2) *Vickerson v. Crowe*, [1914] 1 K.B. 462; 83 L.J.K.B. 469; 110 L.T. 425; 78 J.P. 88; 41 Digest 252, 934.
- (3) *Re Great Eastern S.S. Co., Williams' Claim*, (1885), 53 L.T. 594; 41 Digest 241, 809.

CASE STATED by Cardiff justices.

The appellant was employed by Neale and West, Ltd., as a ship's husband, and on Oct. 1, 1951, the respondent applied to him, at his office in Cardiff, for employment as a cook in trawlers belonging to the company. There being, at the time, no vacancy for a cook, the respondent was engaged by the appellant for shore work. Later that day a vacancy for a cook occurred in the Yashima, a steam trawler owned by the company, the appellant informed the respondent that he required a substitute and offered to appoint him as the substitute, and the offer was accepted. The appellant then informed the respondent that the trawler would be sailing on the morning of Oct. 3 from the West Dock Basin, Cardiff, and ordered him to proceed on board and to sail with her. The Yashima was a fishing boat to which Part IV of the Merchant Shipping Act, 1894, applied.

As the fishing boat's running agreement was not available at the time, it was not read to or signed by the respondent, and he was not informed of the terms and conditions on which he was to sail in the capacity of cook. On Oct. 2, when the appellant had access to the agreement, the respondent could not be found. On the morning of Oct. 3 the crew, with the exception of the respondent, assembled on board the trawler. A car was sent to fetch the respondent, who came to the trawler with his bag, but said that owing to drink he was not in a condition to sail. He refused to sign the running agreement, but said that he was prepared to sail that night. Owing to his refusal to sail, the trawler missed the morning's tide and arrangements were made for her to sail on the morning tide of Oct. 4. The respondent was ordered by the appellant to join the trawler and to sail at that time, and he agreed to do so. Later on Oct. 3 he went to the company's head office and was paid £1 by the cashier as an advance of wages. On the following morning he again failed to join the trawler, but promised the appellant, in the evening, that he would sail on Oct. 5. He again failed to appear, but later in the day he promised that he would join the trawler on Oct. 6. He did not do so. On Nov. 19, 1951, at a court of summary jurisdiction sitting at Cardiff, the appellant preferred four informations against the respondent, under the Merchant Shipping Act, 1894, charging him (i) with having wilfully disobeyed a lawful command, viz., to proceed to sea on Oct. 3, 1951, while he was lawfully engaged to serve as cook in the trawler, contrary to s. 376 (1) (d) of the Act; (ii) with having, without reasonable cause, on the same day and in the same circumstances, refused to proceed to sea with the trawler, contrary to s. 376 (1) (b) of the Act; and with similar offences alleged to have been committed on the following day. The appellant contended inter alia (a) that the respondent was lawfully engaged to serve in the trawler notwithstanding the fact that he had not signed the fishing boat's running agreement, there being a binding contract which did not offend against the Act of 1894 and on which the respondent could have sued for damages had it been broken by the shipowners, and (b) that, the respondent having been engaged as a substitute, s. 401 (3) of the Act of 1894 applied, and, therefore, it would have been lawful for him to have signed the agreement immediately after the trawler had sailed, and, accordingly, the signing of the agreement was not a condition precedent to carrying the respondent to sea and he could lawfully be ordered to proceed to sea with the trawler. The respondent, who was not legally represented, contended that he could not be compelled to obey an order to proceed to sea in the trawler as he had not signed the fishing boat's agreement. The justices were of opinion:

"(i) that the effect of s. 401 (3) of the Merchant Shipping Act, 1894, was not to render a seaman who had not signed the fishing boat's agreement liable to be convicted of the offences set out in the informations, but to exempt the skipper of a fishing boat from a penalty for carrying to sea in an emergency a substitute who had not actually signed the fishing boat's agreement before the boat sailed, and (ii) following the clear dictum of DARLING, J., that the respondent in the case of *Haws v. Brown* (1) could not be convicted of refusing to proceed to sea unless he had signed articles, although he could be convicted of refusing to join his ship after being lawfully engaged, that it was not open to us in law to convict the respondent of the offences set out in the said informations as he had not signed the fishing boat's agreement . . ."

They, therefore, dismissed the informations.

Bowen, Q.C., and *H. J. Davies* for the appellant.

The respondent did not appear.

LORD GODDARD, C.J., stated the facts and continued: The Merchant Shipping Act, 1894, s. 376 (1), provides:

"If a seaman lawfully engaged to serve in any fishing boat, or an apprentice in the sea-fishing service, commits any of the following offences, that

seaman or apprentice shall be liable to be punished summarily as follows . . . ”

Section 376 (1) (b) deals with the offence of

“ . . . refusing without reasonable cause to join or to proceed to sea in his fishing boat . . . either at the commencement or during the progress of the engagement . . . ”

Section 376 (1) (d) deals with the offence of

“ . . . wilful disobedience, that is to say . . . wilfully disobeying any lawful command during the engagement . . . ”

Section 399 (1) provides:

“ The skipper of every fishing boat being a trawler of twenty-five tons tonnage or upwards shall enter into an agreement (in this Part of this Act called a fishing boat's agreement), in accordance with this Part of this Act, with every seaman whom he carries to sea as one of his crew from any port in England or Ireland, and shall not carry to sea any seaman with whom no such agreement has been entered into.”

Section 399 (2) imposes a penalty on a skipper who commits an offence against s. 399 (1). Section 400 (1) provides:

“ A fishing boat's agreement shall be in a form approved by the Board of Trade, and be dated at the time of the first signature thereof, and be signed by the skipper before a seaman signs it.”

Section 400 (2) sets out the matters which the agreement has to contain, including

“ (g) any regulations as to conduct on board, and as to fines, short allowance of provisions, or other lawful punishment for misconduct, which the Board of Trade have approved as proper and the parties agree to adopt.”

The functions of the Board of Trade in these matters are now transferred to the Minister of Transport. Section 401 provides:

“ (1) A fishing boat's agreement shall be signed by each seaman, and the skipper shall cause the agreement to be read over and explained to each seaman, or otherwise ascertain that each seaman understands the same before he signs it, and shall attest each signature. (2) When the crew is first engaged the agreement shall be signed in duplicate, and one part shall be sent by the skipper to the superintendent at the port of departure and retained by him, and the other part shall be retained by the skipper, and shall contain a special place for the descriptions and signatures of substitutes, or persons engaged subsequently to the first departure of the fishing boat.”

Then comes the sub-section on which great reliance has been placed in this case:

“ (3) Where a substitute is engaged in the place of a seaman who has signed the agreement, and whose services are lost by death, desertion, failure to join, or other unforeseen cause, the skipper shall, before the fishing boat puts to sea, if practicable, and if not as soon afterwards as possible, cause the agreement to be read over and explained to the substitute, and the substitute shall thereupon sign the same in the presence of the skipper who shall attest the signature.”

It was not contended in this court that s. 401 (3) could apply if the cook who was originally engaged had not signed the fishing boat's agreement, but there was no express finding in the Case, and we were not told, whether he had. I think, however, that it is a fair inference that the case was argued below on the ground that the previous cook had signed the agreement and would have joined but for some unforeseen circumstance, and that the respondent was engaged as a substitute within s. 401 (3), and, accordingly, we proceed on that basis.

Counsel for the appellant contended, first, that there was a lawful engagement in this case, and I am entirely of that opinion. Indeed, so far as this court is concerned, *Vickerson v. Crowe* (2) is conclusive on that point. That case decided that there could be a lawful engagement of a seaman as a member of a crew although he had not signed any agreement under s. 113 of the Act [the relevant section in that case]. Later cases, however, show that a seaman who has been engaged as a member of the crew cannot be called on to proceed to sea unless he has signed an agreement. As a general rule, a seaman is engaged to proceed to sea, and, therefore, at first sight, it seems odd to find that a seaman has committed a criminal offence merely because he has not joined the ship for which he has been engaged, but that he cannot be prosecuted for not proceeding to sea. On further consideration, however, and, in particular, after reading the judgment of CHITTY, J., in *Re Great Eastern Steamship Co., Williams' Claim* (3), which was cited by ROWLATT, J. ([1914] 1 K.B. 466) and ATKIN, J. (ibid.), in *Vickerson v. Crowe* (2), as the authority for the proposition that there can be an engagement before an agreement is signed, one can see the reason for the distinction. There may be occasions when a shipowner engages seamen as members of the crew, and they agree to act as members of the crew, and they are then set to work in the ship while she is still in port. In such a case there is a lawful engagement which the Act does not require to be in writing.

In *Re Great Eastern Steamship Co.* (3) CHITTY, J., called attention to s. 181 of the Merchant Shipping Act, 1854, which was in the same words as s. 155 of the Act of 1894, and said (53 L.T. 597):

"Section 181 is also material, because it entitles the seaman to wages in a foreign-going ship before the articles are signed."

It follows that a seaman who is engaged to serve on a trawler and agrees to do so commits an offence if, being directed to join the ship, he fails to do so. Conversely, if he tried to join the trawler after he had been engaged to serve on it and the employers then refused to take him and to sign him on as a member of the crew, they would be liable for a breach of contract. But to say that a man commits an offence because he fails to join his ship when he has agreed to do so is different from saying that he commits an offence in refusing to proceed to sea when he has not signed an agreement. This was clearly shown in *Haws v. Brown* (1), to which the justices referred in their opinion. The members of the Divisional Court in that case were DARLING, AVORY and SHEARMAN, JJ. Giving the leading judgment, with which the other learned judges agreed, DARLING, J., said (87 L.J.K.B. 125):

"I think . . . that a seaman may commit an offence against the Merchant Shipping Acts . . . by refusing to join the ship on board of which he may be asked to sign the articles under which he will have to sail. He could not be convicted of the offence of refusing to go to sea unless he had signed articles."

There the distinction is clearly drawn between the case of a seaman who is engaged to serve in a ship and fails to join her and that of a seaman who is required to proceed to sea although he has not signed an agreement. A seaman can be convicted of the offence of failing to join his ship although he has not signed the agreement, but he need not obey an order to proceed to sea unless he has signed the agreement. The reason for this distinction is that the provisions in regard to agreements are inserted in the Act as a precaution against what is known as "crimping".

While agreeing that there was this distinction, counsel for the appellant contended that, by reason of s. 401 (3), these considerations did not apply in the case of a substitute, the effect of the sub-section being that, if a seaman had been engaged and had agreed to act as a substitute for a seaman who had already signed the agreement, he was bound to proceed to sea notwithstanding the fact

that the agreement had not been read to him and signed by him. In my opinion, the sub-section does not have the effect for which counsel for the appellant contends. If it did, it would deprive a seaman of the provisions against "crimping" which are inserted in the Act for his benefit. The effect of s. 401 (3) is that, where a fishing boat has had to put to sea before a substitute has signed the agreement, the skipper has not committed an offence against s. 399 (1) and made himself liable to a penalty under s. 399 (2) provided that he causes the agreement to be read to and signed by the substitute as soon as possible after putting to sea. For these reasons, I am of opinion that the justices came to a right conclusion and for the right reasons, and, therefore, this appeal fails and is dismissed.

HILBERY, J.: I am of the same opinion for the same reasons.

SLADE, J.: I also agree.

Appeal dismissed.

Solicitors: *Kinch & Richardson*, agents for *Vachell & Co.*, Cardiff (for the appellant); *Treasury Solicitor*.

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

LEEK & MOORLANDS BUILDING SOCIETY v. CLARK AND OTHERS.

[COURT OF APPEAL (Somervell, Birkett and Hodson, L.J.J.), June 26, 27, July 21, 1952.]

Joint Tenancy—Surrender—Surrender by one tenant of rights held jointly.

A husband and wife were in possession of premises under a joint tenancy. By a contract of sale dated Dec. 21, 1950, the husband agreed to buy the premises from the landlords "subject to the existing tenancy," and by a further contract, dated Jan. 1, 1951, he agreed to sell the premises to C., vacant possession to be given on completion. On Mar. 13, 1951, C. mortgaged the property to the plaintiffs. The wife had no knowledge of the terms of the sale to C. or of the mortgage, nor did she authorise the termination of her joint tenancy. On a claim for possession by the plaintiffs as mortgagees,

Held: in the absence of express authority it was not competent for one of two joint tenants to surrender rights held jointly, and, therefore, the sale by the husband of the premises to C. without the wife's authority did not terminate the joint tenancy, and, as against the husband and wife, the plaintiffs were not entitled to possession.

Dictum of LORD TENTERDEN, C.J., in *Doe d. Aslin v. Summersett* (1830) (1 B. & Ad. 140), explained.

AS TO SURRENDER, see HALSBURY, Hailsham Edn., Vol. 20, pp. 267-274, paras. 300-307; and FOR CASES, see DIGEST, Replacement, Vol. 31, pp. 565-590, Nos. 6857-7090.

Cases referred to:

- (1) *Turner v. Watts*, (1928), 97 L.J.K.B. 403; 138 L.T. 680; 92 J.P. 113; 31 Digest, Replacement, 575, 6954.
- (2) *Doe d. Gray v. Stanion*, (1836), 1 M. & W. 695; 5 L.J.Ex. 253; 150 E.R. 614; 31 Digest, Replacement, 521, 6428.
- (3) *Doe d. Aslin v. Summersett*, (1830), 1 B. & Ad. 135; 8 L.J.O.S.K.B. 369; 109 E.R. 738; 31 Digest, Replacement, 502, 6268.
- (4) *Easton v. Penny*, (1892), 67 L.T. 290; 31 Digest, Replacement, 572, 6932.

(5) *Re Viola's Indenture of Lease*, [1909] 1 Ch. 244; 78 L.J.Ch. 128; 100 L.T. 33; 31 Digest, Replacement, 599, 7164.

APPEAL by the plaintiffs from an order of His Honour JUDGE FORBES, made at Birmingham County Court and dated Apr. 8, 1952, on a claim for possession.

The plaintiffs were mortgagees of premises at 83, Brays Road, Sheldon, Birmingham. In 1950 the premises were let by Burbury Investment Properties, Ltd., who held the property on a long lease, to the second and third defendants, Mr. and Mrs. Ellison as joint tenants. On Dec. 21, 1950, Burbury Investment Properties, Ltd., sold the reversion in the premises to the second defendant, subject to the existing tenancy. On Jan. 1, 1951, the second defendant sold the reversion to the first defendant, Clark, a condition of the sale being that vacant possession would be given on completion. On Mar. 13, 1951, the first defendant mortgaged the property to the plaintiffs. The second and third defendants remained in possession, paying rent to the first defendant. On Jan. 14, 1952, the first defendant being in arrears of instalments of principal and interest under the mortgage deed, an order for possession was made against him, and the action against the second defendant and the third defendant, who was then joined, was remitted to the county court. The third defendant did not authorise her husband by selling the reversion to determine their joint tenancy. For the plaintiffs it was contended that the second defendant's agreement to purchase the reversion operated as a termination of the tenancy, and, alternatively, that the sale thereof by him operated as a surrender of the joint tenancy. The county court judge held that the plaintiffs were mortgagees of the property subject to the joint tenancy, and, therefore, were not entitled to possession.

L. A. Blundell and Kisch for the plaintiffs.

Handforth for the second and third defendants.

Cur. adv. vult.

July 21. **SOMERVELL, L.J.**, read the following judgment of the court.

This is a claim for possession of certain premises by the plaintiffs as mortgagees. The mortgagor was the first defendant who was in arrears with the instalments of principal and interest due under the mortgage deed. The second and third defendants were and are in possession and claim to be so under a joint tenancy agreement. They rely, if necessary, on the protection of the Rent Acts. The proceedings started in the Chancery Division by originating summons. An order for possession was made against the first defendant, and the action as against Frank Ellison, then the only other defendant, was remitted to the county court. Mrs. Ellison, his wife, was then joined as the tenancy alleged was a joint tenancy to them both. The learned county court judge decided against the plaintiffs.

Prior to December, 1950, the Burbury Investment Properties, Ltd., holders of a long leasehold interest, were the landlords. Mrs. Ellison had lived in the house since 1940, at first with a husband, the then tenant, whom she later divorced. After her marriage to Mr. Ellison the landlords, to whom we will refer as "Burbury", accepted the Ellisons as joint tenants. Towards the end of 1950 Clark, the first defendant, appeared and the following documents came into existence—an agreement of sale of the premises dated Dec. 21, 1950, between Burbury, as vendors, and Mr. Ellison, as purchaser, for £800 "subject to the existing tenancy", i.e., the joint tenancy to the Ellisons, and an agreement of sale of the premises dated Jan. 1, 1951, between Mr. Ellison, as vendor, and Clark, as purchaser, for £1,650. The words "subject to the existing tenancy" were originally typed in, but were deleted and there was an express provision that "vacant possession will be given on completion".

Leaving aside for the moment the question of the tenancy being joint, it was submitted for the plaintiffs on the authority of *Turner v. Watts* (1) that an agreement by a tenant to purchase the reversion operates as a termination of the tenancy. That case we think turned on the terms of the agreement, and, in

particular, a provision that interest should accrue on the purchase price from the date of the agreement. In the absence of any provision express or to be implied an agreement to purchase would not so operate: *Doe d. Gray v. Stanion* (2).

In the present case we do not think that on any view the joint tenancy was extinguished by Mr. Ellison's agreement to purchase on Dec. 21. The agreement says in terms "subject to the existing tenancy". It is unnecessary to consider what would have been the position if there had been no sale on to Clark. By agreeing to sell to Clark with vacant possession Mr. Ellison was, it seems to us, agreeing that the tenancy would be surrendered on completion. If he had been the sole tenant, completion would itself presumably have effected a surrender. If there had been a tenancy in which he had no interest he would have been agreeing to procure that that tenancy would be surrendered or otherwise terminated on or before completion. In fact, the tenancy was one in which he and his wife were joint lessees, and, as will be seen, he never had any authority from her to surrender or terminate that tenancy. Though he is, of course, bound by the agreement which he signed, he may not have realised its effect. The question is whether in these circumstances the joint tenancy has been surrendered or otherwise terminated. We will take the events which ensued from the judgment of the learned county court judge.

"On Jan. 5, 1951, Clark makes application to the plaintiffs for a loan, representing that the house was for his own immediate residence. On Jan. 16, 1951, the plaintiffs by an allotment letter notified Clark that they were prepared to advance to him £1,350 subject to vacant possession being obtained on or prior to completion. The date of completion in the form of application for advance had been given as Jan. 21, 1951, by Clark, but this was not the date on which the matter was completed. In fact it was on Mar. 12, 1951, and completion took place in this form: Burbury Investment Properties, Ltd. were the vendors, Nora Saunders was the mortgagee, Ellison was the purchaser, and Clark the sub-purchaser, and the property was conveyed, not by way of vesting any interest in Ellison, who had only an interest in equity, but the vendors, as beneficial owners, and Ellison assigning to the sub-purchaser Clark. No interest in law was actually vested in Ellison at any time. On Mar. 13, 1951, Clark mortgaged the property to the plaintiffs for £1,350. Nobody seems to have inquired on behalf of the plaintiffs whether the property was let or not. I am not criticising this omission. It seems to have been assumed that the property was not let as Clark stated so. I should have thought the building society would have checked this. The plaintiffs were informed through their solicitors that Ellison agreed to give vacant possession on completion. At some time or other, Clark accepted rent from Ellison. Up to Mar. 5 rent had been paid regularly weekly in advance. At some time or other, certainly not later than a few weeks after the sale and mortgage, Clark purported to let the premises to Ellison or to Mr. and Mrs. Ellison, I do not know which, probably to Mr. Ellison only."

The learned judge's findings with regard to Mrs. Ellison's position are as follows:

"I hold that there is a joint tenancy of Mr. and Mrs. Ellison and when selling or putting an end to the joint tenancy Mrs. Ellison was entitled to be consulted. I find Mrs. Ellison knew in January, 1951, that Mr. Ellison had signed an agreement to sell to Clark. She did not know about the mortgage to the plaintiffs and nothing was said to her about moving out of the premises. Clark had stated to her and her husband that if they moved he would give them some money, but so far as she knew they were only changing from one landlord to another. Mrs. Ellison was not estopped from asserting the joint tenancy. Mere knowledge that Mr. Ellison had signed the contract did not estop her. She did not know the terms of the contract, she did not know the sale was with vacant possession. I do not think Mrs.

Ellison understood what was happening. She did not authorise anyone to put an end to her joint tenancy. I do not think Mrs. Ellison had the faintest idea of what was going on ”.

A Counsel for the plaintiffs sought to rely on *Doe d. Aslin v. Summersett* (3), as supporting a submission that Mr. Ellison by what he did had brought the joint tenancy to an end. That case was dealing with a lessee from year to year of land which he held from two joint lessors. A notice to quit was served, signed by one only of the joint lessors. It was argued that the other lessor had adopted the notice, but LORD TENTERDEN, C.J., who delivered the judgment of the Court of King’s Bench, held that without any such adoption a notice to quit by one of the joint lessors, who were joint tenants, put an end to the tenancy as to both. The ratio of the decision is, we think, to be found in the following sentence

B (1 B. & Ad. 140):

C “Upon a joint demise by joint tenants [i.e., the lessors in that case] upon a tenancy from year to year, the true character of the tenancy is this, not that the tenant holds of each the share of each so long as he and each shall please, but that he holds the whole of all so long as he and all shall please; and as soon as any one of the joint tenants gives a notice to quit, he effectually puts an end to that tenancy . . . ”

It is to be noted that LORD TENTERDEN was dealing with a notice to quit in respect of a periodic tenancy. He was not dealing with a right to determine a lease for, say, twenty-one years at the end, say, of the seventh or fourteenth year. Nor was he dealing with surrender.

D There is, we think, force in the submission made on behalf of the plaintiffs that in the case of a periodic tenancy LORD TENTERDEN’s principle would apply when there were joint lessees. A periodic tenancy continues from period to period unless the notice agreed or implied by law is given. But if one of two joint lessees who “hold the whole” wished it not to continue beyond the end of a period, it might well be held that it did not continue into a new period. That

E would happen only if all, that is, the joint lessees, should please. If one considers a lease to joint lessees for a term certain with a right of renewal, it would be obvious, we think, that both must join in requiring a renewal. A periodic tenancy renews itself unless either side bring it to an end. But if one of two or more joint lessees does not desire it to continue, we would have thought that it was in accordance with LORD TENTERDEN’s principle and with common sense that

F he should be able to make that effective. The question is whether the principle has any application to a surrender. There seems to be no authority on this point though there are cases dealing with a right to determine at a date within the period of the tenancy.

In *Easton v. Penny* (4) the lease in question was for twenty-one years determinable at the end of fourteen years. There was a single lessor and two lessees.

G A notice in writing to determine was given which, on the face of it, expressed an intention of one only of the two joint lessees to determine at the end of fourteen years. ROMER, J., decided this was a bad notice. That decision could have been based on the terms of the clause as to determination. It provided that, if the lessor, or the lessees, or their respective heirs, executors, administrators and assigns, should be desirous of terminating the term of twenty-one years at the

H expiration of the fourteenth year thereof, it should be lawful to *him or them*, or his or their representatives or assigns, so to do, on giving one year’s notice in writing of their intention so to do. ROMER, J., did not expressly refer to the words we have italicised, but referred to the fact that the notice had to be in writing.

Re Viola’s Indenture of Lease (5) dealt with a right of determination conferred on husband and wife as joint lessees at the end of three years in a lease for fifteen and three-quarter years. The notice was given by the husband only, and its validity was disputed on this ground. The clause giving the right to determine

provided that "if the lessees should be desirous of terminating, etc.". In the course of the argument, WARRINGTON, J., said ([1909] 1 Ch. 246):

"You want me to read the words 'if the lessees' in the proviso as if they were 'if either of the lessees'."

This was the basis of his decision in holding that the notice was bad. In distinguishing *Doe d. Aslin v. Summersett* (3) he pointed out that that case turned, at any rate in part, on the effect of a tenancy from year to year.

It may be difficult to imagine a case in which, so far as a right of determination before the full period of the lease has run is concerned, the problem would not be solved by the express terms of the clause. If it was not so solved, we think that such a right would be exercisable only if all desired to exercise it. They all have the right to the full term, and all must concur if this right is to be abandoned. It is also to be noted that in *Viola's* case (5) the court was asked to infer an authority in the husband to act on behalf of his wife. It declined to do so. In the present case there is an express finding of absence of authority.

Even if we are wrong in what we have said with regard to a right to determine within the period of the lease as distinct from a right to terminate a periodic tenancy, we would have thought it plain that one of two joint lessees cannot, in the absence of express words or authority, surrender the rights held jointly. If property or rights are held jointly, prima facie a transfer must be by or under the authority of all interested. The answer suggested to this is the principle laid down in *Summersett's* case (3). That case, for reasons which we have given, is not, in our view, an exception to the rule we have just stated. It is an illustration in a highly technical field of the general principle that if a joint enterprise is due to terminate on a particular day, all concerned must agree if it is to be renewed or continued beyond that day. To use LORD TENTERDEN's phrase, it will only be continued if "all shall please". For these reasons we think the conclusion of the learned county court judge was right, though it is clear that the argument was considerably developed in the hearing before us. The appeal will, therefore, be dismissed.

Appeal dismissed.

Solicitors: *J. E. Lickfold & Sons*, agents for *Rollason, Clift & Holmes*, Birmingham (for the plaintiffs); *Saunders, Sobell, Greenbury & Leigh*, agents for *Stanley A. Coleman*, Birmingham (for the defendants).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

BRAUER & CO. (GREAT BRITAIN), LTD. v. JAMES CLARK
(BRUSH MATERIALS), LTD.

[COURT OF APPEAL (Singleton, Denning and Romer, L.JJ.), July 3, 4, 7, 21, 1952.]

Contract — Non-performance — Excuse — “ Force majeure ” — Delivery of goods “ subject to export licence ” — Minimum export prices fixed in excess of contract prices.

A contract for the shipping of goods from Brazil during February to July, 1951, provided that the contract should be void for any quantity which was not shipped one month after the expiration of the contract period where shipment was prevented by force majeure, and that “ this contract is subject to any Brazilian export licence ”. In June, 1951, the sellers gave the buyers notice that they could not ship the goods on the basis of the contract prices because the Bank of Brazil had stated that the goods could only be shipped at minimum f.o.b. prices of £180 and £135 a ton respectively for the two classes of goods involved, which prices were £28 and £40 a ton higher than the contract prices. If they had paid the minimum higher prices to their suppliers, the sellers could have obtained a licence to export the contract goods and shipped, declared, and tendered them within the contractual period.

HELD: (i) as there was no prohibition or embargo or physical or legal prevention of export, the sellers were not relieved from liability by the “ force majeure ” clause;

(ii) by showing that they were required to pay more for the goods than the agreed selling price the sellers did not show that they were unable to obtain an export licence; they could reasonably have been expected to pay the higher prices which were a condition of obtaining a licence; and, therefore, they had not taken all reasonable steps to obtain a licence and were not relieved from liability under the export licence clause.

Semle: The buyers might have had an answer under the latter clause if they had shown that they had made every reasonable effort, but had been unable to obtain a licence except on prohibitive terms.

Decision of SELLERS, J. ([1952] 1 All E.R. 981), reversed in part.

AS TO EXCUSES FOR NON-PERFORMANCE OF CONTRACT, see HALSBURY, Hailsham Edn., Vol. 7, pp. 197-227, paras. 276-310; and FOR CASES, see DIGEST, Replacement, Vol. 12, pp. 356-495, Nos. 2761-3716.

Cases referred to:

(1) *Partabmull Rameshwar v. K. C. Sethia (1944), Ltd.*, [1951] 2 All E.R. 352n; 2nd Digest Supp.

(2) *Re Anglo-Russian Merchant Traders & Batt (John) & Co. (London)*, [1917] 2 K.B. 679; 86 L.J.K.B. 1360; 116 L.T. 805; 12 Digest, Replacement, 451, 3395.

(3) *Windschuegel, Ltd. v. Pickering*, (1950), 84 Lloyd, L.R. 89.

(4) *Société D'Avances Commerciales (London) Ltd. v. A. Besse & Co. (London) Ltd.*, [1952] 1 T.L.R. 644.

(5) *British Movietonews, Ltd. v. London & District Cinemas, Ltd.*, [1951] 2 All E.R. 617; [1952] A.C. 166; 2nd Digest Supp.

APPEAL by the buyers, James Clark (Brush Materials), Ltd., from an order of SELLERS, J., dated Apr. 2, 1952, and reported [1952] 1 All E.R. 981, answering questions of law whether the sellers, Brauer & Co. (Great Britain), Ltd., were excused from liability under their contract of sale with the buyers by (i) the “ force majeure ” clause, or (ii) the export licence clause, as to (i) in favour of the buyers, and as to (ii) in favour of the sellers. The dispute between the sellers and the buyers was referred to arbitration in accordance with the contract, and the

arbitrators made an award in favour of the buyers. The sellers appealed to the Board of Appeal of the Seed, Oil, Cake and General Produce Association, appointed in accordance with the conditions of sale, and requested that the award of the board should be stated in the form of a Special Case for the opinion of the court. Subject to the decision of the court on the question of law the board made an award in favour of the buyers. *SELLERS, J.*, answered the second question of law in favour of the sellers, thus reversing the decision of the board, and the buyers appealed. A

Mocatta, Q.C., and *T. G. Roche* for the buyers.

Sir Hartley Shawcross, Q.C., and *E. W. Roskill* for the sellers.

Cur. adv. vult.

July 21. The following judgments were read.

SINGLETON, L.J.: The Case Stated finds that by a contract dated Feb. 20, 1951, the sellers sold to the buyers ninety tons of Bahia piassava comprising forty tons of crude seconds, thirty tons of cut stiff 7", and twenty tons of cut stiff 8", at the price of £118 per thousand kilos. for crude seconds and £163 per thousand kilos. for cut stiff 7" and cut stiff 8", both prices being c.i.f. London. By the terms of the said contract shipment was to be from Salvador/Bahia/Brazil during February/March/April/May/June/July subject to freight space being available to London. The quality of the said goods was to be "best", if inferior thereto a fair allowance to be made. The contract also contained the following printed clause:— B

"9. Should shipment be prevented or delayed owing to prohibition of export, revolution, riots, strikes, lock-outs, blockade, hostilities, force majeure or plague, shipper shall be entitled at the termination of such cause or causes to an extension of time for shipment prior to the outbreak of such cause or causes, but such extension shall in no case exceed one month. In case of non-fulfilment under above conditions the date of default shall be similarly dealt with. Shipper shall give notice by cable within two days after the last day for shipment if he claims an extension of time for shipment. If, from any of the above causes, shipment be not completed within one month from the expiration of the original contract period then this contract is to be void for any unfulfilled quantity." D

There was added a further typed clause as follows:

"Any freight alterations pro or con for buyer's account. This contract is subject to any Brazilian export licence. Any import duty for buyer's account." E

The Case also sets out cl. 12 of the conditions, which provides for arbitration, and refers to the conditions of sale of the association. It also states that on June 20, 1951, the sellers informed the buyers that, owing to the intervention of a section of the Bank of Brazil, it was impossible for them to ship the goods mentioned in the said contract on the basis of the prices contained therein, and on the same date the sellers wrote to the buyers (inter alia) as follows:— F

"We confirm that due to the intervention of a section of the Bank of Brazil it is impossible for our associates to ship the piassava on the basis of the prices contained in the above-mentioned contract. The department of the Bank of Brazil concerned state that the piassava must be shipped at the minimum f.o.b. prices of £180 a ton for the cut stiff and £135 a ton for the seconds, which would in effect mean an increase respectively of £28 and £40 a ton. We personally regret this situation most sincerely, but frankly we must claim protection under the force majeure clause as it is due solely to the Brazilian authorities that we are unable to fulfil your contract. As we see the position three courses remain open to yourselves, namely:— (a) You decide to cancel the contract. (b) You decide to accept the new prices. (c) You decide to take the matter to arbitration." G

H

No goods of any description were at any time shipped, declared, or tendered by the sellers to the buyers in pursuance of the said contract. The sellers could have shipped, declared, and tendered during February, March, April, May, June and July, as was admitted by them, goods to fulfil the said contract if they had paid the minimum prices mentioned in the letter dated June 20, 1951.

The questions raised by the Case Stated are:

- A “(i) Did the refusal of the Bank of Brazil and/or other Brazilian authorities to grant licences for the export of the said goods, except at prices higher than the prices contained in the said contract, excuse the sellers from fulfilling the said contract by reason of the provisions of cl. 9? (ii) Did the refusal of the Bank of Brazil and/or other Brazilian authorities to grant licences for the export of the said goods, except at prices higher than the prices contained in the said contract, excuse the sellers from fulfilling the said contract by reason of the clause in the said contract reading: ‘This contract is subject to a Brazilian export licence’?”
- B

SELLERS, J., was of opinion that the sellers were not excused from performance of the contract by anything in the printed cl. 9. He said ([1952] 1 All E.R. 983):

- C “The award finds . . . that the sellers admitted before the appeal committee that they could have shipped, declared and tendered the contract goods within the contractual date if they had paid the minimum price. On this admission, the sellers cannot, in my opinion, rely on force majeure. There was no prohibition, no embargo, no physical or legal prevention. The goods could have been exported.”

- D The learned judge, however, considered that, in the events that had happened, the sellers were relieved within the typewritten words “subject to a Brazilian export licence”, and he answered question (ii) in favour of the sellers.

I find myself in complete agreement with SELLERS, J., that cl. 9 of the contract, as it appears in print, does not excuse the sellers from performance of the contract, and I do not propose to say anything further on that part of the case.

- E The difficulty arises on the words added in type:

“Any freight alterations pro or con for buyers’ account. This contract is subject to a Brazilian export licence. Any import duty for buyers’ account.”

The question for the court is whether the refusal of the Bank of Brazil to grant licences for export except at prices higher than the prices contained in the contract excuses the sellers from fulfilling the contract. SELLERS, J., taking a different view from that of the arbitrators and of the appeal board, held that it did. I do not think that his conclusion is right on the facts stated. The risk of any increase in import duty is on the buyers, and so is the risk of an increase in freight charge (which the judge appears to have overlooked). Prima facie, the risk of an increase in the price of the goods is on the sellers; they had a period of about six months during which they could ship them. The words: “This contract is subject to a Brazilian export licence” mean that the contract is to be considered as cancelled if the sellers are unable to obtain an export licence for goods of the quality and quantity called for by the contract. The contract was on c.i.f. terms, and both buyers and sellers were English companies. The Case finds that the sellers could have arranged for the shipment of the goods if they had paid the minimum prices mentioned in the letter of June 20, 1951. This was a considerable increase (twenty per cent. to thirty per cent.) on the price as between buyers and sellers, but we know nothing as to whether prices varied much in this class of goods. The statement of facts is meagre in the extreme. We know nothing more than the cable of June 12 and the letter of June 20.

On these facts I fail to see that the sellers can excuse themselves by reason of the words: “This contract is subject to a Brazilian export licence”. I agree

with the learned judge that some meaning must be given to the words over and above that which is gained from the words in print. It appears to me that they were introduced to make clear beyond doubt what was to happen if the sellers were unable to obtain an export licence. If they were able to show that they were unable to obtain the necessary licence in time to perform their obligations under the contract, the contract was to be treated as cancelled. There would be no need to consider extensions of time owing to prohibition of export under the printed clause, nor would any argument as to frustration be necessary. A

It is, however, necessary for the sellers, who rely on the clause to excuse them from performance, if they are to be excused, to show that they were unable to obtain an export licence. They do not do that merely by showing that they were required to pay more for the goods than the price at which they had agreed to sell them. That goes no further than showing that, in the events which happened, they had entered into an unprofitable contract—which provides no answer. B
SELLERS, J., took the view that the words protected the sellers, and he said ([1952] 1 All E.R. 983):

“ If the clause does not protect the sellers in this case, one asks whether it could protect them if the minimum price f.o.b. for an export licence to be granted were raised to the extent of one hundred times the contract price, so that a contract, for instance, at £10 a ton had to be met by the sellers at a price of £1,000 a ton. I do not think any such obligation was in contemplation of the parties. What they contemplated was that the sellers would use due diligence to obtain an [export] licence to fulfil a contract into which they had entered.” C

Had the sellers showed that they had taken all reasonable steps to obtain an export licence and had failed, they would have had an answer. They have not done that, nor was that the case put forward, as the question under consideration shows. The only point raised was that the increased price required before export was allowed provided an excuse for non-performance under the words “ subject to any Brazilian export licence ”. We do not know when the sellers’ associates applied for a licence, or whether they would (or might) have got one on easier terms if they had applied earlier, nor do we know anything as to market conditions in Brazil, nor do we know how, or to what extent, there had been control of export prior to the date of the contract—though it is to be assumed there had been some measure of control, or something of the kind was anticipated, else it is unlikely that the words would have been added. D
On the question posed by SELLERS, J., as to what would happen in the event of inability to obtain a licence without incurring a cost a hundred times as much as the contract price, one can imagine a case in which sellers might be able to show that they had made every reasonable effort, but were unable to obtain a licence except on prohibitive terms or on terms entirely outside the contemplation of the parties. If that position arose, they might well have an answer. E
No such position arises in the present case. No effort was made to show whether or not they could have shipped at an earlier date. No evidence was forthcoming whether there was a changing market, nor whether it was pointed out to the authorities that this contract had been entered into long before the bank or government requirement (if in fact it was). Indeed, we do not know from what date the requirement operated, or whether it was something completely new or only an extension. F
The sellers would have the clause read as giving them an option to cancel if they found they had to pay more for the goods in order to obtain an export licence. That was not a term of the contract. G H

It follows from what I have said that I think that the award of the board of appeal should be restored. It may be that the members of the board have much more knowledge of conditions in Brazil at the time than appears in the Case—but I do not base my judgment on any such thought. In my opinion, the

sellers have not brought themselves within the terms of the clause on which they rely. For these reasons, I think the appeal must be allowed.

DENNING, L.J.: The question for decision depends on the true construction of the words: "This contract is subject to any Brazilian export licence." Those words serve a most useful purpose. The parties to the contract knew that the goods could not lawfully be exported from Brazil without an export licence.

A If this clause had not been inserted, the buyers might have contended that the sellers undertook absolutely to obtain a licence and ship the goods, and that it was no excuse for the sellers to say that they could not get a licence: see what **LORD PORTER** said recently in *Partabmull Rameshwar v. K. C. Sethia (1944), Ltd.* (1), when he commented on *Re Anglo-Russian Merchant Traders & John Batt & Co. (London)* (2). The printed cl. 9 might not by itself be sufficient to protect the sellers. That clause may be said only to apply to causes of delay which arise after the contract has been made, such as a subsequent prohibition of export or a subsequent force majeure. It may not apply to delays caused by an existing licensing system. In order to avoid such contentions, the parties inserted this express typewritten clause so as to protect the sellers if an export licence was refused. They inserted the words: "This contract is subject to any **C** Brazilian export licence", meaning that the contract only binds the sellers if a Brazilian export licence can be obtained.

This still leaves many questions unanswered. Whose duty is it, for instance, to apply for the licence? And what is the extent of the duty? The parties have not themselves provided the answers, and it is for the court to find them. It is, I think, clearly the duty of the sellers to apply for an export licence and to use due diligence and take all reasonable steps to get it: see *Windschuegel, Ltd. v. Pickering* (3); *Société D'Avances Commerciales (London) Ltd. v. A. Besse & Co. (London) Ltd.* (4). If a licence is granted, no trouble arises. The sellers must ship the goods. But, if it is refused, conditionally or unconditionally, many questions may arise. How far is it the duty of the sellers to overcome the difficulties thus presented? Must they fulfil the conditions prescribed by the **E** licensing authorities in order to get a licence? Must they make another application if the first one fails? Ought they to have applied earlier? And so forth. The answer to all these questions is, I think, that this clause is a special exemption inserted in favour of the sellers. In order to enable them to take advantage of it they must show that, notwithstanding that all reasonable steps were taken by them, they could not obtain a licence to export during any part of the shipment **F** period, or, alternatively, that it was useless for them to take any such steps, or any further steps, because it was quite impossible for them to obtain a licence.

The facts stated in the award are not nearly sufficient to satisfy this test. There is nothing to show that the licence could not have been obtained at some time during the shipment period. On the contrary, there is a specific finding that an export licence *could* have been obtained if the sellers had been prepared to pay **G** a higher price for the goods to their Brazilian associates—a price higher, that is, than the price at which they had contracted to re-sell them. Was that a step which they could reasonably be expected to take? This depends on how much was the price they had to pay to get the licence. If it was, to take the judge's illustration, one hundred times as much as the contract price, that would be "a fundamentally different situation" which had unexpectedly emerged, and they would not be bound to pay it: see *British Movietonews, Ltd. v. London & District Cinemas, Ltd.* (5). But if the price they had to pay was only the current market price, as we were told it was, then they ought to have paid it so as to get the licence. After all, any person who sells goods forward must be ready himself to bear any increase in the market price. It would be a strange thing if a seller could insist on the contract if the price fell, and could escape his own obligations if it rose. It would do away with the whole point of forward contracts altogether. In this case it is, I think, implicit in the award that the sellers could reasonably be **H**

expected to pay the price necessary to get a licence. On that basis I am of opinion that the award was right and should be upheld.

That is sufficient to decide this case, but I must mention one point more. The judge seems to have been influenced by the reflection that, if the sellers had been resident in Brazil, they could not have obtained a licence by paying a higher price themselves, because it would not bring in any additional foreign currency to Brazil. Why, then, should it be different when they act through London associates? My answer is that the sellers are liable in each case. It must be remembered that there is often a string of contracts of sale and re-sale for one parcel of goods, all made "subject to export licence". The licence which is contemplated is not a licence for a particular contract or a particular price, but a licence for particular goods. I should have thought that, if a licence is refused solely on the ground of price, the sellers are bound to overcome the objection or pay damages. After all, the whole point of a forward contract is to fix the future price. Just as the buyer takes the risk of a fall in price, the seller takes the risk of a rise. There must be an implication to that effect. I agree that the appeal should be allowed and damages awarded in accordance with the decision of the arbitrators and the board of appeal.

ROMER, L.J.: I agree with the judgments which my brethren have delivered.

Appeal allowed.

Solicitors: *Layton & Co.* (for the buyers); *Gregory, Rowcliffe & Co.*, agents for *Bartlett & Son*, Liverpool (for the sellers).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

Re WILLIAMS' WILL TRUSTS. PITTS-TUCKER AND ANOTHER v. WILLIAMS AND ANOTHER.

[CHANCERY DIVISION (Roxburgh, J.), June 23, 24, July 3, 1952.]

Real Property—Rule in Shelley's Case—Strict settlement in common form—Limitation to W. for life, with remainder to his sons in tail male and remainders over—Death of testator before Jan. 1, 1926.

By his will a testator, who died on Dec. 20, 1921, devised certain freehold properties "to the use of my son [W.] during his life . . . with remainder to the use of his first and other sons successively according to seniority in tail male" with remainders over. W. contended that the phrase "his first and other sons successively in tail male" imported the whole succession of his male inheritable blood and embraced the whole line of the heirs male of his body, and that, therefore, the rule in *Shelley's Case* (1581) (1 Co. Rep. 93), applied, and, accordingly, he claimed to be in possession as tenant in tail male.

HELD: an expression properly construed as designating particular individuals was not to be regarded as one which included the whole line of succession capable of inheriting or imported the whole succession of inheritable blood merely because the individuals designated did, in fact, comprise the whole line of succession capable of inheriting; on the true construction of the testator's will, the sons of W. were to take as purchasers and the words devising estates tail to them were not to be construed as delimiting the estate of W.; and, therefore, the rule in *Shelley's Case* (supra) did not apply, and W. took only an estate for life.

Goodtitle d. Sweet v. Herring, (1801) (1 East, 264), applied.

Dicta of LORD MACNAGHTEN and LORD DAVEY in *Van Grutten v. Foxwell*. *Foxwell v. Van Grutten*, ([1897] A.C. 668, 685), not applied.

AS TO THE RULE IN *Shelley's Case*, see HALSBURY, Hailsham Edn., Vol. 27, pp. 737-743, paras. 1266, 1267; and FOR CASES, see DIGEST, Vol. 38, pp. 705-707, Nos. 497-522.

Cases referred to:

- (1) *Shelley's Case*, *Wolfe v. Shelley*, (1581), 1 Co. Rep. 93 (76 E.R. 206); Moore, K.B. 136 (72 E.R. 490); 3 Dyer 373b (73 E.R. 838); 1 And. 69 (123 E.R. 358); Jenk. 249 (145 E.R. 176); 38 Digest 705, 497.
- (2) *Van Grutten v. Foxwell*, *Foxwell v. Van Grutten*, [1897] A.C. 658; 66 L.J.Q.B. 745; 77 L.T. 170; 38 Digest 706, 500.
- (3) *Goodtitle d. Sweet v. Herring*, (1801), 1 East, 264; 102 E.R. 102; 44 Digest 871, 7270.
- (4) *Re Scott*, [1911] 2 Ch. 374; 80 L.J.Ch. 750; 105 L.T. 577; 44 Digest 430, 2589.

ADJOURNED SUMMONS to determine the nature of the interest in certain freehold properties which the first defendant, Sir William Law Williams, took under the will of his father, the testator Sir Frederick Law Williams, who died before Jan. 1, 1926 (the day on which the rule of law known as the rule in *Shelley's Case* (1) was abolished by the Law of Property Act, 1925, s. 131).

By his will the testator devised the freeholds, subject to certain prior uses, to the use of the first defendant during his life with remainder to the use of his first and other sons successively according to seniority in tail male with remainders over. The first defendant claimed to be in possession as tenant in tail male under the rule in *Shelley's Case* (1), and, therefore, entitled to bar the entail. He was the testator's only son and had no issue at present, and, under the terms of the settlement contained in the will, the second defendant, a brother of the testator, was presumptively entitled to the settled freeholds for life next after him.

M. Bowles for the plaintiffs (the trustees).

Cross, Q.C., and *Hesketh* for the first defendant.

Salt, Q.C., and *H. E. Francis* for the second defendant.

Cur. adv. vult.

July 3. ROXBURGH, J., read the following judgment. This summons relates to the rule of law known as "the rule in *Shelley's Case* (1)", which, after being in disfavour for more than a century, was abolished as from Jan. 1, 1926 [by the Law of Property Act, 1925, s. 131]. Posthumously, as it were, counsel for the first defendant, the testator's son, has been bold enough to submit that, although no breath of suspicion had been cast on them while the rule was in force, all strict settlements of land made in common form before that date, and, in particular, the present settlement, are vitiated by that rule, and he has supported his submission by formidable argument. The settlement is by a will of a testator who died on Dec. 20, 1921, and the material disposition is

" . . . to the use of my son William during his life . . . with remainder to the use of his first and other sons successively according to seniority in tail male . . . "

with remainders over. The testator's son, William (who has no issue), claims to be in possession, not as tenant for life, but as tenant in tail male under the rule in *Shelley's Case* (1).

The rule was stated and described in CHALLIS ON REAL PROPERTY, 1st ed. (1885), p. 123, as follows:

"In the limitations now under consideration, there occurs always an estate of freehold limited to a specified person, and a subsequent limitation, whether immediate or remote, expressed to be made to the heirs, or to some class of the heirs, of the same person. The prior estate and the subsequent limitation must both arise under or by virtue of the same instrument. Grammatically, the construction of the second limitation might be, to give

a remainder by purchase to the specified heirs. And since the person whose heirs they are, or rather, are to be, is living at the date of the limitation, such a remainder, if taken by the heirs as purchasers, would be a contingent remainder of Fearn's fourth class, being a limitation in remainder to a person not yet ascertained or not yet in being [FEARNE'S ESSAY ON CONTINGENT REMAINDERS AND EXECUTORY DEVISES]. But the law puts upon the limitation to the heirs a different construction, not giving to them any estate at all by purchase, but taking account of the mention of the heirs only for the purpose of giving a corresponding estate to the specified ancestor. Therefore, it is commonly said, that in limitations coming within the rule in *Shelley's Case* (1), the word heirs is not a word of purchase but a word of limitation."

In the present case no limitation is expressed to be made to the heirs, or to a class of the heirs, of William, and it, accordingly, differs fundamentally from *Van Grutten v. Foxwell*. *Foxwell v. Van Grutten* (2), in which there was an express limitation to the heirs of the body of the propositus, but counsel for the son founds himself on two passages, admittedly obiter, in the speeches of LORD MACNAGHTEN and LORD DAVEY. LORD MACNAGHTEN said ([1897] A.C. 668):

"It is hardly necessary to observe that any expression which imports the whole succession of inheritable blood has the same effect in bringing the rule into operation as the word 'heirs' . . ."

LORD DAVEY said (*ibid.*, 685):

"... but the question always remains, whether the language of the gift after the life estate properly construed is such as to embrace the whole line of heirs or heirs of the body or issue . . ."

These dicta did not deflect the practice of conveyancers drawing strict settlements or raise any query as to their efficacy until now: see, for example, KEY AND ELPHINSTONE'S PRECEDENTS IN CONVEYANCING, 10th ed. (1914), [Vol. II, p. 936], PRIDEAUX'S PRECEDENTS IN CONVEYANCING, 22nd ed. (1926), [Vol. III, p. 785], and CHALLIS'S REAL PROPERTY, 3rd ed. (1911), ch. 13; but counsel for the son submits that the phrase "his first and other sons successively according to seniority in tail male" imports the whole succession of male inheritable blood of William and embraces the whole line of the heirs male of the body of William, and that, therefore, the rule in *Shelley's Case* (1) applies. I am unable to resist the logic of this argument if the dicta are to be construed in isolation and accepted as a complete guide to the problem. But, in my judgment, they are not.

Goodtitle d. Sweet v. Herring (3) appears to me to be conclusive authority to support my conclusion. In that case the devise was to the use of Margaret Davie for life, then

"... to the use of and in trust for the heirs male of the body of the said Margaret Davie to be begotten, severally, successively, and in remainder one after another as they and every of them should be in seniority of age and priority of birth, the elder of such sons and the heirs male of his body lawfully issuing being always preferred, and to take before the younger of such son and sons and the heirs male of his and their body and bodies . . ."

It will be noted that the devise there (unlike the devise here) actually referred to the heirs male of the body of Margaret, but it also included words closely resembling those in the present case. It was held that the rule did not apply. LORD KENYON, C.J., said (*ibid.*, 272):

"The intention is most obvious to give the first taker only an estate for life; but if that intention could not be carried into effect without shaking a positive rule of law I should certainly bow to the decisions."

After considering a number of cases he concluded (*ibid.*, 273):

"All [the cases] conspire to show that Margaret Davie took only an estate for life, and not in tail."

GROSE, J., said (*ibid.*, 274):

"The only question is, whether the words 'heirs male of the body of M.D.' etc., can by the subsequent words be explained to be used as words of purchase? That must be determined by considering what the intent of the testatrix was, and whether such intent can be effectuated within settled rules of law."

A LAWRENCE, J., after considering the terms of the devise, said (*ibid.*, 275):

"... this ... is the same as if the testatrix had said 'by heirs male of the body I mean the eldest and other son and sons of M.D.'; and if she had said so in as many words it cannot be questioned but that the former words must have had that construction put upon them."

B The whole of the judgment of LE BLANC, J., is in point. He said (*ibid.*, 276):

"There is no rule of law to prevent the words 'heirs male of the body' from being words of purchase, if they are clearly so intended to be. Now here the testatrix expressly says, 'such son and sons', plainly referring to the same persons she had before described as heirs male of the body, etc. and pointing out what estate they were to take. And having provided for the sons she proceeds to provide for the daughters of M.D., which confirms the construction put upon the former words. Therefore I am clearly of opinion that Margaret Davie took only an estate for life, and that the sons took as purchasers."

C *Goodtitle d. Sweet v. Herring* (3) seems to me to be clear authority for the proposition that, in a devise in common form in a strict settlement, the sons of the propositus take as purchasers, and the words devising estates tail to them should not be construed as words delimiting the estate of the propositus. If this is so, the rule in *Shelley's Case* (1) cannot apply. I feel sure that neither LORD MACNAGHTEN nor LORD DAVEY intended to throw out any doubt on the efficacy of such a settlement, which was treated as beyond question in 1801 and never afterwards doubted. This was the view of the profession. In *Re Scott* (4), for example, both WARRINGTON, J., and all counsel tacitly proceeded on that basis, and the practice of conveyancers did not change. Perhaps the clue to the interpretation of LORD MACNAGHTEN's dictum ([1897] A.C. 668) in *Van Grutten v. Foxwell* (2) is to be found in the passage where he said (*ibid.*, 677):

F "... the question now in every case must be whether the expression requiring exposition, be it 'heirs' or 'heirs of the body', or any other expression which may have the like meaning, is used as the designation of a particular individual or a particular class of objects, or whether, on the other hand, it includes the whole line of succession capable of inheriting."

G This passage seems to me to show that an expression properly construed as designating particular individuals is not to be regarded as one which includes the whole line of succession capable of inheriting or imports the whole succession of inheritable blood merely because the individuals designated do, in fact, comprise the whole line of succession capable of inheriting. LORD HERSCHELL must, I think, have so understood LORD MACNAGHTEN, because he said (*ibid.*, 663):

H "... if the words which are added, or, indeed, any provisions to be found in other parts of the will, show that the expression 'heirs' or 'heirs of the body' was not intended to be used in the ordinary legal sense, but was intended to designate some individual person or particular class of persons, effect may be given to the intention of the testator thus expressed. The rule in *Shelley's Case* (1) does not then apply, because the limitation after the estate for life is not upon the true construction of the will to the heirs or heirs of the body of the tenant for life in the legal sense of those

words, any more than it would have applied if the gift had been in terms to a designated person or a designated class."

Having said this, he expressly agrees with LORD MACNAGHTEN as to the scope of the rule. The clue to LORD DAVEY's dictum is, I think, similar. His reasoning (*ibid.*, 685), read as a whole, seems to me to show that an expression designating a particular class would not be regarded by him as embracing the whole line of heirs merely because they did all happen to fall within its orbit. But whether or not I have accurately interpreted these dicta, I am convinced that strict settlements in common form (including the present settlement) must be, and were intended to be, excluded from their scope.

Order accordingly.

Solicitors: *Church, Rendell & Co.*, agents for *Pitts-Tuckers*, Barnstaple (for the plaintiffs); *Vandercom, Stanton & Co.*, agents for *Brewer & Thorburn*, Barnstaple (for the first defendant); *Walker, Martineau & Co.* (for the second defendant).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

REEVES v. DEANE-FREEMAN.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), July 15, 23, 1952.]

Public Authority—Limitation of action—Soldier on duty—Member of Canadian forces—Visiting Forces (British Commonwealth) Act, 1933 (c. 6), s. 2 (3) (b)—Limitation Act, 1939 (c. 21), s. 21 (1).

As the result of a collision on Nov. 14, 1946, between the plaintiff, who was riding a motor cycle, and a lorry belonging to the Canadian army and driven by the defendant, a member of the Canadian army, in the course of his duty, the plaintiff, on Dec. 2, 1949, issued a writ in an action for damages against the defendant.

HELD: an act done by a soldier in Her Majesty's army in the course of his duty was done in pursuance of a public duty within s. 21 (1) of the Limitation Act, 1939; by s. 2 (3) (b) of the Visiting Forces (British Commonwealth) Act, 1933, members of the Canadian army were put in the same position in relation to this matter as members of the home forces; and, therefore, the action could not be maintained, it not having been commenced before the expiration of one year from the date on which the cause of action accrued.

FOR THE VISITING FORCES (BRITISH COMMONWEALTH) ACT, 1933, s. 2 (3), see HALSBURY'S STATUTES, Second Edn., Vol. 22, p. 676; and FOR THE LIMITATION ACT, 1939, s. 21 (1), see *ibid.*, Vol. 13, p. 1180.

Cases referred to:

- (1) *Merlihan v. Pope, Ltd.*, [1945] 2 All E.R. 449; [1946] K.B. 166; 115 L.J.K.B. 90; 173 L.T. 257; 109 J.P. 231; 2nd Digest Supp.
- (2) *Horden Richmond, Ltd. v. Duncan*, [1947] 1 All E.R. 427; [1947] K.B. 545; [1947] L.J.R. 1024; 176 L.T. 332; 2nd Digest Supp.
- (3) *Wilson v. 1st Edinburgh City Royal Garrison Artillery Volunteers*, (1904), 7 F. (Ct. of Sess.) 168; 38 Digest 125, n.
- (4) *The Danube II*, [1921] P. 183; 90 L.J.P. 314; 125 L.T. 156; 38 Digest 103, 741.
- (5) *Greenwell v. Howell*, [1900] 1 Q.B. 535; 69 L.J.Q.B. 461; 82 L.T. 183; 38 Digest 105, 751.
- (6) *Griffiths v. Smith*, [1941] 1 All E.R. 66; [1941] A.C. 170; 110 L.J.K.B. 156; 164 L.T. 386; 105 J.P. 63; 2nd Digest Supp.

ACTION for damages for negligence.

On Nov. 14, 1946, the plaintiff, while riding a motor cycle, collided with a lorry belonging to the Canadian army and driven by the defendant, a member

of the Canadian armed forces, and suffered personal injuries. On Dec. 2, 1949, he issued a writ for damages for negligence against the defendant. On July 20, 1950, the plaintiff filed his statement of claim. By para. 4 of the defence it was pleaded that the action was barred by the Limitation Act, 1939, s. 21 (1), it not having been brought within one year of the date on which the cause of action accrued. On Mar. 11, 1952, PARKER, J., made an order under R.S.C., Ord. 25, r. 2, that the point of law raised in para. 4 of the defence be set down for hearing forthwith and disposed of before the trial of the action. It was contended by the plaintiff (i) that a soldier on duty was not entitled to the protection of s. 21 (1) as a person acting in pursuance of a public duty or authority, and (ii) that, even if the Act afforded protection to a member of the British forces, it did not do so to a member of the Canadian forces.

R. J. S. Harvey for the plaintiff.

P. M. O'Connor for the defendant.

Cur. adv. vult.

July 23. LORD GODDARD, C.J., read a judgment in which he stated the facts and continued: In my opinion, the second point raised by the plaintiff is concluded in the defendant's favour by s. 2 (3) (b) of the Visiting Forces (British Commonwealth) Act, 1933, the object of which, as it seems to me, is to put members of the forces of the British Commonwealth while in this country in precisely the same position as members of the home forces. The words of the section on which reliance is placed are these:

"Subject as hereinafter provided, any enactment (whether contained in the Naval Discipline Act, the Army Act, the Air Force Act or any other statute) which . . . (b) in virtue of a connection with the home forces or any of them, confers a privilege or immunity on any person . . . shall, with any necessary modifications, apply in relation to a visiting force as it would apply in relation to a home force of a like nature to the visiting force."

If, therefore, a home force is to be regarded as a public authority, a visiting force is to be equally so regarded.

The question how far a soldier on duty is entitled to rely on this Act does not appear to have been the subject of express decision in this country. In *Merlihan v. Pope, Ltd.* (1) the circumstances were exactly the same as in the present case, as one Pagnello, who had been made a third party, was a member of the Canadian armed forces, and it was held that he would have been liable in the action but for the protection afforded by s. 21 (1) of the Limitation Act, 1939. It does not seem that counsel in the case had argued that the section did not apply or that a soldier was not to be regarded as acting in pursuance of a public duty. It may well be that an admission was made, but it is observable that BIRKETT, J., in giving judgment, said ([1945] 2 All E.R. 450):

"It is quite clear that the plaintiff at [the date of the writ,] could not sue Pagnello because of this section [s. 21 (1)]. The twelve months had gone past . . ."

In *Hordern Richmond, Ltd. v. Duncan* (2) it was assumed that a sergeant in the British army was entitled to the protection of the sub-section. It is now said, however, that those cases cannot be regarded as authorities as the question was not specifically argued, and it is desired to obtain a definite decision on the point.

It seems to me impossible to contend that the army and its officers are not a public authority. The nearest case on the point is *Wilson v. 1st Edinburgh City Royal Garrison Artillery Volunteers* (3), which was cited with approval in the Court of Appeal in *The Danube II* (4). In the *Wilson* case (3) a child was killed on the highway by an ammunition wagon belonging to a regiment of volunteers of which the second defendant, Colonel Mackay, was the commanding officer, and it was alleged that the accident had been caused by his fault in not seeing

that quiet horses were used, that competent drivers were employed, that the wagons were driven according to military regulations, and that a competent commissioned officer was present to superintend the parade. It was held that the alleged neglect resulted from the execution of Colonel Mackay's public duty as commander of volunteers. In *The Danube II* (4) the action was against the master of a tug which was towing a battle practice target to Scapa Flow where it was to be used for gunnery practice by the Royal Navy, and it was held that the master of the tug was entitled to the protection of the Public Authorities Protection Act, 1893, s. 1, now replaced by s. 21 (1) of the Act of 1939. A

On the question whether an individual can be a public authority within the meaning of the section, in my opinion, the matter is concluded in this court by the decision in *Greenwell v. Howell* (5), where it was held that the protection of the Public Authorities Protection Act, 1893, s. 1, extended to officers of a public body and to persons acting under their direct mandate. If, therefore, the army is a public authority, as, in my opinion, it is, and if the soldier was acting under the direct orders of his officer, he is entitled to the protection which the Act gives. B
In *Griffiths v. Smith* (6) VISCOUNT MAUGHAM said ([1941] 1 All E.R. 76):

"It is sufficient to establish that the act was in substance done in the course of exercising for the benefit of the public an authority or a power conferred on the public authority not being a mere incidental power, such as a power to carry on a trade. The words in the section are 'public duty or authority', and the latter word must be taken to have its ordinary meaning of legal power or right, and does not imply a positive obligation." C

It was for this reason that, before deciding, I required an admission, not only that the defendant was on duty, but also as to the nature of the duty, for I can conceive that, if, let us say, the commanding officer of a battalion or depot had to attend some social function, such as a regimental sports meeting or a special church service, for which it might be proper for him to use an army car, it might be that the driver would not be acting in pursuance of a public duty, and, if an accident took place on the journey, he might not be protected by the section. D
The evidence showed that on the day in question the defendant was on a journey from the army garage to Waterloo station for duty in connection with the railway transport officer and that his journey had been authorised by the officer commanding the transport company. E
It seems to me, therefore, clear, that this was a journey which he was required by his military duty to undertake and that the duty was in connection with army service, and I am of opinion that he is protected by s. 21 (1) of the Limitation Act, 1939, and that this action falls. F

Judgment for the defendant.

Solicitors: *L. Bingham & Co.* (for the defendant); *Preston, Lane-Claypon & O'Kelly* (for the plaintiff).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

In the Estate of DAVIS (deceased).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), July 9, 1952.]

Will—Revival—Revival by codicil—Intention appearing on face of codicil—Evidence of surrounding circumstances—Wills Act, 1837 (c. 26), s. 22.

On Oct. 2, 1931, the testator made a will bequeathing his property to his executrix. On Oct. 22, 1932, he married the executrix, the will thereby being revoked under s. 18 of the Wills Act, 1837. On May 29, 1943, the testator wrote on the envelope containing the will: "The herein named [executrix and sole beneficiary] is now my lawful wedded wife". This writing was duly signed and attested. On a motion for probate of the will and codicil,

HELD: the writing of May 29, 1943, constituted a codicil; to revive the will, within the meaning of s. 22 of the Wills Act, 1837, an intention to revive the same must appear on the face of the codicil, and to determine whether there was such an intention evidence was admissible of the surrounding circumstances, e.g., of a conversation between the testator and a witness prior to his making the codicil; in the circumstances the intention appeared on the face of the codicil, and, therefore, the will was revived and both documents would be admitted to probate.

In the Goods of Steele, (1868) (L.R. 1 P. & D. 575), applied.

AS TO REVIVAL, see HALSBURY, Hailsham Edn., Vol. 34, pp. 91-95, paras. 129-131; and FOR CASES, see DIGEST, Vol. 44, pp. 365-370, Nos. 1979-2034.

Case referred to:

- (1) *In the Goods of Steele*, *In the Goods of May*, *In the Goods of Wilson*, (1868), L.R. 1 P. & D. 575; 37 L.J.P. & M. 68, 72; 19 L.T. 91; 32 J.P. 791; 44 Digest 366, 1995.

MOTION for grant of probate of a will dated Oct. 2, 1931, together with a codicil dated May 29, 1943.

The will was revoked by the testator's marriage on Oct. 22, 1932, and the question in issue was whether a writing dated May 29, 1943, was a codicil, and, if so, whether it showed an intention to revive the will.

Hunter-Brown for the applicant.

Dearbergh for next of kin in the case of an intestacy.

WILLMER, J.: This is a motion asking that a purported will and codicil should be admitted to probate in rather unusual circumstances. The testator made a will on Oct. 2, 1931, in which he purported to devise and bequeath all his property to a certain Ethel Phoebe Horsley, whom he appointed as his sole executrix. Nothing is mentioned in that will to the effect that it was made in contemplation of marriage. On Oct. 22, 1932, the testator married Ethel Phoebe Horsley. Nothing was done with reference to the will, and, pursuant to s. 18 of the Wills Act, 1837, it must be taken that it was revoked by the marriage. On May 29, 1943, the testator executed what, in my judgment, was intended to be a codicil. It was written on the outside of the envelope containing the will of Oct. 2, 1931, and all it said was: "The herein named Ethel Phoebe Horsley is now my lawful wedded wife". It is signed by the testator and duly witnessed by two witnesses. I am invited to say that the effect of that document was such as to show an intention to revive the will within the meaning of the provisions of s. 22 of the Wills Act, 1837, the material part of which provides as follows:

"No will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same . . ."

The question I have to determine is whether this codicil of May, 1943, shows an intention to revive the will. Only so can I admit the documents to probate.

I have been referred to *In the Goods of Steele* (1), where the meaning of s. 22 of the Wills Act was fully considered and it was held that in order to satisfy the words that the codicil must show an intention to revive the will the intention must appear on the face of the codicil, either by express words referring to a will as revoked and importing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some other expression conveying to the mind of the court with reasonable certainty the existence of the intention. It would seem that three possibilities are expressed there. The first two do not arise in the present case, for there are no express words here referring to the will as revoked, nor is there any disposition of property contained in the purported codicil. The question remains whether it can be said that there is some expression conveying to the mind of the court with reasonable certainty the existence of an intention to revive the will.

To say that the intention must appear on the face of the codicil does not mean that evidence of surrounding circumstances is not admissible. That is made clear in another part of the judgment in the case to which I have just referred. Evidence would clearly be admissible in the present case to identify Ethel Phoebe Horsley, and also of the fact that a marriage had taken place between her and the testator. I am, however, invited to go further and to admit and give effect to the evidence of a sister of Miss Horsley who says that shortly before the time when the purported codicil was executed she had had a discussion with the testator in the course of which she pointed out that the effect of his marriage was to revoke the will. It seems to me that that is one of the surrounding circumstances which I am entitled to take into consideration when I approach the task of construing the words of the purported codicil to decide whether or not they show an intention to revive the will.

I was very much impressed with the argument of counsel for the applicant when he pointed out that one must assume that the testator intended to execute some sort of effective document when he executed the document of 1943, and that he cannot be credited with an intention to execute a wholly ineffective codicil to a wholly ineffective will. The words which he wrote refer specifically to what was written within the envelope, and within the envelope was the will. It is pointed out, and I think with force, that the testator could only make this an effective codicil by making the will an effective will. If I am not to infer that, in preparing this document and having it executed in the form of a codicil, the testator intended to revive his will, what other intention can possibly be imputed to him? Nobody suggests that he was otherwise than in full possession of his faculties. It seems difficult to draw the inference that in executing this document he was intending to revoke the will, for the will was in any case already revoked by his marriage, and, even if he were unaware of that (although, as I have pointed out, there is evidence to show that he had been reminded of it), there are easier ways than that to revoke a will. I am baffled when I try to think what other intention the deceased could possibly have had except to revive the will. It appears to me that the words ought to be construed, if they legitimately and fairly can be construed, so as to have some effect, and the only effect I can give them is that of making the will effective.

In all the circumstances, and bearing in mind, as I have done, the surrounding circumstances that have been proved in evidence, I have come to the conclusion that the execution of that document in 1943, coupled with the words used therein, do show an intention to revive the will of 1931, which had been revoked by the marriage of 1932. It appears to me, therefore, that the will and the codicil should be admitted to probate as valid testamentary documents.

Grant of probate of will and codicil.

Solicitors: *Collyer-Bristow & Co.*, agents for *Ingram & Co.*, Leicester (for all parties).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

LEES v. MOTOR INSURERS BUREAU.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), July 16, 1952.]

Street Traffic—Motor insurance—Compulsory third party insurance—Liability in respect of death of employee—Judgment in favour of widow unsatisfied—Liability of Motor Insurers Bureau—Road Traffic Act, 1930 (c. 43), s. 35 (1), s. 36 (b), proviso (i).

A By an agreement between the Ministry of Transport and the Motor Insurers Bureau the bureau undertook to satisfy any judgment not satisfied within seven days in respect of "any liability which is required to be covered by a policy of insurance or a security . . . under Part II of the Road Traffic Act, 1930." A policy of insurance taken out by an employer covered liability for the death or bodily injury of any person caused by the use of a lorry owned by the employer, but it excluded "liability in respect of death arising out of and in the course of his employment of a person in the employment of the insured." An employee in the course of his employment drove the lorry negligently on a road and killed another employee, whose death arose out of and in the course of his employment. The widow and administratrix of the deceased employee obtained in an action for damages against the driver a judgment which remained unsatisfied, and she claimed that she was entitled to recover the sum for which judgment had been given from the Motor Insurers Bureau by virtue of the agreement.

C HELD: as by proviso (i) to s. 30 (1) (b) of the Road Traffic Act, 1930, a policy of insurance required to be taken out in respect of the use of a vehicle on a road under s. 35 (1) was not required to cover "liability in respect of the death arising out of and in the course of his employment of a person in the employment" of the insured, liability for the death of the employee was not "required to be covered by a policy of insurance" and the bureau were not liable under the agreement.

D FOR THE ROAD TRAFFIC ACT, 1930, s. 35 (1) and s. 36 (1) (b), see HALSBURY'S STATUTES, Second Edn., Vol. 24, pp. 602 and 605.

E Cases referred to:

- (1) *John T. Ellis, Ltd. v. Hinds*, [1947] 1 All E.R. 337; [1947] K.B. 475; [1947] L.J.R. 488; 176 L.T. 424; 2nd Digest Supp.
- (2) *Marsh v. Moores*, [1949] 2 All E.R. 27; [1949] 2 K.B. 208; [1949] L.J.R. 1313; 113 J.P. 346; 2nd Digest Supp.
- F (3) *Sutch v. Burns*, [1943] 2 All E.R. 441; *revsd.* C.A. [1944] 1 All E.R. 520, n.; [1944] K.B. 406; 113 L.J.K.B. 407; 2nd Digest Supp.
- (4) *Richards v. Cox*, [1942] 2 All E.R. 624; [1943] K.B. 139; 112 L.J.K.B. 135; 168 L.T. 313; 2nd Digest Supp.
- (5) *Digby v. General Accident Fire & Life Assurance Corpn., Ltd.*, [1942] 2 All E.R. 319; [1943] A.C. 121; 111 L.J.K.B. 628; 167 L.T. 222; 2nd Digest Supp.

G SPECIAL CASE stated by an arbitrator.

The claimant was the widow and administratrix of the estate of Joseph Lees, an employee of G. R. Jackson, Ltd., of Oxford Road, Reading, Berkshire, and Dudley Street, Wednesbury, Staffordshire. On May 5, 1948, one William Goode, another employee of G. R. Jackson, Ltd., in the course of his employment so negligently drove a lorry on a road within the meaning of Part II of the Road Traffic Act, 1930 (as was conceded by the respondents) as to cause it to strike a gate which led to masonry forming an adjacent wall or pillar falling on Joseph Lees who was standing nearby. As a result Lees suffered injuries from which he died. His injuries and death arose out of and in the course of his employment as a servant of G. R. Jackson, Ltd. At the time of the accident G. R. Jackson, Ltd., held a policy of insurance issued in respect of the use of the lorry by the Cornhill Insurance Co., Ltd., who were authorised insurers for the purposes of

s. 36 of the Road Traffic Act, 1930, within the meaning of s. 5 (1) of the Assurance Companies Act, 1946. The policy indemnified the insured, inter alia, against

"all sums which the insured shall be legally liable to pay by way of compensation for:—(a) death of or bodily injury to any person caused by or arising out of the use of any motor vehicle described in the schedule . . ."

A condition of the policy provided that

"2. This policy does not insure against:—(a) liability in respect of death arising out of and in the course of his employment of a person in the employment of the insured or of bodily injury sustained by such a person arising out of and in the course of his employment."

After notice to the respondents, on Feb. 1, 1949, the claimant, as widow and dependent and administratrix of the estate of Joseph Lees, brought an action against the driver of the lorry under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934. No defence was delivered and on Mar. 18, 1949, she signed interlocutory judgment in the action and on June 9, 1949, the damages were assessed at £1,200 with £79 13s. 6d. costs. That judgment was not satisfied.

By an agreement, dated June 17, 1946, and made between the Minister of Transport and the respondents:

"If judgment in respect of any liability which is required to be covered by a policy of insurance or a security . . . under Part II of the Road Traffic Act, 1930, is obtained against any person or persons in any court in Great Britain whether or not such person or persons be in fact covered by a contract of insurance . . . and any such judgment is not satisfied in full within seven days from the date upon which the person or persons in whose favour the judgment was given became . . . entitled to enforce it then Motor Insurer's Bureau will subject to the provisions of cl. 5 and 6 of these presents pay or satisfy or cause to be paid or satisfied to or to the satisfaction of the person or persons in whose favour the judgment was given any sum payable or remaining payable thereunder in respect of the foresaid liability including taxed costs . . . whatever may be the cause of the failure of the judgment debtor to satisfy the judgment."

The claimant claimed a declaration that the judgment she had obtained was in respect of a liability required to be covered by a policy of insurance by s. 35 (1) and s. 36 (1) (b) of the Road Traffic Act, 1930, being a liability which was incurred by the driver in respect of the death of Joseph Lees caused by the use by the driver of a vehicle on a road. She contended that, as she had complied and was prepared to comply with the conditions precedent to the liability of the respondents under their agreement with the Minister of Transport, the respondents had incurred a liability to satisfy the judgment and pay the costs, and she claimed further an order that they pay her the damages and costs awarded with interest and the costs of the arbitration. The respondents contended, inter alia, that the judgment was not in respect of a liability required to be covered by a policy of insurance under the Act of 1930, and that a policy of insurance complying with the requirements of the Act of 1930 was at all material times in force in respect of the user of the lorry by the driver as the servant of the insured. The arbitrator held that the driver was required to be covered by a policy of insurance or security under the Act of 1930 in respect of the accident and that he was not so covered since liability under the policy was excluded by condition 2 (a). He, therefore, made the declaration and order asked for, subject to the decision of the court whether the judgment was in respect of a liability required to be covered by a policy of insurance or security under Part II of the Act of 1930.

C. N. Shawcross, Q.C., and *A. M. Lee* for the claimant.

Berryman, Q.C., and *H. H. Edmunds* for the respondents.

LORD GODDARD, C.J., stated the facts and continued: A person is only required to insure himself in accordance with the Road Traffic Act, 1930, because he is the owner of a motor vehicle which he uses on the road. Section 35 (1) of the Act provides:

"Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part of this Act."

By s. 36 (1) (b) the policy must be a policy which:

"insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road: Provided that such a policy shall not be required to cover—(i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment."

At the time of this accident there was in force in relation to the user of the vehicle by the driver a policy of insurance in respect of third party risks which complied with the requirements of the Act, because the policy indemnified the insured against all the sums which he should be deemed to be liable to pay in respect of death or bodily injury to any person arising out of the use of the motor vehicle. The Divisional Court has decided that what has to be covered by insurance is the use of the vehicle, not the person using the vehicle. The words are quite clear:

"unless there is in force in relation to the user of the vehicle by that person . . . a policy of insurance."

See *John T. Ellis, Ltd. v. Hinds* (1) and *Marsh v. Moores* (2). The suggestion that the driver ought to have had a policy insuring him is exactly what was held by ATKINSON, J., in *Sutch v. Burns* (3) which the Divisional Court overruled in *John T. Ellis, Ltd. v. Hinds* (1) where it was held that a policy in force covering the user of the vehicle at the time when it was on the road was a compliance with the Act. If the driver had been prosecuted for driving an uninsured vehicle, his answer would have been that the vehicle belonged to his master who had a policy in force covering him (the master) against any accident for which he might become liable by reason of the use of the vehicle on the road. Therefore, the driver did not commit any offence and was not in breach of s. 35 (1) of the Act. Prima facie there was a liability which was required to be covered by a policy of insurance.

The difficulty is that the person who was killed, Joseph Lees, was a servant of the insured, and liability in respect of his death is excluded from the scope of the policy. In addition, the owner of the vehicle was not required by the Act of 1930 to insure against liability for injury caused to someone in his service. Reliance has been put specially on *Richards v. Cox* (4) which followed *Digby v. General Accident Fire & Life Assurance Corp., Ltd.* (5). In *Richards v. Cox* (4) the same state of affairs arose as is present here, the person injured and the driver of the car being both in the employ of the owner of the car. The driver was negligent, and the plaintiff recovered damages in an action against him. The question then arose whether the policy obliged the underwriters to indemnify the driver, and it was held that it did by reason of its terms which provided:

"In terms of and subject to the limitations of and for the purposes of, this section the company will treat as though he were the insured person

any person who is driving such vehicle on the insured's order or with his permission provided (a) that such person is not entitled to indemnity under any other policy."

It was held that there were in effect two policies in one document, a policy insuring the owner of the vehicle and a policy insuring the driver. The owner of the vehicle would not have been able to recover against the underwriters because the policy did not cover his liability to his own servant, but as the terms of the policy insured the driver himself, and as the injured person was not a servant of the driver, nevertheless the driver was covered by the policy and was entitled to an indemnity by the insurance company against the damages which he had to pay. I do not find in the present policy any such term. I am unable to hold here that there was not a policy in force which complied with the Act of 1930 and covered all the persons whom the Act requires to be covered, but it excludes liability in respect of employees of the insured, and the underwriters are entitled to exclude that liability under proviso (i) to s. 36 (1) (b). The liability in this case, therefore, was not required to be covered by a policy of insurance, and I must differ from the learned arbitrator.

Arbitrator's award reversed.

Solicitors: *A. E. Wyeth & Co.* (for the claimant); *Stanley & Co.* (for the respondents).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

TIDEWAY INVESTMENT AND PROPERTY HOLDINGS, LTD. D *v.* WELLWOOD. SAME *v.* ORTON. SAME *v.* JONES. SAME *v.* FRIEDENTAG. SAME *v.* THORNILY.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.), July 10, 11, 14, 15, 1952.]

Rent Restriction—Costs—Action in High Court—Claim for possession and damages for breach of covenant—Joinder with claim for trespass—Trespass of trifling nature—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 17 (2)—County Courts Act, 1934 (c. 53), s. 40 (1), s. 47 (1). E

Rent Restriction—Statutory tenancy—Breach of covenant during contractual tenancy—Failure to remedy before expiration of tenancy—Tenant continuing in possession. F

Rent Restriction—Possession—Form of order—Possession on failure of tenant to fulfil conditions—Tenant authorised to continue breach of covenant and trespass.

Flats, of some of which the defendants in the present action were tenants, were let on tenancies which expired on Dec. 25, 1950. The rateable value of each flat brought it within the protection of the Rent Restrictions Acts. Although the landlords intended to provide hot water and other services for these flats and the rent was such as to include the cost of services, the tenancy agreement in respect of each of them contained (a) a provision that the landlords undertook no obligation to provide any services, and (b) a covenant by the tenant not to make any alteration whatever in the premises or erect any stove or pipe without the written consent of the landlord. In March, 1950, on applications by the tenants under the Landlord and Tenant (Rent Control) Act, 1949, the rent tribunal reduced the rents of the flats on the basis that the landlords were under no contractual obligation to provide any services. The landlords thereupon withdrew all services, but offered to provide them at an increased rent, and they also informed each tenant that alterations necessary to instal individual water heating would be authorised subject to the tenant complying with certain conditions in regard to reinstatement and payment towards the landlords' costs. By October,

1950, the defendants had installed (without the licence of the landlords) gas heaters, the fumes of which were carried out of the flats by flue pipes fixed by brackets to the under side of the balcony of the storey above and ending in a baffle protruding beyond the balcony. The balconies were not demised to the tenants. On learning that heaters were already installed by the defendants, the landlords were willing to waive the breach of covenant if the defendants would sign an agreement containing the conditions in regard to reinstatement and payment towards their costs, but the defendants refused to do so. On the expiry of the tenancy agreements, the tenants retained possession and the landlords started actions in the Chancery Division for possession of the five flats, mesne profits, damages for breach of contract, and damages for trespass. Neither claim for damages was quantified and no objection was taken in respect of the joinder of the claim for damages for trespass. The defendants pleaded the protection of the Rent Restrictions Acts. At first instance it was held that the installation of the stoves constituted a breach of covenant and that the fixing of the brackets to the under side of the balcony of the storey above amounted to a trespass in respect of which 10s. damages were awarded against each tenant, but the judge decided that it would not be reasonable to make orders for possession and each tenant would be allowed to remain in possession and to maintain his installation subject to his signing an agreement (i) to pay a proper sum towards the landlords' costs, and (ii) to deposit a proper sum for the reinstatement of the flat after the removal of the heater. The judge found himself precluded from awarding the landlords any costs by s. 17 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. On appeal,

HELD: (i) the award of 10s. damages for trespass by each tenant was ample recompense for the injury suffered by the landlords; it being apparent on the pleadings and at the trial that the claim for trespass was of a trivial nature, it was within the jurisdiction of the county court; and, therefore, having regard to the fact that the remainder of the relief sought (which must be regarded as arising under the Rent Restrictions Acts) was also within that jurisdiction, the judge rightly concluded that, in view of s. 17 (2) of the Act of 1920, no costs could be awarded to the landlords.

Smith & Co., Ltd. v. Kirby ([1947] 1 All E.R. 459), distinguished, and doubted by **SIR RAYMOND EVERSHERD, M.R.**

Dictum of **COHEN, L.J.**, in *Wolfe v. Clarkson* ([1950] 2 All E.R. 532), dissented from by **SIR RAYMOND EVERSHERD, M.R.**

(ii) while, as a general rule, where, in an action for possession, it was desired to impose conditions, it was desirable to make an order for possession and to suspend it provided that the conditions of the order continued to be satisfied, in the special circumstances of the present case and in view of the fact that, if the landlords had to make a further application in the action, they would not be able to recover costs, the order refusing possession to the landlords subject to the condition that the tenants entered into certain obligations within a certain time (failing which the order for possession would go) ought not to be disturbed, and, moreover, in view of the trivial nature of the trespass and all the circumstances relating to the breach of covenant, it was not a valid objection to the order that it imposed on the landlords a continuing breach of covenant and a continuing trespass.

(iii) there was no basis in the Rent Restrictions Acts for the submission that, because during their contractual tenancies the tenants were in breach of a covenant in their leases so that the landlords were entitled to forfeit the leases, the tenants failed to acquire protection of those Acts after the determination of their leases, although that circumstance would, no doubt, be relevant on the question whether it was reasonable to make an order for possession.

Decision of **HARMAN, J.** ([1952] 1 All E.R. 1142), affirmed.

AS TO DISCRETION OF COURT AS TO ORDERS FOR POSSESSION, see HALSBURY, Hailsham Edn., Vol. 20, p. 329, para. 392; and FOR CASES, see DIGEST, Replacement, Vol. 31, pp. 696, 697, Nos. 7875-7884.

Cases referred to:

- (1) *Legon v. Count*, [1945] 1 All E.R. 710; [1945] K.B. 391; 114 L.J.K.B. 404; 173 L.T. 1; 2nd Digest Supp.
- (2) *Smith & Co., Ltd. v. Kirby*, [1947] 1 All E.R. 459; 31 Digest, Replacement, 723, 8064. A
- (3) *Wolfe v. Clarkson*, [1950] 2 All E.R. 529; 31 Digest, Replacement, 722, 8057.
- (4) *Bell London & Provincial Properties, Ltd. v. Reuben*, [1946] 2 All E.R. 547; [1947] K.B. 157; [1947] L.J.R. 251; 176 L.T. 92; 31 Digest, Replacement, 700, 7903. B
- (5) *Court v. Robinson*, [1951] 1 All E.R. 209; [1951] 2 K.B. 60; 2nd Digest Supp.
- (6) *Skinner v. Geary*, [1931] 2 K.B. 546; 100 L.J.K.B. 718; 145 L.T. 675; 95 J.P. 194; 31 Digest, Replacement, 659, 7612.
- (7) *Remon v. City of London Real Property Co.*, [1921] 1 K.B. 49; 89 L.J.K.B. 1105; 123 L.T. 617; 31 Digest, Replacement, 638, 7455. C
- (8) *Russoff v. Lipovitch*, [1925] 1 K.B. 628; 94 L.J.K.B. 355; 132 L.T. 789; 31 Digest, Replacement, 722, 8054.
- (9) *Lee v. Carter (K.), Ltd.*, [1948] 2 All E.R. 690; [1949] 1 K.B. 85; [1949] L.J.R. 7; 31 Digest, Replacement, 426, 5529.

APPEALS by the landlords from orders of HARMAN, J., made on Apr. 4, 1952, and reported [1952] 1 All E.R. 1142. D

In each case the tenancy agreement, which expired on Dec. 25, 1950, contained a covenant by the tenant not to make any alteration in the premises, nor to erect any stove or pipe without the consent of the landlords. In October, 1950, each tenant installed a gas water heater without the landlords' permission. On learning this, the landlords were willing to waive the alleged breach of covenant on certain conditions, but the tenant refused to comply with the conditions. After the contractual tenancy expired, the tenant remained in possession of the flat, and in January, 1951, the landlords started actions for possession on the ground of breach of covenant. HARMAN, J., held that the installations constituted a breach of covenant and a trespass, and awarded damages against each of the tenants amounting to 10s., but refused to make an order for possession so long as the tenants were willing to enter into agreements regarding the water heaters which would give the landlords substantially the same protection as they would have had if the conditions on which they had been willing to waive the breaches of covenant had been accepted. He made no order as to costs. E

Heathcote-Williams, Q.C., and *A. R. Campbell* for the landlords. F

L. A. Blundell and *S. Ibbotson* for the tenants. G

SIR RAYMOND EVERSHED, M.R.: The appellants, Tideway Investment and Property Holdings, Ltd., are the landlords of flats of which the several defendant respondents are tenants. The flats are all part of a block known as Hartington Court in Chiswick. The block consists of some fifty-six separate flats. All the flats of which the respondents are the tenants are to be found in the central block of what is, in truth, a U-shaped edifice, and in this central block are altogether twenty-two similar, or substantially similar, flats. The remaining part of the building, which contains some thirty-three flats, is at the present time under requisition by the Brentford and Chiswick local authority. For the purpose of the appeals we have dealt with one case only, that of Mr. Wellwood in flat No. 25, since the points involved are common to each of the five cases. I shall, therefore, follow that example and confine my attention in general to the case of Mr. Wellwood. H

The agreement under which the tenant occupies is one which was made before the present landlords acquired the premises. It was made by the receiver appointed by debenture holders of the previous landlords. So far as this case is concerned (and, indeed, this is a feature common to all the flats) the tenant, under the agreement to which I am about to allude was not Mr. Wellwood. According to the judge, the persons who took these original agreements were persons who, having taken them, then proceeded to dispose of them on terms advantageous to themselves to those who now occupy. The receiver adopted in one respect what may appear to be a somewhat peculiar device which reflects the great complications which much legislation and a good deal of human ingenuity have introduced into the relationships between landlords and tenants. Thus in cl. 11 (a) of the agreement of Sept. 9, 1947, is found this provision:

"The landlord undertakes no obligation (1) to provide or maintain any supply of hot water, electricity, gas or artificial heat or energy in any form to the flat or to provide or maintain or operate any lift in the building or to employ any porter, caretaker or other servant for giving attendance to the tenant in any shape or form or to clean any part of the building or to provide any service, privilege or facility of any kind whatsoever (other than access to the flat by the passages, staircases and landings and cold water supply) or (2) to provide or install or maintain or operate or permit the tenant to use any apparatus or equipment or plant or fixture or fitting or other thing of the landlord's not included in this demise."

The presence of such a provision might, at first sight, be thought to be somewhat depreciatory of the attractions of the flat. Under the conditions, however, then prevailing which enabled a tenant to apply for a reduction of rent to a rent tribunal, the absence of any obligation to provide services disabled the tenants from making application. In fact, there was, when this building was made, installed the means of providing some, or all, of the services mentioned, including a hot-water supply, and in fact the landlords, until the events which I shall presently narrate, provided a hot-water supply and heating to the tenants, but, as is quite clear from the terms of the clause that I have read, they did so gratuitously and not in pursuance of any obligation. Before I leave the agreement, two other matters may be mentioned: first, that the rent was fixed under it at £150 a year, and, secondly, that there was a covenant on the tenant's part in cl. 4

"... without the written consent of the landlord not to make any alteration in, or addition to, the said premises whatsoever, nor erect any stove or pipe, or do anything to increase the rate of premium of insurance, nor affix to any window of the premises externally or internally any venetian or other blind."

After a time the statutory provisions relating to rent tribunals were altered, and the absence of any obligation to provide services no longer was a bar to an application by a tenant for a reduction of rent, and so, in November, 1949, Mr. Wellwood, and sixteen other of the tenants in this block made, in fact, application to the appropriate rent tribunal and were successful. The tribunal were told that in this case there was no obligation on the landlords to provide any of these services, and the tribunal proceeded to consider the quantum of rent with regard to that fact, and they reduced Mr. Wellwood's rent, substantially, to £90 a year. That was the first skirmish in the warfare which now, some three and a half years later, finds another aspect in this court. So large a reduction of rent was naturally a somewhat severe blow to the landlords, and they came to the conclusion that, with the prevailing costs of providing services such as hot water and heating, they could no longer economically maintain those services for a rent reduced to £90 a year. They, therefore, in the exercise of their undoubted rights under the agreement, proceeded to cut off altogether the hot water and

heating. That in turn was an activity not likely to commend itself to the tenants, especially in the winter. There followed a period of attempts at negotiation, and I hope I do neither party an injustice if I say that the temper of each party became such that they were not at all inclined to accept as reasonable any suggestion which the other side made. Eventually the tenants, who, no doubt, thought life without any hot water or heating was hardly tolerable, proceeded to make some arrangements themselves for installing means to give them those amenities.

The means they adopted, I am bound to say, do not appear to me to be of a very unpleasing character from any point of view. We have been supplied with some photographs. Counsel for the tenant has given us the details, but it is sufficient to say that the private heating installation at each flat involved that there should be carried out of the flat through a window a flue pipe for the discharge of gases, and at the end of the pipe appears to be a square piece of metal, perforated round the edges for disseminating the gases into the outer atmosphere. This pipe is held in position by two rods, or a bracket, affixed to the under side of the balcony in each case which runs along the flats behind them and provides a means of access to the flats. The arrangements made corresponded to the arrangements similarly made in the flats requisitioned by the Chiswick and Brentford local authority for supplying heating and hot water to the thirty-three flats which they had requisitioned, so that there was, at any rate, a degree of uniformity in these arrangements, and, looking at the photographs, I am bound to say that to describe them as eyesores or as seriously diminishing the aesthetic virtues, if any, of the edifice seems to me to be the language of extravagance. But such a proceeding clearly involved, as the judge held (and I think there can be no question of it), a breach of the covenant which I have read in cl. 4 of the tenant's agreement for tenancy.

The warfare proceeded, and the counter-offensive taken by the landlords was to threaten forfeiture of the lease on the ground of breach of covenant, and thereafter to sue for possession. The judge held that there was never any effective forfeiture, but at the material time (that is, the issue of the proceedings) the tenant's tenancy had in fact expired, so that his continuing occupation was justified by his defence in reliance on the Rent Restrictions legislation, and it is not in dispute that, so far as the rateable value of the premises is concerned, Mr. Wellwood's flat is, as are the other flats, within the scope of that legislation.

With that preliminary statement I now turn to the proceedings themselves. They were instituted, not in the county court, but in the Chancery Division of the High Court, and the pleadings are, indeed, somewhat elaborate, but the claim made is simple enough. The prayer of the statement of claim is as follows:

"The plaintiff's claim is for (1) Possession of [the premises]; (2) Mesne profits; (3) Damages for breach of contract; (4) Damages in trespass."

It is to be noted that no figure was stated as the quantum of damage suffered or claimed under paras. 3 and 4 of the prayer. As regards the damages in trespass, the trespass alleged consisted of the fact that, as I have already explained, the flue pipes were attached by rods or brackets to the under side of the balconies, and the claim was (and it was a claim which the judge held to be well founded) that the balconies formed no part of the subject demised, but were the property of the landlords, to the possession of which the landlords were entitled. The joinder in one action of the claims for possession, rent, etc., on the one hand, and the claim for damages for trespass, on the other, was, strictly speaking, not authorised save by consent, but no objection, in fact, was ever taken to that joinder, and no doubt that was wise enough since the whole matter turns on the consideration of a single series of facts.

I propose, first, to deal with a point that has been taken and which depends on the circumstance that this action was started in the High Court and not in the county court. In the course of his judgment the learned judge expressed the

view (and I am content to treat it as entirely correct) that the tenants, during the course of this protracted series of battles, were unreasonable, among other matters, when they declined to agree with certain suggestions put forward by the landlords in May, 1948, for authorising, on terms, the continuance (at any rate for a limited time) of the arrangements which I have tried to describe for separate heating and the provision of separate hot water to the flats by means of these pipes attached to the balconies. Indeed, at the end of the learned judge's judgment I find this language ([1952] 1 All E.R. 1149):

"As to the tenants, they deserve none [i.e., no costs] in my judgment, for they could have had the terms which I have accorded to them without any action and the proceedings stem from their unreasonable attitude."

But the judge came to the conclusion that by virtue of s. 17 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, he was precluded, either directly or indirectly, from awarding to the landlords any costs whatever. That is one of the matters which has been the subject of complaint in this court by the landlords, and since it has, I think, somewhat far-reaching effects when I come to consider the order made or to be made in this case, I propose immediately to deal with that aspect of the case.

The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 17 (2), provides:

"A county court shall have jurisdiction to deal with any claim or other proceedings arising out of this Act or any of the provisions thereof, notwithstanding that by reason of the amount of claim or otherwise the case would not but for this provision be within the jurisdiction of a county court, and, if a person takes proceedings under this Act in the High Court which he could have taken in the county court, he shall not be entitled to recover any costs."

It was the learned judge's view that the whole of these proceedings were fairly to be described as proceedings taken "under this Act", and were proceedings which, accordingly, could have been taken in the county court. For that reason the learned judge thought that the final line of the sub-section prevented him from awarding to the landlords any costs whatever, and the first question is to consider whether that view is right. I think the matter is one of some little difficulty, and although it has been considered on two or three occasions by the courts, I confess that for my part I am not satisfied that any satisfactory answer to the question, what is the exact scope and meaning of this sub-section, has yet been given.

The first thing to note about this case is that although the first three paragraphs of the prayer seem to me, with reasonable clearness, to comprehend, or to be, claims "arising under the Act", that is not true of the claim for trespass. In saying that the first three claims are properly described as "claims arising under this Act", I do not forget that, as the proceedings were initiated, the form which they took was of the character that the plaintiffs said: "Here is a contractual lease the provisions of which have been broken. We, the landlords, have forfeited the lease. We claim possession as on a forfeiture, and also claim damages for breach of the contract contained in the lease." But once it was made apparent by the terms of the defence that the claim that the tenant would set up, and seek to rely on, was that he was within the protection of the Rent Acts, and certainly once it was made clear (as it was by the learned judge) that there had been no forfeiture of the lease, but that the lease had expired, and, accordingly, that the tenant was in possession or occupation either as a trespasser or by virtue of s. 12 of the Act of 1920 (i.e., as what is called a statutory tenant), and, further, when it is appreciated that the breach of covenant is a continuing breach, then I think it becomes plain, and I do not think counsel for the landlords have really seriously contended to the contrary, that all these claims arising out of the alleged breach of covenant and consisting primarily of a claim for

possession must be regarded as arising out of or under the Rent Restrictions Acts. If, therefore, there had been no other claim added, it must, I think, be obvious that the county court had jurisdiction to deal with them. I agree that the present matter is in some respects complicated, but still it has been plainly the policy of Parliament that all these Rent Acts cases should be dealt with in the county court. It is not part of the duty of the court to criticise the policy of Parliament, and I am not doing so. Indeed, I add that, according to my experience, the county courts have shown themselves very well qualified to deal with all the problems to which the rent legislation has given rise. But that is not an end of the matter in the present case, for there is here added the claim for trespass, and that is something quite distinct from anything comprehended in the Rent Restrictions Acts. The matter would be just the same, to take an example given in the course of the argument, if, in a case of this kind, physical violence had occurred and a landlord had claimed for some physical injury done in a fight.

The next thing to observe is that the claim for damages in respect of trespass is not quantified, and that makes it desirable to refer at once to the section dealing with the jurisdiction of the county court in matters of tort, viz., the County Courts Act, 1934, as amended by the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 19 (1) and sched. II, s. 40 (1), which provides:

“A county court shall have jurisdiction to hear and determine any action founded on . . . tort where the . . . damage claimed is not more than £200 . . . ”

As a matter of practice, it appears to be well established that in actions of tort in the county court a limit is placed in the plaint itself on the amount of damage so as to make clear that the claim is within the county court jurisdiction. A plaintiff is always entitled to put that limitation on his claim. If, in fact, he has suffered (say) in a personal injuries action more than £200 damage, he may abandon any claim to an excess, and sue in the county court for damages not exceeding that figure. The first question is: Is it necessary, in order to found jurisdiction, that there should be a statement in the plaint limiting the claim for damages to that extent?

That question came before this court in *Legon v. Count* (1). In that case there had been no limit placed in the plaint on the damages claimed, but, objection having been taken by the judge himself to the jurisdiction of the court, the plaintiff sought to amend his claim by imposing such a limit, and the county court judge held that he had no jurisdiction in the matter at all and could not, therefore, sanction any amendment. This court took a different view and held that the court had power, under Ord. 15, r. 6, of the County Court Rules, 1936-1941, to amend the plaint so as to impose the necessary limit on the claim. I am left in a little doubt how far the decision in that case logically goes. It was the argument of counsel for the tenant that it logically goes the length that, if the county court judge had jurisdiction to amend the claim by inserting a limit as to damages, then so long as no more than the requisite sum of damages was claimed, or recovered at the trial, it must follow that the county court had jurisdiction to try the case, even though at the trial there was still no limit stated as to damages. If that were so, then, said counsel for the tenant, any argument which is based in this case on the incompetence of the county court, because the sum of damages for trespass was unstated, is disposed of in limine. I think it unnecessary to express a view on that matter, and, as I shall repeat later, having considered the cases which have been cited, I think the whole of this rather difficult question of the exact effect of s. 40 of the County Courts Act, 1934, and of the precise construction of s. 17 (2) of the Act of 1920 may some day have to be considered in this court—and I think it is open to the court to consider it. In the present case, I think that this point can be disposed of on the special facts of the case itself, the submission being (in case I have not made it clear)

that the learned judge was wrong in his conclusion on the effect of s. 17 (2), because the proceedings were not exclusively proceedings under the Rent Restrictions Acts, but included a claim for damages for trespass which latter claim was, by reason of the absence of any limit stated, outside the jurisdiction of the county court.

So that I may give at once the answer which I think should be given to that argument, I think, having regard to the facts in this case as they became apparent
A on the pleadings (and certainly as they became apparent at the trial) that the claim for damages for trespass must be regarded, and can only be regarded, as having always been a very minor characteristic of the proceedings, a claim in respect of which the damages could not by any possibility have amounted to any figure approximating to £200. The only trespass alleged consisted of the fact that in each case a pipe had protruded through the window and was held
B in position by a bracket or two rods affixed to the under side of the balcony. It is true that counsel for the landlords has said that the effect of these actions on behalf of the tenants was greatly to diminish the value of the flats by destroying, or diminishing, their aesthetic value, but, as I have already ventured to say, I think that is an altogether extravagant suggestion. The sum of 10s. awarded by the judge in respect of the damage by trespass is, to my mind, ample recompense for any injury suffered on this account by the plaintiffs. I add also that
C when before the trial an application was made by the tenants to have the proceedings transferred to the county court, no point appears to have been taken by the landlords that the case was in any event (by reason of the unquantified claim for damages for trespass or otherwise) outside the county court jurisdiction.

It, therefore, follows that in this case there have been joined two causes of
D action (and if improperly joined according to the rules, there has been no objection taken to the joinder), viz., proceedings under the Rent Restrictions Acts for possession and ancillary relief (which clearly, by the terms of s. 17 (2) would, as such, be within the competence of the county court) and also an independent claim for damages for trespass, being a claim which, as was made apparent in the pleadings and was made more apparent at the trial, was of an altogether
E trivial character, and such as, it is clear, would of itself have also been within the jurisdiction of the county court. Not only that, but according to the County Courts Act, 1934, s. 47 (1), it was a claim which (apart from any point under s. 47 (3)) in the event disentitled the landlords to recover any costs in respect of it at all. I, therefore, take the view that on the facts in this case, whether the matter is regarded as a whole or whether regard is had to the two aspects of the claim, namely, the Rent Restrictions Acts claim and the trespass claim, the
F judge rightly concluded that no costs could be awarded to the landlords, either directly or indirectly, in respect of their claims.

But it will, I think, be useful if I say a little more on this topic because of the authorities which have been cited, of which I propose to refer to two only. The first is *Smith & Co., Ltd. v. Kirby* (2), which came before HILBERY, J. That
G was an action brought by landlords claiming, first, arrears of rent under a lease, and, secondly, to recover possession of premises, which premises were comprehended within the scope of the Rent Restrictions Acts. The action having been brought in the High Court, the question arose whether the plaintiffs, being entitled to judgment, could recover costs, having regard to s. 17 (2) of the Act of 1920. From what is pointed out in *Wolfe v. Clarkson* (3) (to which I will come
H later) by TUCKER, L.J. ([1950] 2 All E.R. 533) it appears that the lease in question was a lease for twenty-one years, which had been granted in 1928. It seems clear, therefore, that the claim for rent, unpaid rent, was a claim solely in respect of the contractual obligation to pay rent as distinct from a claim which might have arisen against a statutory tenant, so called, for failure to pay the equivalent of rent which he is bound to pay by virtue of s. 15 of the Act of 1920. Having regard to the circumstance that the lease was for twenty-one years and was granted in 1928, the claim of the plaintiffs must also have been founded on

a forfeiture, since the case was tried in 1947, only nineteen years after the grant of the lease. However that may be, the learned judge, rejecting the argument that the case could have been brought in the county court said ([1947] 1 All E.R. 460):

"It arose out of the lease, and could never have been brought in the county court because it was outside the amount which is the limit of the jurisdiction of the county court. The claim for possession was a claim which the county court could have entertained, and which the county court alone should have entertained if it had stood alone, but the action was for arrears of rent and, in the second place, for possession, and, although the premises are within the Act, and, therefore, the claim in respect of the possession arises out of the Act, yet, as the claim for the rent arises out of the lease, the whole action is not one to which s. 17 (2) applies. That sub-section applies to a claim or proceeding arising out of the Act and provides that the county court shall have jurisdiction to deal with such a claim. It is true that the sub-section gives the county court jurisdiction to deal with such a claim, notwithstanding that, by reason of the amount of the claim or otherwise, the county court would not otherwise have jurisdiction. It is the amount of the claim arising out of the Act which, if in excess of the county court jurisdiction, is not to prevent the county court having jurisdiction. That sub-section deals with a case where the whole claim arises out of the Act."

So it was argued here that, since the claim for trespass did not arise out of the Act, s. 17 (2) did not apply. In my judgment, the present case, since the claim for trespass was also within the county court jurisdiction, is distinguishable on that account from *Smith v. Kirby* (2).

I will pass to the second case, to which I have already made some allusion by anticipation, *Wolfe v. Clarkson* (3), in this court, in which the first case was considered. That was also a case for possession of premises with an added claim for a sum of money for damages for breach of covenant to repair, and it was said, on the authority of *Smith v. Kirby* (2), that the two things were distinct. A claim for damages for failure to repair was a claim arising under the contract and, therefore, following *Smith v. Kirby* (2), was not one arising under the Rent Restrictions Acts, and, having regard to the amount claimed, was not otherwise one with which the county court judge could deal. The answer of this court in *Wolfe v. Clarkson* (3) was that, since the breach was a continuing breach, and since before the action started the contractual tenancy had determined, therefore both the claim for possession and the claim for breach of covenant to repair could be said to arise under the Rent Restrictions Acts, for the plaintiff could found his claim for damages exclusively on the period after expiry of the contract, when the tenant was a statutory tenant only. But, in the course of his leading judgment in that case, COHEN, L.J., having cited the passage which I have already cited, referred in these terms to *Smith v. Kirby* (2) ([1950] 2 All E.R. 532):

"That case, I think, amounts to a decision that, if any part of the claim is one which could not be within the jurisdiction of the county court, the fact that another part could have been brought in the county court instead of in the High Court does not prevent the court awarding costs in respect of the whole proceeding. That conclusion derives some support from the contrast between the early words of s. 17 (2), which deal with jurisdiction and enable the county court to deal with 'any claim or other proceedings,' and the words in the last part which merely prohibit the awarding of costs if proceedings are taken in the High Court, (which, I think, means the whole proceedings) which could have been taken in the county court. Therefore, with that part of the decision I do not see any reason to quarrel."

I have added the brackets enclosing the words "which, I think, means the whole proceedings" in order to show what I think is the essential punctuation. The

learned lord justice then proceeds to say that as regards the rest of *Smith v. Kirby* (2), namely, whether it was rightly decided on its own facts, he expressed no view. TUCKER, L.J., in his shorter following judgment, confined himself to saying, as regards *Smith v. Kirby* (2), that he expressed no view about it, and was not to be taken to be suggesting that it was wrongly decided.

The first part of the passage which I have read from COHEN, L.J.'s judgment lends, I think, support to the conclusion which I have already stated, for, in the present case, all the claims were within the county court jurisdiction, but, with the utmost respect to him, I am not, as at present advised, satisfied that I agree with COHEN, L.J., when he says, at the end of the passage which I read, that the second part of s. 17 (2) means, and could only mean, cases in which the whole proceedings could have been taken in the county court, if he intended thereby to say that s. 17 (2) has no application (quoad Rent Restrictions Acts claims) where those claims are joined with another claim which itself is outside the county court jurisdiction. It is to be noted that he omits certain important words which appear in the later part of the sub-section. The passage is

"and, if a person takes proceedings *under this Act* in the High Court which he could have taken in the county court, he shall not be entitled to recover any costs."

The wording of the sub-section is not entirely happy nor its conception entirely clear to my mind, for it is quite plain that all proceedings "under this Act" must be within the jurisdiction of the county court. It is not possible to contemplate any proceedings "under this Act" part of which are outside the jurisdiction of the county court. What I think is difficult is the case where there is a proceeding "under this Act" joined with some proceeding not under this Act, the latter being of itself outside the jurisdiction of the county court. What should the plaintiff do? Should he bring two proceedings, one in the county court and one in the High Court? If he brings both proceedings together in the High Court, then, as things stand at present, he may rely on *Smith v. Kirby* (2) as authority for the view that he is entitled to costs in the ordinary way, s. 17 (2) being excluded, but I am not, as at present advised, entirely satisfied as to the correctness of the decision of *Smith v. Kirby* (2) or of the affirmation of it as it was expressed by COHEN, L.J., in the passage which I have read. I think the matter is open for consideration and decision in this court. I say no more in the present case, since, for reasons which I have already given, where there is joined with a proceeding under the Rent Restrictions Acts another proceeding or claim which is itself within the county court jurisdiction, I am, for my part, satisfied that s. 17 (2) is not excluded so far as it relates to the proceeding under the Rent Restrictions Acts.

That part of my judgment disposes, rather out of turn, of the argument of the landlords criticising the order appealed against for the failure to award them any costs, either directly or as a condition of the tenant's remaining in possession. I have dealt with it at this stage for the reason that there has been criticism, on the landlords' side, of the form of the order in this case, to which I am about to turn. It is a form of order which I should not in general, if I may say so without disrespect to the learned judge, be prepared to approve. Putting it briefly, what the judge has done is to state in his order that he does not grant possession to the landlords, but he makes the order subject to the condition that the tenants enter into certain obligations, and then goes on to state that, if they do not do so within a limited time, an order for possession will go. In general I think a more satisfactory form of order, where the judge takes the view that the tenant should be entitled to remain in possession subject to conditions, is to make an order for possession and suspend it provided that the conditions of the order continue to be satisfied. In saying that I am echoing the language of MORTON, L.J., in *Bell London & Provincial Properties, Ltd. v. Reuben* (4). The tenant in that case, contrary to the terms of her tenancy, insisted on keeping a

dog in her flat on the ground that the presence of the dog was a necessary comfort to her nerves, and, as she kept the dog in breach of her covenant and clearly intimated that she proposed to continue to do so, the landlords served a notice to quit and brought an action for possession in the county court founded on the breach of covenant. The county court judge declined to grant possession and dismissed the proceedings. He added: "I do not say anything about any possible future breach." It was objected that that form of order sanctioned by necessary inference a continued and indefinite breach of the covenant. Therefore, MORTON, L.J., said ([1946] 2 All E.R. 551):

"I think that, if I had been trying the case, I might have inserted some safeguard for the assistance of the landlords. I have not thought out the exact form of words, but I might have ordered that possession should be given, the order not taking effect so long as the defendant satisfied the landlords, perhaps monthly or every two months, by some medical certificate, that her health still required the presence of the dog."

In cases of this kind I also think it is more desirable, as a rule, to make an order for possession and suspend it on certain terms than to follow the converse, which has been adopted in this case, particularly where, as here, so long as the tenants continue in possession in accordance with the scheme which has appealed to the judge, they will not only be in continuous breach of the covenants derived from the leases, but will also be continuing a trespass by the two little bars or the bracket on the underneath part of the balcony. Whatever may be the best general practice to apply in this case I think that the matters to which I have already alluded make it highly undesirable that a form of order should be selected which would perpetuate these proceedings in the High Court. If the order is in the form for which MORTON, L.J., indicated a preference, then, plainly, if there were any question whether the conditions continued to be so satisfied, an application would have to be made to the Chancery Court for the purpose of determining what further order should be made, and for reasons which I have already indicated, it seems to me that, if any such further application were made to the High Court, however well justified the landlords might be on that occasion, the result would be that the landlords could never recover any costs. That seems to me to be wrong and unfair to the landlords. Therefore, in this case, subject to what I shall presently say, I do not think that there is any good reason for altering the form of order which the judge made.

I should state more precisely what was the order made, and I read it accordingly:

"This court doth order that upon the execution by the [tenant] of an agreement in terms to be agreed between the parties or in the alternative to be settled by the judge within twenty-one days of the date when its terms are agreed or settled by the judge and upon the deposit and payment within the time aforesaid of such sums as by the terms of the said agreement are to be deposited or paid by the [tenant] this court doth not think fit to make an order for possession but in default of such execution deposit and payment it is ordered that the [landlords] do recover from the [tenant] possession of the property known as ——— and it is ordered that the [landlords] do recover from the [tenant]"

a certain sum for mesne profits, and then is an order for payment of 10s. as damages for trespass. The complaints made against that form of order are, first, that which I have already indicated, namely that by inference the judge has authorised, indeed imposed on, the landlords a continuing breach of covenant and a continuing trespass. I agree that, where a judge thinks it reasonable to make an order on some condition or another, it would not be, in general, right that the condition should involve the committal of some independent wrong, but, in the present case, it is plain from what I have said that the trespass itself

is of a most trifling and unsubstantial character. Furthermore, the breach of covenant must be regarded in the light of the fact that these premises were obviously built and adapted for the central supply of heat and hot water. No one can possibly have supposed that the covenant, which I have read, was ever intended to operate in the circumstances in which, unless it were broken, the tenants would have no heating and no hot water whatever. Indeed, the actual work done, as the judge held, would, apart from the trespass, have been an improvement and one to which the landlords could not reasonably have refused their consent. The case is, therefore, very special, and the inferences which may be said to flow from the order, namely, that they contemplate the continuance of some wrongful act, are inferences which are not of any real moment. I have no doubt that the solution which appealed to the learned judge is the correct and sensible solution. The agreement, which is referred to in the order, was the document which was put to the tenants for execution at the time of the negotiations in May, 1948, and with which the landlords continued to be content until shortly before the proceedings started. The terms of it are referred to by the learned judge, and I need not take time by reading the whole document. The short effect of it is that the tenant is to do the work in a proper way, is to make certain payments, the amount of which does not seem to be in dispute, is to maintain the apparatus properly, and, on the happening of certain events, is to remove it.

[HIS LORDSHIP then referred to a second objection taken to the form of the order, which does not call for a report, said that an amendment to the order was necessary, and continued:] One other thing must be made clear. By making it part of the order that the tenant shall enter into a deed of covenant in that form, it is not to be taken that the landlords are thereby assenting to, or waiving the trespass. In the existing circumstances no court would grant an injunction against a continuation of the trespass, but it should be clearly understood that it is open to the landlords, if they desire to do so, to proceed for damages for trespass so long as this stove arrangement continues. Let me say at once that, if the landlords should think fit either because there is some change in the circumstances, or if the tenant should break the terms of his deed of covenant, or, if and when they are ready to put into operation a central scheme of heating for all the flats, then it will be open to them, notwithstanding anything in this order, to make an application, but to make it to the county court, for an order for possession on the ground that it is no longer reasonable for these tenants to continue in possession in breach of the terms which the original contract imposed on them, and it would then be open to the county court to consider whether, and if so, on what terms (which may well be quite different from those now imposed) any further permission to remain in possession should be given to the tenants.

That covers the main substance of this case, but there is one other point to which I must refer. Counsel for the landlords said that in any case the present tenant was outside the ambit of Rent Restrictions Acts and, therefore, he could not claim the benefit of those Acts, and, since his tenancy had expired, he must be ordered forthwith to give up possession. That argument was based on the suggestion that the tenant had been shown to have been in breach of cl. 4 of his contract, and was shown also to be intending to continue that breach and accordingly was disentitled to claim the protection of the Acts. So stated the proposition is, at least, intelligible. It is true that by his defence the tenant was alleging that he was not in breach of covenant, but the court found that he was, and it is, I think, a correct inference in the circumstances to say that he intended to continue to do the thing which was held to be a breach of covenant. Counsel for the landlords then went further. The judge used, in the course of his judgment, the word "flout" as applicable to the conduct of the tenant. He was "flouting" his landlords, and counsel said that the tenant was intending

to "dictate terms" to the landlord. He then formulated his argument thus: If the tenant knows that he is breaking his covenant and intends to go on breaking it and intends to dictate his own terms and to flout the landlord and the landlord has made it plain that he will not accept the terms which the tenant seeks to dictate, then the tenant does not get the benefit of the Rent Restrictions Acts. I am bound to say, although the first statement of the proposition was intelligible, the latter expansion is, to my mind, not intelligible. When language such as "flouting" and "dictating terms" and so on is introduced, then it seems to me that we pass from the precise language which the lawyer understands to the imprecise language of moral condemnation, or even abuse, and I can find nothing in the Rent Restrictions Acts which introduces any such consideration as a basis for their application. No doubt all these matters are relevant on reasonableness, but, in truth, on the argument even as earlier formulated I can add nothing to what the learned judge said. The judge said ([1952] 1 All E.R. 1148):

"The landlords argue that this status is not acquired by a tenant who during his contractual tenancy has committed such a breach as would entitle his landlord to forfeit the lease, but I can find no basis for this proposition, reasonable though it may sound. The landlords served no notice to remedy the breach before the expiration of the tenancies and were, therefore, not in a position to forfeit the leases before they expired, and I can see no reason why in those circumstances statutory tenancies did not arise at Christmas, 1950, in favour of each tenant who held over. Whether the same would be true if notices had been served I need not decide, though I think it would. If writs for possession had been issued before Christmas, 1950, thus conditionally avoiding the leases, the position might have been different, though, even so, it would have been arguable that statutory tenancies arose: see the observation of ASQUITH, L.J. ([1951] 2 K.B. 73), in *Court v. Robinson* (5)."

I am content to adopt all that passage and to add but little to it. It seems to me that the language of the relevant section, s. 3 (1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, leaves no room for an argument of that character. The sub-section provides:

"No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejection of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and either—(a) the court has power so to do under the provisions set out in sched. I to this Act; . . ."

I then refer to (a) in sched. I:

" . . . any other obligation of the tenancy (whether under the contract of tenancy or under the principal Acts), so far as the obligation is consistent with the provisions of the principal Acts, has been broken or not performed."

We were referred to s. 15 (1) of the Act of 1920, which defines, in so far as there is any definition, the situation of statutory tenants so called, but it seems to me, having read s. 3 (1) and the relevant part of sched. I to the Act of 1933 and s. 15 (1) of the Act of 1920, that the Act of 1933 is providing in plain terms that one cannot get an order for possession against a tenant or an ex-tenant, unless the court thinks it reasonable and unless there is jurisdiction in the court, by reason, *inter alia*, that the tenant or ex-tenant has broken either the contract of tenancy or the conditions imposed by s. 15 or, of course, both. The commonest case of all, I suppose, is that of a contractual tenant in arrear with rent, who is then served with a notice to quit and continues in arrear. In that case nobody has ever suggested that because the tenant was in default as regards payment of rent at the time of his contract and continued in default thereafter, that he was deprived of the protection of the Act. It seems to me impossible for counsel for the landlords to avoid the conclusion, if he is right, that a statutory tenant

only remains such so long as he strictly observes all the conditions extracted from the contract of tenancy which s. 15 imposes on him as a statutory tenant, and I see, as the learned judge did, no basis for that argument.

A Counsel for the landlords said this is a very remarkable case and the court ought to do a little judicial legislation, just as it did in *Skinner v. Geary* (6) where the court said that the only persons entitled to the protection of the Acts was those in actual occupation or in an equivalent situation. That (says counsel) was a gloss on the statute, and so now this court ought to make a further gloss, the character of which would be somehow so defined and expressed as at any rate to defeat any claim on the part of the present tenant to remain in possession under the Acts. Counsel for the landlords referred to a phrase used by SCRUTTON, L.J., in *Remon v. City of London Real Property Co.* (7) in which he described, as B the persons entitled to the benefit of the Act, persons "who were willing to carry out the terms of their old tenancy." But, that phrase was, of course, only a general and compendious way of indicating the general policy of the Acts. It was not in the least directed to any point such as has been here debated, and in *Skinner v. Geary* (6) the so-called gloss was the explanation given to the court of what was intended in s. 15 (1) of the Act of 1920 by the language "tenant C who by virtue of the provisions of this Act retains possession of any dwelling-house." I have been unable to find any language in the Acts which would give any basis or warrant for the suggestion which counsel for the landlords has put forward.

D The result of the whole matter is that in each of the five cases, subject to the variation which I have indicated and subject to the language I have used to make clear that the landlords are prejudiced neither in any claim they may bring for damages for trespass nor in their right to go to the county court at any time and ask for possession on the footing that the continued occupation by the tenant is no longer reasonable, the appeals should be dismissed.

E JENKINS, L.J.: I agree. Under the tenancy agreements inherited by the landlords and the five tenants, the landlords undertook no obligation to supply hot water, electricity and so on, but were to do so, if they did so at all, only as an act of grace. On the other hand, the tenant under each of these agreements covenanted, among other things, not without the written consent of the landlords to make any alteration or addition to the said premises whatsoever, nor erect any stove or pipe, and so on. The relevant words are "nor erect any stove or pipe." F The provision excluding any obligation on the part of the landlords to provide hot water and so forth was a device designed to escape the impact of the *Furnished Houses (Rent Control) Act, 1946*, and it was obvious from a practical point of view that the tenant's covenant to which I have referred imposed a restriction which was only reasonable so long as the landlords did supply hot water. If the landlords ceased supplying hot water, observance by the tenants of the restriction in question would make the flats which they were G renting uninhabitable according to modern ideas.

H The device in due course gave rise to trouble, as such devices generally do, and the landlords found themselves hoist with their own petard, or, perhaps, I should say the petard of their predecessors in title. On the coming into operation of the *Landlord and Tenant (Rent Control) Act, 1949*, or shortly thereafter, certain of the tenants applied to the appropriate tribunal for a reduction of their rent, and in support of their application they called in aid, as they were perfectly entitled to do, the peculiar feature of their tenancy agreement whereunder the landlords were not obliged to provide hot water. They argued that, having regard to this provision, the supply of hot water and other services could not be taken into account in fixing the appropriate rent. That argument was, not unnaturally, accepted by the tribunal, and the rents were reduced accordingly. This, according to the landlords, made the supply of hot water by them an uneconomic proposition, and they, therefore, discontinued the

supply. Protracted negotiations ensued. The landlords offered the hot water at a price, but the tenants were not prepared to agree. A number of tenants (including the defendants) applied to the landlords for permission to erect heating installations of their own in their respective flats. The landlords, down to the issue of the writ, were ready to grant licences to the tenants authorising them to put in such installations on certain terms, and I think four tenants (not the parties to these actions) did, in fact, accept those terms, and under licence from the landlords erected installations accordingly. The five defendant tenants would not accept the terms of the licence offered, and proceeded to install their own apparatus in breach of covenant. They thereby committed a tactical error, for the landlords were then enabled, under the provisions of s. 3 (1) of and sched. I to the Act of 1933, to make an application for possession against each of the defendants on the strength of the breach of covenant thus committed. That they decided to do, and these actions were, in due course, launched in the High Court. A B

The fact that the covenant had been broken gave the learned judge jurisdiction to make orders for possession against the tenants, but only if he considered that it was reasonable to do so. The learned judge, after a very full and detailed hearing, decided that it would not be reasonable to make an unqualified order for possession, and (apart from the fact that thirty-three requisitioned flats already had similar installations), the ground on which he so held was, in effect, that the landlords had been willing, down to the issue of the writ, to grant licences for the installation of hot water in the form to which I have already referred. The learned judge, therefore, held that it would be unreasonable to make an order for possession against these tenants so long as they were willing to enter into, and did enter into, stipulations with regard to the offending water heaters which would give the landlords substantially the same protection as they would have had if these tenants had done what they ought to have done and had accepted licences from the landlords on the terms offered by them. C D

In my view, the learned judge came to a right conclusion in all the circumstances of this case. Moreover, the matter was eminently one for his discretion with which the court should not interfere unless he has exceeded his jurisdiction, or has committed some error of principle in exercising his discretion. His order has been criticised on the ground that the effect of it is to compel the landlords to retain the tenants on what amount to new terms of tenancy. It is said that it compels the landlords to assent to a continuing breach of covenant, and furthermore to submit to a continuing trespass, albeit a small and technical trespass, for the flues of these heaters are, in fact, attached by means of brackets to balconies outside the flats, which are not included in the respective demises to the defendant tenants. E F

As to the trespass, I entirely agree with my Lord that no condition imposed in these proceedings can, or should, have the effect of legalising it. That is a matter entirely outside the Rent Restrictions Acts to which the discretion of the court under that legislation by no means extends. As to the breach of covenant, it has been described as a continuing breach, and, as I have said, it is a matter of complaint on the part of the landlords that the learned judge should (as it were) have perpetuated and authorised a continuing breach. For my part, I would not describe it as a continuing breach. I think, where there is a covenant not to install a heater, the breach is complete when the heater is installed. Nevertheless, the effect of the order, undoubtedly, is to withhold possession from the landlords when there has been a breach of covenant and that breach has not been remedied. In general, in Rent Restrictions Acts cases, where there has been a breach of covenant and possession is sought on that ground, the court will not withhold an order for possession except on the footing that the breach is to be remedied, but that is not an invariable rule in all cases, as appears from *Bell London & Provincial Properties, Ltd. v. Reuben* (4). In the circumstances of the present case, which are undoubtedly *sui generis*, I think it was open to the G H

learned judge in the exercise of his discretion to make the order in the form it took. It would have been more in accordance with the usual practice to make an order for possession and suspend it so long as the conditions were complied with, but, in my view, that is not the only way in which a case of this kind can be dealt with, although it is the method for which express sanction is to be found in s. 5 (2) of the Act of 1920. It was open to the learned judge in this case, if he thought it right, in the exercise of his discretion, simply to refuse an order for possession altogether, on the ground that he did not consider it reasonable to make such an order. If he could do that, it seems to me necessarily to follow that it was equally open to him to say: "If the tenants comply with such and such conditions, which I now state, I will not make an order for possession, for in that case I do not think it would be reasonable to do so. On the other hand, if they do not comply with those conditions, then the order for possession must go." Accordingly, I see no reason for disturbing the order of the learned judge, except in so far as there should, in accordance with what has fallen from my Lord, be substituted in the order a provision for each tenant to enter into a deed of covenant in the appropriate terms in substitution for the agreement contemplated in the order as made by the learned judge. I also agree that those terms should be varied, as my Lord has proposed, the order made by this court being made on the footing to which my Lord has referred, that it is in no way to preclude a further application by the landlords in the event of any relevant change in the circumstances concerning their arrangements for the central supply of water. It should also be made clear that these conditions are not to be regarded as authorising the technical trespass involved in the tenants' installations, although, speaking for myself, I cannot think that, if any further proceedings were brought about that trifling matter, the court would be prepared to grant an injunction. It seems to me that the case would be one in which justice would be met by purely nominal damages. It is to be hoped that the parties will not have found that their past experience has so whetted their appetites for litigation that the landlords will think it worth while to pursue any claim of that kind. That, I think, disposes of the substance of the action itself.

There remains the question of costs. Considered as a claim for possession, it is plain that the claim in each of the actions should have been brought in the county court in accordance with the provisions of s. 17 (2) of the Act of 1920. *Prima facie*, therefore, the position is that the landlords, having chosen to bring in the High Court proceedings arising out of the Acts which they could have brought in the county court, are not entitled to recover any costs. For the purpose of escaping that unwelcome conclusion, counsel for the landlords relies on the circumstance that, in addition to the claims for possession in these actions, there are claims for damages for breach of contract and damages in trespass, and it is said that, inasmuch as the amounts claimed under those heads were not expressed as liquidated sums, those were claims which could only have been brought in the High Court, and, accordingly, as it was convenient to join them with the claim for possession, the entire action was one which was properly brought in the High Court notwithstanding s. 17 (2) of the Act of 1920. With that I cannot agree. The substantial object of these proceedings was to obtain possession of premises within the protection of the Rent Restrictions Acts. The claim for damages for breach of contract might, I think, in itself be regarded as a claim arising out of the Acts just as much as the claim for possession itself, inasmuch as it is a claim against a statutory tenant, but, in any case, the observations I am about to make in regard to the claims in trespass are equally applicable to the claims for breach of covenant.

As to the claim for damages in trespass, it seems to me that this manifestly could have been brought in the county court. I decline to accept the view that a litigant could justify bringing in the High Court a claim well within the county court jurisdiction by the simple expedient of refusing to put a figure on it. In

this case damages of 10s. were awarded in each of the five cases. Accordingly, in my view, as the claims for trespass could, by themselves, have been brought in the county court, it is abundantly clear that the joinder of those claims with claims plainly arising under the Rent Restrictions Acts could not have the effect of displacing the prima facie operation of s. 17 (2) so as to justify the bringing of the claims arising under the Acts in the High Court otherwise than on terms that the plaintiffs should not recover any costs, even if the joinder of claims outside the county court jurisdiction with a claim arising under the Rent Restrictions Acts has the effect of excluding the last-mentioned claim from the category of proceedings under the Acts which could have been taken in the county court for the purposes of s. 17 (2). A

The circumstances of this particular case thus make it unnecessary for me to consider the questions arising under s. 17 (2) which were discussed in *Russoff v. Lipovitch* (8), *Smith & Co., Ltd. v. Kirby* (2), and *Wolfe v. Clarkson* (3), and I would like to reserve my opinion on the effect of those cases until such time as it is necessary, with reference to a particular matter of costs, to decide the difficult points involved. As to the argument of counsel for the landlords to the effect that in the circumstances of this case the tenants had succeeded in putting themselves outside the protection of the Rent Restrictions Acts by (if I may so describe it) their contumacious attitude with regard to their obligations under their respective tenancies, I can only say that, having given the matter the best attention I can, I can find nothing in the Acts, or in any of the decisions under the Acts to which we have been referred, to justify the conclusion to which he invites us to come. Accordingly, I agree that, subject only to the modifications proposed by my Lord in the order as made by the learned judge, these appeals fail and should be dismissed. B C D

HODSON, L.J.: I agree. The learned judge decided that in the circumstances of these five cases it would be unreasonable to make an order for possession, and, in my view, it is impossible to attack that decision on the ground that the learned judge, in exercising his discretion, took into account anything that he ought not to have taken into account, or the reverse. In withholding possession he imposed terms on the tenant in each case, and I think he was entitled so to do. In my opinion, in the circumstances the judge's order was the only practical order to make. In other cases it would have been more usual to have made an order for possession, suspended so long as the conditions imposed were complied with, but here there is the difficulty that, if the suspended order were made, it might involve further applications to the High Court which, in turn, would entail a disablement on the landlords with regard to costs. E F

That brings me to consider the question of costs, because one of the complaints on this appeal was that the learned judge was wrong in holding that he was precluded from awarding costs to the landlords by s. 17 (2) of the Act of 1920, he having said that, on the analogy of an action for forfeiture, in the ordinary course of events he would have given the landlords costs unless he felt precluded from doing so. I agree that he was precluded. The language of s. 17 (2) is clear: G

"A county court shall have jurisdiction to deal with any claim or other proceedings arising out of this Act or any of the provisions thereof, notwithstanding that by reason of the amount of claim or otherwise the case would not but for this provision be within the jurisdiction of a county court, and, if a person takes proceedings under this Act in the High Court which he could have taken in the county court, he shall not be entitled to recover any costs." H

The claim for possession was a claim under the Acts. This section was clearly drafted to discourage proceedings being taken in the High Court under these Acts by preventing a plaintiff from recovering costs if he did so, and it seems to me to be wrong that a plaintiff should be able to succeed in avoiding the consequence

of s. 17 (2) merely by joining with a claim under the Acts another claim which does not come under them. Accordingly, in so far as HILBERY, J., in the last sentence of his judgment in *Smith v. Kirby* (2), says ([1947] 1 All E.R. 460): "That sub-section deals with a case where the whole claim arises out of the Act", I would respectfully disagree. I do not propose to explore this ground further, because disagreeing with that sentence does not necessarily involve casting doubt on the correctness of the decision in *Smith v. Kirby* (2), which met with some approval in the judgment of COHEN, L.J., in *Wolfe v. Clarkson* (3). I agree that the appeals fail subject to the minor alterations which have been mentioned.

Appeals dismissed.

Solicitors: *Forsythe, Kerman & Phillips* (for the landlords); *Bird & Bird* (for the tenants).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

NOTE.

R. v. NEWCASTLE-UNDER-LYME JUSTICES.

Ex parte WHITEHOUSE.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., and Hilbery, J.), July 25, 1952.]

Certiorari—Peremptory order—Irregularity in conviction by justices admitted on affidavit by justices' clerk.

Cases referred to:

- (1) *R. v. Kent JJ., Ex p. Machin*, [1952] 1 All E.R. 1123; 116 J.P. 242.
- (2) *Blyth v. Lancaster Appeal Committee*, [1944] 1 All E.R. 587; 113 L.J.K.B. 401; 171 L.T. 283; *sub nom. Ex p. Blyth*, [1944] K.B. 532; 2nd Digest Supp.

MOTION for leave to apply for an order of certiorari.

At a court of summary jurisdiction sitting at Newcastle-under-Lyme on Mar. 27, 1952, the applicant was charged with having, on Mar. 8, 1952, feloniously stolen from a shop a silver cigarette case valued at £20. Through inadvertence it was not explained to the applicant before he pleaded or at any other time that he might be committed to quarter sessions for sentence notwithstanding an election by him to be dealt with summarily as required by the Summary Jurisdiction Act, 1879, s. 17 (2) as amended by s. 79 and sched. IX of the Criminal Justice Act, 1948. On being charged he elected to be dealt with summarily and entered a plea of Guilty, and in the result he was committed to quarter sessions for sentence. On his appearance before quarter sessions on July 11, the recorder adjourned the case on the ground that the applicant's better remedy was before the Divisional Court and that quarter sessions could not sentence him in the face of an admission by the prosecution that the conviction was bad, the case being on all fours with the recent decision of the Divisional Court in *R. v. Kent JJ. Ex p. Machin* (1) (of which the report was published subsequently to the decision of the justices). The facts as to the hearing before the court of summary jurisdiction stated on affidavit by the solicitor who represented the applicant at the hearing were confirmed by affidavit by the clerk to the justices. The applicant contended that, by reason of the failure to inform him that he might be committed to quarter sessions for sentence, the conviction was bad in law.

J. H. Ellison (for the applicant).

LORD GODDARD, C.J., said that the order for certiorari to quash the

conviction would be made peremptory in the first instance because the justices' clerk had put in an affidavit admitting the irregularity. A telegram would be sent to the prison to say that the applicant was to be released.

Peremptory order for certiorari.

Solicitors: *Doyle, Devonshire & Co.*, agents for *Dennis, Bishop & Turner*, Hanley, Stoke-on-Trent (for the applicant).

F.A.A.

Re BANQUE INDUSTRIELLE DE MOSCOU.

[CHANCERY DIVISION (Wynn-Parry, J.), July 28, 29, 1952.]

Company—Foreign company—Winding-up—Dissolution under laws of country of incorporation—Crown's claim to assets in England as bona vacantia.

By an order of the court, made, on June 11, 1951, on a petition presented by creditors in England, a Russian company, which was dissolved over thirty years ago under the laws of Russia, and was alleged to have assets in England, was ordered to be wound-up under the Companies Act, 1948, and a liquidator was appointed. The Treasury Solicitor having appeared by counsel at the hearing of the petition to ask that there should be some degree of protection for the Crown in regard to its claim against the assets as bona vacantia, the penultimate paragraph of the order provided that his costs, as well as those of the petitioners, should be taxed and paid out of the assets of the company, and the last paragraph of the order was: "And this order is without prejudice to the claim of the Crown to any of the assets of the said company which may have become bona vacantia."

HELD: the last paragraph of the order was to be read subject to the qualification that the right of the Crown to the assets as bona vacantia, which, though defeasible, existed until the winding-up order was made, was to be temporarily defeated to the extent necessary to give effect to the order and to the administration which was to follow consequent on the order, and the Crown was entitled only to any surplus that remained after the completion of the winding-up.

Per curiam: "... the form of the last paragraph of the order ought to be the subject of very careful consideration for the future. It is clearly advisable that a modified form should be produced so as to remove any such doubt as has arisen and had to be resolved on this summons."

AS TO RIGHT OF CROWN TO ASSETS OF DISSOLVED COMPANY AS BONA VACANTIA, see HALSBURY, Hailsham Edn., Vol. 5, 1949 Edn., pp. 823, 824, paras. 1362, 1363.

Case referred to:

- (1) *Russian & English Bank & Florance Montefiore Guedalla v. Baring Bros. & Co., Ltd.*, [1936] 1 All E.R. 505; [1936] A.C. 405; 105 L.J.Ch. 174; 154 L.T. 602; Digest Supp.

ADJOURNED SUMMONS issued by the liquidator under the Companies Act, 1948, s. 246 (3).

On June 11, 1951, a winding-up order was made in respect of a Russian company which had been dissolved before 1918 under Russian law and which was said to have assets in England. After providing for the appointment of a liquidator and for the taxation of the costs of the petitioning creditors and of the Treasury Solicitor, who had appeared at the hearing of the petition to assert the Crown's claim to the assets as bona vacantia, the order stated that it was without prejudice to the Crown's claim to any of the assets which might have become bona vacantia. The liquidator issued the summons to determine, inter alia, whether the Treasury Solicitor, in right of the Crown, was entitled,

notwithstanding the order, to assert a claim to get in any assets of the company outstanding at the date of the order in priority to the liquidator.

Hesketh for the liquidator.

Russell, Q.C., and *R. Gwyn Rees* for Lazard Brothers and Co., the petitioning creditors.

Svenson-Taylor for the Bank of Brussels, another creditor.

The Attorney-General (*Sir Lionel Heald, Q.C.*), and *Denys B. Buckley* for the Treasury Solicitor.

WYNN-PARRY, J.: This is a summons by the liquidator in the liquidation of the company raising a short point of construction of the order by which this company was ordered to be wound-up. The company was incorporated under the laws of the Empire of Russia, and it is common ground that, at the latest, by Jan. 1, 1918, it was effectively dissolved under the laws of Russia as they then existed. The petition on which the order was made was dated May 8, 1951, and the order was made on June 11, 1951. The order proceeds in the usual form ordering that the company "be wound-up by this court under the provisions of the Companies Act, 1948", and providing that one of the official receivers attached to this court be constituted provisional liquidator of the affairs of the company. Then follows a paragraph dealing with the costs:

"And it is ordered that the costs of the petitioners and of the Solicitor for the Affairs of His Majesty's Treasury of the said petition be taxed and paid out of the assets of the said company."

Provision was made for the costs of the Treasury Solicitor because he appeared by counsel to ask that there should be some degree of protection for the Crown in regard to its claim against the assets as *bona vacantia*, and this led to the incorporation in the order of the last paragraph, which is in this form:

"And this order is without prejudice to the claim of the Crown to any of the assets of the said company which may have become *bona vacantia*."

It is because of that paragraph and because of the form which it takes that it has been necessary to bring this petition before the court.

The simple question is: Is the effect of that paragraph, as is contended by the Crown, to preserve without qualification of any sort the claim of the Crown to all the assets of the company within the jurisdiction of this court, or, as is contended by the liquidator, is its effect, when read against the proper background, of a considerably more qualified nature? It is admitted by the liquidator that, at the date of the liquidation, the Crown had a claim against all the assets within the jurisdiction as *bona vacantia*. It is, on the other hand, admitted by the Crown that that claim was one which was defeasible. Indeed, no other position could have been taken up as regards this point on behalf of the Crown, having regard to the observations of LORD ATKIN in *Russian & English Bank v. Baring Brothers & Co., Ltd.* (1). After considering an argument which had been addressed to the House of Lords under the Companies Act, 1929, s. 190, he said ([1936] 1 All E.R. 518):

"The initial futility remains. 1. There is no property belonging to the company. 2. What has been the property of the company now belongs to a third person, the Crown, and there is no power to vest the property of a third person in the liquidator. The result is that if the company for the purposes of winding-up is to be treated as dissolved, there never can be any assets over which the liquidator can exercise any powers of any kind. On the assumption I prefer to adopt, the Crown acquired a defeasible title defeated upon the making of a winding-up order."

It is, I think, clear that, but for the inclusion of the last paragraph in the order which is now before me, this case would be unarguable on behalf of the Crown. If the Crown's contention is right, then it appears to me that there is

great force in the submission made by counsel for the creditors on whose petition the order was made that the order is a nullity, or, if that be thought too strong, is, at any rate, nothing more than a solemn farce. On this aspect of the matter, the Attorney-General contended that it did not necessarily follow that, because the last paragraph, according to his submission, was completely unqualified, nothing could result from the making of the order and the setting in motion of the winding-up administration, since it would be open to the liquidator to proceed as he would have proceeded but for the inclusion of that paragraph, unless and until stopped by the Crown as regards his dealing with any particular asset or assets. With all respect to that suggestion, it appears to me merely to underline the artificial position that would result if I acceded to the Crown's argument. A more hopelessly inconvenient position could hardly be imagined, and it is difficult to believe that any responsible professional man would be found in the city of London to undertake a liquidation in such circumstances. It is true that the last paragraph, if taken by itself and construed literally, can be said to be in very wide terms and to present difficulty in putting on it any qualification, because, as the Attorney-General rightly emphasised, the provision relates to any of the assets which may have become bona vacantia. Although that paragraph, taken by itself, may be capable of producing what, to my mind, would be a most unfortunate result, it is to be remembered that a cardinal canon of construction requires that the paragraph should be construed on a consideration not only of the whole of the order, but against the background properly to be taken into consideration, which must include the whole of the legislation pursuant to which the order was made, i.e., the Companies Act, 1948.

As is made perfectly clear both on the face of the statute and in numerous decided cases—I need only refer to the opinions of the majority of the House of Lords in *Russian & English Bank v. Baring Brothers & Co., Ltd.* (1)—the object of the legislation in regard to the winding-up of companies, including such a company as this, is to ensure administration, the collection and getting in of the assets which are within the reach of the liquidator, and the distribution thereof, or such part thereof as may be necessary, among those who are properly entitled to participate in such distribution as creditors. In the case of an ordinary company registered in this country, the right of contributories must further have to be considered, but in a case such as this, where the company has been dissolved long ago under the laws of the country of its incorporation, there can, of course, be no question as regards contributories. It appears to me that it is most important to bear in mind the object of the statute and the object of the order in bringing into operation the provisions of the statute. That is plainly intended to be done by every word that is used in this order until one comes to the last paragraph. If the matter stood there, I should be prepared either to construe that paragraph as having necessarily a more limited meaning than its prima facie wide literal meaning, or else as being repugnant to the rest of the order. I think that it can be construed so as to be consistent with the rest of the order, and I think that the key to it is to be found in the preceding paragraph, under which it was ordered that the costs, not only of the petitioners, but of the Solicitor for the Affairs of His Majesty's Treasury be taxed and paid out of the assets of the company. What a solemn farce the court must have lent itself to if the contention of the Crown is correct. What need was there for taxing the costs of the Treasury Solicitor, and what need to provide that those costs, when taxed, should be paid out of the assets of the company which, on the hypothesis on which I am proceeding, were all the time the property of the Crown. Effect must be given to that paragraph, which proceeds, clearly, on the basis that the control over the assets is vested in the liquidator, and, therefore, the last paragraph must be read with some qualification imposed on it.

What is the extent of that qualification to be? In my view, the qualification suggested by counsel for the creditors in his argument is the proper one, and it is the common sense one. It is the one which presents itself to one's mind when

endeavouring to give effect to the object of the legislation and of the order, and that is that the right of the Crown which, though defeasible, existed prior to the winding-up order, is only to be temporarily defeated, and defeated only to the extent necessary to give effect to the order and the administration which will follow consequent on the order. If at the end of that proper administration there should be found to be a surplus, then it is that surplus, and, to my mind, no more than that surplus, which is saved to the Crown by the concluding paragraph. I should hesitate long before bringing myself to be a party to producing such a futility as would necessarily have been produced had I felt compelled to accede to the Crown's argument, but I feel that, for the reasons which I have given, that futility can properly be avoided, and, therefore, I propose to answer the question which is before me in the negative. In my view, the form of the last paragraph of the order ought to be the subject of very careful consideration for the future. It is clearly advisable that a modified form should be produced so as to remove any such doubt as has arisen and had to be resolved on this summons.

Order accordingly.

Solicitors: *Linklaters & Paines* (for the liquidator and the petitioning creditors); *Stephenson, Harwood & Tatham* (for other creditors); *Treasury Solicitor*.

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

RAWLENCE v. CROYDON CORPORATION.

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), July 8, 9, 25, 1952.]

Housing—House unfit for human habitation—Notice to execute works—"Person having control"—Receipt of rack-rent—"Full net annual value" of house—House controlled under Rent Acts—Housing Act, 1936 (c. 51), s. 9 (4).

A dwelling-house to which the Rent Restrictions Acts applied was let at the maximum permitted rent of £45 a year. Flooring of the house being in a state of disrepair, the local authority served on the landlord, as the person having control of the house, a notice under s. 9 (1) of the Housing Act, 1936, requiring him to execute such works as would render the house fit for human habitation.

HELD: the full net annual value of the house within s. 9 (4) was the value of the house to the landlord, and in the case of a house within the Rent Restrictions Acts was the maximum rent permitted by those Acts, i.e., in the present case, £45; as the landlord was receiving this rent, he was receiving a rack-rent; and, therefore, he was the person in control of the house within the meaning of the sub-section, and the notice was properly served on him.

Poplar Metropolitan Borough Assessment Committee v. Roberts ([1922] 2 A.C. 93), distinguished.

Semle: if the rent permitted by the Rent Acts were not the rack-rent, the landlord was the person who would receive a rack-rent if the house were let at a rack-rent, because, if the restrictions imposed by the Rent Acts were removed, he was the person who would receive the full rent.

FOR THE HOUSING ACT, 1936, s. 9 (4), see HALSBURY'S STATUTES, Second Edn., Vol. 11, p. 457.

Cases referred to:

- (1) *Poplar Metropolitan Borough Assessment Committee v. Roberts*, [1922] 2 A.C. 93; 91 L.J.K.B. 449; 127 L.T. 99; 86 J.P. 137; *reusg. s.c. sub nom. Roberts v. Poplar Assessment Committee*, [1922] 1 K.B. 25; 38 Digest 520, 698.

- (2) *Cartwright v. Sculcoates Union*, [1899] 1 Q.B. 667; *affd.* H.L., [1900] A.C. 150; 69 L.J.Q.B. 403; 82 L.T. 157; 64 J.P. 229; 38 Digest 564, 1025.
- (3) *Sculcoates Union v. Kingston-upon-Hull Dock Co.*, [1895] A.C. 136; 64 L.J.M.C. 49; 71 L.T. 642; 59 J.P. 612; 38 Digest 562, 1001.
- (4) *Port of London Authority v. Orsett Union Assessment Committee*, [1920] A.C. 273; 89 L.J.K.B. 481; 122 L.T. 722; 84 J.P. 69; 38 Digest 563, 1017.
- (5) *London County Council v. Erith Parish (Churchwardens, etc.) & Dartford Union Assessment Committee, West Ham Parish (Churchwardens, etc.) v. London County Council, St. George's Union Assessment Committee v. London County Council*, [1893] A.C. 562; 63 L.J.M.C. 9; 69 L.T. 725; 57 J.P. 821; 38 Digest 429, 42.
- (6) *Truman, Hanbury, Buxton & Co. v. Kerslake*, [1894] 2 Q.B. 774; 63 L.J.M.C. 222; 58 J.P. 766; 36 Digest 234, 732.
- (7) *Wright v. Ingle*, (1885), 16 Q.B.D. 379; 55 L.J.M.C. 17; 54 L.T. 511; 50 J.P. 436; 26 Digest 491, 2018.
- (8) *Royal Crown Derby Porcelain Co., Ltd. v. Russell*, [1949] 1 All E.R. 749; [1949] 2 K.B. 417; 31 Digest, Replacement, 715, 8007.
- (9) *Gundry v. Dunham*, (1915), 85 L.J.K.B. 417; 114 L.T. 106; 7 Tax Cas. 12; 28 Digest 98, 586.

APPEAL by the defendant, the local authority, from an order of His Honour JUDGE SIR GERALD HURST, Q.C., made at Croydon County Court on May 9, 1952, allowing an appeal by the plaintiff, a landlord, from an order made by the local authority under s. 9 (1) of the Housing Act, 1936.

The landlord was the owner of premises at No. 3, Burlington Road, Thornton Heath, which he let on a yearly tenancy at a rent of £45 exclusive of rates, the tenant being liable for internal repairs. The rent charged was the full permitted rent under the Rent Acts. At all material times the house was unfit for human habitation by reason of the condition of the kitchen floor which could have been rendered fit at a reasonable expense. The local authority served on the landlord a notice under s. 9 (1) of the Act of 1936 requiring him to execute works which, in the opinion of the authority, would render the house fit. For the landlord it was contended that, owing to the restrictions on the recoverable rent imposed by the Rent Acts, he was not in receipt of the rack-rent, and so was not the person having control of the house within the meaning of s. 9 (4), and, therefore, the notice should not have been served on him. For the local authority it was contended that, as the landlord was receiving the full permitted rent, he was the person who was receiving the rack-rent, or, alternatively, if he were not receiving the rack-rent, he was the person who would receive it if the house were let at a rack-rent. The county court judge held that the landlord was not in receipt of the rack-rent, and, further, he was not the person who would be in receipt of the rack-rent if the house were so let, and he allowed the landlord's appeal.

Maurice Lyell for the local authority.

M. R. Hoare for the landlord.

Cur. adv. vult.

July 25. The following judgments were read.

SOMERVELL, L.J.: This appeal turns on the construction of s. 9 of the Housing Act, 1936, as amended by the Housing Act, 1949, s. 1, and sched. I, which is as follows:

"(1) Where a local authority, upon consideration of an official representation, or a report from any of their officers, or other information in their possession, are satisfied that any house . . . is in any respect unfit for human habitation, they shall, unless they are satisfied that it is not capable

at a reasonable expense of being rendered so fit, serve upon the person having control of the house a notice requiring him, within such reasonable time, not being less than twenty-one days, as may be specified in the notice, to execute the works specified in the notice and stating that, in the opinion of the authority, those works will render the house fit for human habitation.

(2) In addition to serving a notice under this section on the person having control of the house, the local authority may serve a copy of the notice on any other person having an interest in the house, whether as freeholder, mortgagee, lessee, or otherwise. (3) In determining for the purposes of this Part of this Act whether a house can be rendered fit for human habitation at a reasonable expense, regard shall be had to the estimated cost of the works necessary to render it so fit and the value which it is estimated that the house will have when the works are completed. (4) For the purposes of this Part of this Act, the person who receives the rack-rent of a house, whether on his own account or as agent or trustee for any other person, or who would so receive it if the house were let at a rack-rent, shall be deemed to be the person having control of the house. In this sub-section the expression 'rack-rent' means rent which is not less than two-thirds of the full net annual value of the house."

In the present case a notice under s. 9 (1) was served by the local authority on the landlord in respect of the kitchen floor of No. 3, Burlington Road, Thornton Heath. The landlord owns the freehold of the house, which is let on a yearly tenancy at a rent of £45 per annum exclusive of rates, the tenant being liable for internal, and the landlord for external, repairs. The house is within the Rent Restrictions Acts. It was let in 1914 for £35 and the rent of £45 represents that sum plus the increases permitted under the relevant Acts. It is common ground that the rent of £45 is less than two-thirds of the net annual value on the hypothesis that there were no statutory restrictions on the rent. On that hypothesis, therefore, the landlord would not be receiving a rack-rent. There would remain the question whether he was within the latter words of s. 9 (4) as the person who would receive the rack-rent if the house were so let.

It is clear, in the first place, that the section is not concerned with the liability as between the person having control and a lessee for the repairs required by the notice. If there is a lessee who is liable under covenant for the repairs in question, the person having control is required to do them and left to exercise any remedy he may have under the covenant to recoup himself. The learned county court judge held that the Rent Restrictions Acts could not be treated as relevant to the meaning of the words "rack-rent" as defined, and he was led to this conclusion by the reasoning of the House of Lords in *Poplar Metropolitan Borough Assessment Committee v. Roberts* (1). He, therefore, held, first, that the landlord was not in receipt of a rack-rent. He further held that the landlord was not the person who would receive the rack-rent if the house were so let. The notice was, therefore, improperly served. With respect, I have come to a different conclusion.

The first question turns on whether, in arriving at the "full net annual value" in the context of s. 9 (4), one has to have regard to the limitations placed by the Rent Acts on what is recoverable by the landlord as rent, in respect of the annual value. The *Poplar* case (1), to which the learned county court judge referred, was relied on by each party to the appeal. Counsel for the landlord relied on the decision and counsel for the local authority on the reasoning. In that case the courts had to consider the effect of the Rent Acts on the application of the definition of "gross value" in the Valuation (Metropolis) Act, 1869, s. 4, which is as follows:

"The term 'gross value' means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenant's rates and

taxes . . . and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent."

It is unnecessary to consider whether, apart from the Rent Acts, the definition would, in respect of any particular premises, lead to the same figure as "full net annual value". The definitions are both dealing with the value of premises. The Divisional Court and this court, by a majority, held that the "gross value" of a house to which the Rent Acts applied could not be greater than the standard rent together with the permitted increases. The first relevant question in the Case Stated was whether the Rent Acts were to be taken into account, and the second question was whether the highest gross value which could be placed was the standard rent plus permitted increases. ATKIN, L.J., who was of the majority, dealt with these two questions as follows ([1922] 1 K.B. 53):

"Applying the principles discussed above to the present case, the first question to be answered . . . is . . . whether the said Rent (Restrictions) Act, 1920, in its application to the said hereditament is to be taken into account in arriving at the valuation of the said hereditament under and for the purposes of the Valuation (Metropolis) Act, 1869? In my opinion this question only admits of an affirmative answer. 'The problem is to ascertain, according to the statute, what a tenant from year to year might reasonably be expected to give as rent. For the solution of that problem it appears to me that apart from the decisions, as to which I will say a word presently, all that could reasonably affect the mind of the intending tenant ought to be considered'. That is from the judgment of LORD HALSBURY in *Cartwright v. Scolcoates Union* (2). To suggest that in the present time the mind of an intending tenant of a house to which the Rent (Restrictions) Act applies would not be reasonably affected by the provisions of the Rent (Restrictions) Act appears to me to border upon the ridiculous. I have already said that in my view the decisions so far from indicating a contrary view affirm the necessity of taking such provisions into consideration. I need say no more upon this question. The second question . . . is whether the highest gross value which can be assigned to and placed on the said hereditament . . . is the standard rent plus the highest increases of rent provided for in s. 2 (1) (c) and (d), of the [Increase of Rent, etc., Act, 1920]? In my opinion, the answer is again in the affirmative. I have already referred to *Scolcoates Union v. Kingston-upon-Hull Dock Co.* (3), which seems to me to admit of but one answer to this question. If no higher rent than the standard rent and statutory increases is enforceable, as a matter of common sense that seems to be the limit of the rent a tenant can be reasonably expected to give. But it is suggested the tenant is not prohibited from giving or the landlord from receiving more than the standard rent; all that is provided is that the excess shall not be enforceable; the assessment committee may consider that the demand for houses may lead the willing tenant to offer and the landlord to accept an increase above the standard rent which both parties will know to be unenforceable but which will still be paid; and in this particular case, seeing that a large premium was recently paid for the lease, it is said that such an agreement might readily be inferred. I think that the answer is that when the Valuation (Metropolis) Act speaks of rent it means rent, a sum legally enforceable; and is not contemplating a sum legally enforceable plus a voluntary gift; still less a voluntary gift which after payment can at any time be recovered back."

Those last words refer to s. 14 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The House of Lords reversed that decision. They decided that the gross value was not limited to the standard rent plus increases, and that the Rent Act was not to be taken into account. LORD CARSON dissented

on both points, and LORD SUMNER, who agreed on the first point, expressed no opinion on the second.

Counsel for the landlord relies on this decision. On the face of it, it would seem to assist him. In applying a somewhat similar formula the Rent Acts were disregarded. Counsel for the local authority, as I have said, relies on the reasoning which, he submits, assists his case. I have come to the conclusion that a study of the reasoning in relation to the passage I have cited from ATKIN, L.J., supports the local authority in this appeal. It is, I think, desirable to cite the relevant passages from the speeches rather than seek to summarise them. LORD BUCKMASTER said ([1922] 2 A.C. 103):

“ It is round the true meaning of this section that the dispute centres. The tenant referred to is, by common consent, an imaginary person; the actual rent paid is no criterion, unless, indeed, it happens to be the rent that the imaginary tenant might reasonably be expected to pay in the circumstances mentioned in the section. But although the tenant is imaginary, the conditions in which his rent is to be determined cannot be imaginary. They are the actual conditions affecting the hereditament at the time when the valuation is made. This was stated by this House in *Port of London Authority v. Orsett Union Assessment Committee* (4), and I do not think that the language which I there used needs to be modified or explained; but those words related entirely to determining the value of the occupation to the occupier, excluding, of course, any element due to his skill, industry, or other strictly personal qualifications. In the present case the respondent seeks to introduce into these words the conditions which regulate the value of the hereditament to the landlord. So far as the occupier is concerned, the provisions of the Rent Restrictions Act have not in any way made his occupation less beneficial. It is the landlord who is affected, and he, as landlord, is not the subject of assessment, nor can his interest in the property be considered for the purpose of determining what that assessment should be. If, however, the rent which has to be ascertained under the section is the real rent, then the fact that that cannot be increased will have a material effect upon the valuation. I agree, however, with what was said by counsel for the appellants that so to interpret the statute would be to deal with something which was nothing but a measure of value in such a manner as completely to destroy the very object for which that measure was set up. Just as the tenant is hypothetical, so also is the rent; it is only used as a standard which must be examined without regard to the actual limitation of the rent paid by virtue of covenant as between landlord and tenant, and also, as I regard it, to statutory restrictions that may be imposed upon its receipt. From the earliest time it is the inhabitant who has to be taxed. It is in respect of his occupation that the rate is levied, and the standard in the Act is nothing but a means of finding out what the value of that occupation is for the purposes of assessment. In my opinion, the rent that the tenant might reasonably be expected to pay is the rent which, apart from all conditions affecting or limiting its receipt in the hands of the landlord, would be regarded as a reasonable rent for the tenant who occupied under the conditions which the statute of 1869 imposes.”

LORD BUCKMASTER then found support for his conclusion in the cases dealing with local authorities, statutory undertakers, and charitable trusts, which had held that premises could be rated although they could not be let.

LORD ATKINSON also referred to and relied on these cases, and the ratio of his opinion is, I think, summarised in the following sentences (*ibid.*, 107):

“ What the ratepayer is, under both the [Parochial Assessments] Act of 1836 and [the Valuation (Metropolis) Act] of 1869, rated in respect of is decided by many cases in this House to be the beneficial occupation of a

hereditament. And if he is in enjoyment of this species of occupation, he must be rated, even though he should not be a tenant of the hereditament, and though no person could be made the tenant of it, and though no rent is or could be received in respect of it."

LORD SUMNER said (*ibid.*, 116):

"Rating is a process between an occupier and a rating authority, to the determination of which the landlord and the lessee are strangers. It may be observed that the phrase is 'might be expected to pay'; it does not go on to say 'and the landlord might be able to exact'. If, as is contended, 'rent' is throughout rigidly restricted to its meaning as a term of art, and the measure of value thus applied by hypothetical hands is the real thing, the result would be that the occupier, who already has been enriched under the Rent Restrictions legislation by receiving a statutory present of part of the value of his landlord's property, would profit still further and equally unmeritoriously by escaping from the rates, which the hereditament ought to bear, to the prejudice of other less fortunate occupiers. I say 'ought to bear', because the only justification for the restriction is that the hereditament is really worth more by the year in the market than the landlord is allowed to charge, but that it is inexpedient that he should have the benefit of it."

It is, perhaps, to be noted in passing that the definition in the Parochial Assessment Act, 1836, s. 1 (now to be found in s. 68 (1) of the Rating and Valuation Act, 1925), which has been held to be identical in meaning with the definition in s. 4 of the Act of 1869: *London County Council v. Erith Parish (Churchwardens, etc.)* (5) ([1893] A.C. 588, 595); was differently worded. It referred to "the rent at which [a hereditament] might reasonably be expected to let . . ." It would be wrong, therefore, to regard LORD SUMNER's opinion as based on the fact that the definition in the statute under consideration was worded in the other sense.

LORD PARMOOR said (*ibid.*, 118):

"Under 43 Eliz. c. 2, rates are to be levied upon every occupier of lands, houses, etc. The distinction between occupier and owner, in this connection, is of primary importance. The occupation value of property may be, and often is, distinct from its value to the owner. This distinction would probably be emphasised where an artificial statutory maximum is fixed, and a statutory restriction prevents an owner from recovering from any tenant a greater amount, as rent, than the statutory maximum. It has long been recognised that actual rents based on the contractual relationship between tenant and landlord are not the test of the value of a property for rating purposes. I do not think that there is any difference in this respect between a contractual or a statutory rental."

This reasoning seems to me to support the local authority's argument. The present section is, in the first instance, in search of an actual landlord receiving an actual rent. His interest is clearly affected by the Rent Acts, as is emphasised in the passages I have cited. The observations in the judgment of ATKIN, L.J., did not prevail because rating is concerned with value, not to the landlord, but to the occupier. The section with which we are dealing is concerned with value to the landlord. If Parliament limits that value, then that limitation must, in my opinion, operate on the "full net annual value" of the house for the purpose of the definition.

Reliance was sought to be placed on a line of reasoning which is to be found in the dissenting judgment of BANKES, L.J., and was approved by LORD BUCKMASTER in the last sentence of his speech. BANKES, L.J., suggested that one could take into account voluntary payments which a tenant might make in excess of the standard rent. None of the other noble and learned Lords expressed

approval of that line of reasoning, and it was not the primary ratio of LORD BUCKMASTER's opinion. I agree with what ATKIN, L.J., said with regard to this in the passage I have cited.

A Counsel for the landlord emphasised that an owner may realise the full value in many ways. He may occupy himself, he may have a service occupancy or tenancy, he may sell the house with vacant possession, and so on. The answer to this argument is that the part of the section which I am now considering is operating on a tenancy and the quantum of the actual rent being paid. It pre-supposes actual conditions in which the Rent Acts control the rent to be paid, that is, the value to the landlord. Reliance was placed on the word "full". B It would be remarkable, if the Rent Acts would otherwise be applicable, that their operation should have been excluded, not by saying so, but by the word "full". The word, I think, is natural as making clear that the proportion is to be a proportion of the highest figure which could reasonably express the net annual value. Counsel also submitted that, if the local authority succeeded, the court would be construing substantially similar formulae in one way in one Act and in one way in another. I find no difficulty about this for the reason given in the passage which I have cited from LORD SUMNER's speech. Both Acts are concerned with value. The Rent Acts control and restrict the value to the C landlord with which we are concerned, while leaving unaffected the value to the occupier with which rating is concerned.

In the present case, therefore, I come to the conclusion that the "full net annual value" was £45, and, as this was the amount of the rent the landlord was receiving, he was receiving a rack-rent and the notice was properly served on him. It was argued for the local authority that, assuming they were wrong on D the first point, the landlord was the person who "would so receive it", that is, a rack-rent "if the house were let at a rack-rent" as provided by s. 9 (4). We were referred on the other side to *Truman, Hanbury, Buxton & Co. v. Kerslake* (6). That dealt with similar words in a definition of "owner" in the Public Health (London) Act, 1891, s. 141. In that case there was a lease for thirty-nine years at a rent which was not a rack-rent. It was held by the Divisional Court that, as the E lessee had power to let at a rack-rent, he was the person who would receive the rack-rent if the premises were so let. All I wish to say on that point is that it would not, I think, necessarily apply to a tenant of rent restricted premises. On the hypothesis that the standard rent with increases is not a rack-rent, the tenant could not himself let at a rack-rent. I find it unnecessary to pursue what the consequences would be because, if I am right in my conclusion on the first F point, the question does not arise here and seems unlikely to arise in other cases. For the reasons I have given I would allow the appeal.

DENNING, L.J.: We are here concerned with a dwelling-house to which the Rent Acts have applied ever since they first started in 1915. The rent in 1914 was £35 a year which has been raised by permitted increases to £45 a year. G No more rent can be recovered for the house so long as it is let unfurnished as a separate dwelling. £45 is the maximum rent which can be charged, or, at any rate, recovered, for it. The kitchen floor is now in a bad condition. It is affected by dry rot. As between landlord and tenant it is clear that the tenant ought to repair it, because the tenancy is on the terms that the tenant is liable for internal repairs. But the tenant has done nothing about it. The house is unfit for human H habitation, and the local authority have decided that it must be made fit. In order to get the work done they have served a notice on the landlord requiring him to repair it. The landlord says that the notice ought to be served, not on him, but on the tenant. He says that the rent he gets for the house is so low that he is no longer "the person having control of the house", and that, if anyone has control, it is the tenant and not the landlord. The county court judge has accepted this contention. The local authority appeal to this court.

The county court judge based himself on a case which decided that the Rent

Acts are to be ignored in assessing rateable value. It is *Poplar Metropolitan Borough Assessment Committee v. Roberts* (1). I do not think that case has any application to the present case. Rating concerns the value to the occupier, whereas we are here concerned with the value to the landlord. The law requires those who assess rateable value to have a lively imagination. They have to picture this country as a land which is inhabited by tenants, who are not real but hypothetical, and where the Rent Acts do not exist. The law does not require anything so far-fetched in the case of the Housing Acts. The local authority have to take every house as it is. If it is occupied by a tenant who is paying a rack-rent, then the person who in fact receives the rent is the person in control of the house. If it is occupied by the owner, then he is the person in control, because he is the person who would receive the rent if it was let at a rack-rent. If the house is one which is within the Rent Acts, regard must, I think, be had to that fact. The "full net annual value of the house" is not to be calculated as if the Rent Acts did not exist. It is the full amount which a landlord can reasonably be expected to get from a tenant. He cannot reasonably be expected to get more than the Rent Acts permit. If he receives the full permitted amount, he is receiving the full annual value. He is receiving a rack-rent and is the person having control of the house. Any other view would lead to an impossible situation. If the Rent Acts are to be treated as non-existent, the annual value of the house would soar far above the restricted rent which the tenant is paying. The landlord would then not be the person having control of the house, because he would not be receiving a rack-rent. Who, then, would be in control of the house? Can it be said that the tenant would be the person having control? Is he the person who would receive the rack-rent if it was let at a rack-rent? That needs a great stretch of imagination, because the fact is that the tenant himself cannot sub-let the house at more than the permitted amount; and if he is a statutory tenant, he cannot sub-let it at all, that is, not as a whole. Faced with these difficulties, counsel for the landlord suggested that there might be no one in control of the house and referred us to what BOWEN, L.J., said in *Wright v. Ingle* (7) (16 Q.B.D. 402). But if there was no person having control we would get to the absurd position that the Housing Acts would be inoperative in the case of houses which were within the Rent Acts because there would be no one on whom the local authorities could serve the necessary notices. Parliament cannot have intended any such result when they passed the Housing Act, 1936. At that time there were still many small houses—class C. houses—still within the Rent Acts, and it was very important that the landlords should keep them reasonably fit for human habitation. Parliament can never have intended to release the landlords of their responsibilities in respect of them.

The judge relied on *Truman, Hanbury, Buxton & Co. v. Kerslake* (6), but I think that case turned a good deal on its special facts. It should not be regarded as laying down a broad principle which has been subsequently sanctioned by Parliament: see *Royal Crown Derby Porcelain Co., Ltd. v. Russell* (8). If a landlord out of generosity or friendship chooses to let a house to an occupier at less than a rack-rent, I should have thought that the landlord would ordinarily be the person having the control of the house because he is the person who would receive a rack-rent if it were let at a rack-rent. So, here, if, contrary to my opinion, the rent which is paid is not a rack-rent, then I think that the landlord is the person who would receive a rack-rent if the house were let at a rack-rent, because, if the restrictions imposed by the Rent Acts were removed, he is the person who would receive the full rent.

My conclusion is that the local authority can compel the landlord to do the necessary repairs. The landlord has theoretically a right over in damages against the tenant for not repairing, or a ground for claiming possession, because the tenant was under an obligation to do the repairs and has not done them. But that does not affect the right of the local authority to compel the landlord to do it. It is no doubt hard on private landlords that they should be compelled to do

repairs at greatly increased cost and not be allowed to increase the rent, but that is a matter for Parliament and not for us. I agree that the appeal should be allowed.

ROMER, L.J.: I agree that this appeal should be allowed. Section 9 (4) of the Housing Act, 1936, provides that for the purposes there relevant

A “the person who receives the rack-rent of a house . . . or who would so receive it if the house were let at a rack-rent, shall be deemed to be the person having control of the house.”

The term “rack-rent” was defined in BLACKSTONE’S COMMENTARIES, 4th ed., vol. 2, p. 43, as “a rent of the full value of the tenement, or near it”. SWINFEN EADY, L.J., described it in *Gundry v. Dunham* (9) (85 L.J.K.B. 422) as

B “the value at which the premises are worth to be let by the year in the open market—that is to say, what a tenant, taking one year with another, may fairly and reasonably be expected and required to pay.”

C The words “and required” are not without importance in relation to the present case. The definition of rack-rent in s. 9 (4) does not disturb this long-accepted understanding of the term in attributing to it the meaning of “the full net annual value of the house” but, for the purposes of the section, reducing such annual value by one-third. The fundamental characteristic, therefore, of the person who is rendered liable, in the first instance, to the charge imposed by the section is that he should be in receipt of two-thirds of the rack-rent, according to what is, in effect, the ordinary acceptance of that term, of the premises to which the charge relates.

D The landlord contends, in effect, that this rack-rent is to be ascertained, so far as rent-controlled houses are concerned, by an estimate of what the houses would yield each year if the Rent Restrictions Acts had never been passed. Alternatively, he argues that the full annual value of controlled houses in the hands of the owners may exceed the standard rents of such houses if the standard rents have to be taken into account. Taking the second point first, it was illustrated in argument by the following example. A man who owns a rent-controlled house lets it for occupation at the standard rent to a servant who works for him. In such a case, it is said, the annual value of the house to the owner is greater than the amount represented by the standard rent for, by reason of the occupation, he gets the services in addition. So he does, but the services are not “rent”, and it is by reference only to rent, as I have already pointed out, that, by the language of the section itself, the annual value of the house is to be assessed. I am, accordingly, unable to accept the argument of the landlord so far as this point is concerned.

E The first point was mainly based on *Poplar Metropolitan Borough Assessment Committee v. Roberts* (1). I have had the advantage of reading the judgment which my Lord has delivered and I entirely agree with what he has said on this aspect of the case. In the Court of Appeal ATKIN, L.J., considered the language of the statute which was there in question in the light of its assumed applicability to the relationship of landlord and tenant, and, on that hypothesis, expressed his conclusions in a manner which militates strongly against the landlord’s argument on the present appeal. The House of Lords in no way differed from or overruled the lord justice’s reasoning, but said that the correct approach to the question of value for the purposes then under discussion was not, as here, what the property was worth to a landlord, but what the right of occupation was worth to the occupier. I, accordingly, agree that the views of ATKIN, L.J., in the *Poplar* case (1) may be regarded as authority against the present landlord.

H Then it was contended that the word “full” in the section is the opposite of “restricted” and that this shows that the legislature had in mind what the learned judge described as the economic rent rather than the controlled rent.

As to this, it is true that a burden is imposed by the section and that the word "full" (as, indeed, the term "rack-rent" itself) does suggest that the burden was only intended to be borne by a person who was in receipt of an economic or profit rental. But this consideration cannot in itself nullify the effect which the Rent Acts would otherwise have on the position. When the legislation was first introduced into our economic and social system, and it may be for some considerable time thereafter, landlords still received a profit rental although they were in the main precluded from increasing it. The general trend of the legislation has long since resulted in landlords only receiving rentals which are usually a great deal less than those received by owners of equivalent, but uncontrolled, properties. Nevertheless, this change cannot alter the fact that landlords who are affected by the legislation are undoubtedly receiving the full rent which their properties are capable of yielding, in the sense that they are receiving the maximum which is permitted by the law. In other words, they are receiving the "rack-rents" of their premises. The argument to the contrary overlooks the fact that value is not an absolute, but a relative, conception. The value of any particular thing can only be ascertained in the light of circumstances which affect or control its disposability. For example, the apparent owner of property might have some defect in his title which would lessen its selling value below that of another similar property the title to which was flawless. Similarly, in the present case the rack-rent or annual value of the property in question is conditioned by the fact that its owner cannot increase its annual yield beyond the permitted maximum. In my opinion, the legislature, in s. 9, was applying itself to a factual and not to a hypothetical position. If the standard rent is the greatest rent that is obtainable in respect of any particular premises, then it is the full rent of those premises, the rack-rent, notwithstanding that (and, indeed, because) the owner is restricted from receiving the higher rent which the premises, if uncontrolled, would command.

On the second question which was argued before us no decision is necessary having regard to our views on the first question, but I agree with the observations which my brethren have made on it.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *E. Taberner*, town clerk, Croydon (for the local authority); *A. Rawlence* (for the landlord).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

Re WOLFE (deceased). HELLER v. WOLFE.

[CHANCERY DIVISION (Roxburgh, J.), July 22, 29, 1952.]

Administration of Estate—Sale by court—Auctioneer's commission—Sale at more than £25,000.

A Freehold property was ordered to be sold by the court and auctioneers were appointed by the master. No mention of remuneration was made at the time of the appointment, but, during a subsequent appointment before the master (which was not attended by the auctioneers), the master said that the auctioneers' remuneration should be "the ordinary court scale". It was conceded that the auctioneers were appointed at such remuneration as might be allowed by the master, or, on appeal, by the judge. £455 was spent on printing and advertisements by the auctioneers, and an auction B was held, but the property was withdrawn at £175,000, the reserve price of £180,000 not having been reached. After a further abortive auction, held by the master in his room, the property was finally sold in a second auction held by the master for £192,500. No scale of fees is prescribed relating to commission payable to auctioneers on sales by the court when the purchase money exceeds £25,000, and an appointment was taken with the C master to fix the auctioneers' remuneration. No notice of the appointment was given to the auctioneers, and (although a clerk of the auctioneers was present) they were not heard. Their remuneration was fixed at five hundred guineas. On a summons taken out by the auctioneers to have their remuneration fixed,

D **HELD:** the proper course in the circumstances was to move the court to discharge the master's order, but, the master having exercised his discretion without hearing the auctioneers, the court would re-exercise the discretion, and, having regard to the scale relating to sales in bankruptcy, the remuneration would be fixed at £1,600.

E **Per curiam:** It is desirable in a sale for a sum exceeding £25,000 to arrange the auctioneers' remuneration before they are employed, but, if that is not done, the auctioneers ought to be heard before the master exercises his discretion in fixing their remuneration.

PROCEDURE SUMMONS taken out by auctioneers to fix their remuneration in respect of the services rendered by them in relation to a sale of land by the court.

F The sale realised £192,500, and, there being no scale fee for the services of auctioneers where the sale price exceeds £25,000, the master fixed the fee at five hundred guineas. The auctioneers were given no opportunity of being heard, and, therefore, they took out this summons.

Bonner for Isabel Daphne Heller, the plaintiff in the action.

J. L. Arnold for Henry Lucien Wolfe, the defendant.

J. A. Wolfe for the auctioneers.

G **ROXBURGH, J.:** This is a matter of considerable importance. In the matter of the freehold property known as the Café de Paris and 4 Rupert Street and the Rialto Cinema and in the matter of the estate of Mark Wolfe, deceased, it became necessary to order a sale by the court of the property known as the Rialto Cinema and the Café de Paris and certain adjacent land. The plaintiff in the action was Isabel Daphne Heller, and the defendant was Henry Lucien H Wolfe. On July 19, 1950, the master, in the presence of various parties, appointed Hillier, Parker, May & Rowden as the auctioneers. Nothing was said at that time about their remuneration. On Oct. 13, 1950, at an appointment before the master which was not attended by the auctioneers, the master said that the auctioneers' remuneration should be "the ordinary court scale". That order was, as far as I know, never communicated to the auctioneers. What precisely it meant I am not sure, because there is no ordinary court scale relating to a sale

at a price above £25,000, and nobody, I think, can have thought for one moment that this property would fetch less than £25,000. The practice is clear that beyond that amount the employment is "at such remuneration as may be allowed by the master": see the *ANNUAL PRACTICE*, 1951 ed., p. 922. I think counsel for the auctioneers concedes (if he does not, I so hold) that the auctioneers were employed at such remuneration as might be allowed by the master, or, on appeal from the master, by the judge.

On Nov. 9, 1950, as one or both of the parties wanted liberty to bid at the sale, the master appointed Messrs. M. A. Jacobs & Co. to act as solicitors for the sale. The sale was of a most complicated character, and I will read an account of it from the affidavit of Mr. Legg, a partner in the firm of auctioneers:

"On our suggestion, £500 was spent on printing and advertisements, all of which my firm arranged. We had the auction particulars printed, and the auction was arranged for and took place on Wednesday, Feb. 28, 1951. Prior to the date of the auction, my firm busied itself in making the sale known among possible purchasers, and our representatives had considerable correspondence and numerous interviews with possible purchasers and their agents, and, in particular, with Messrs. D. E. & J. Levy acting on behalf of a client then unknown, but which turned out later to be Gleniffer Finance Corporation, Ltd. My firm duly put the property up for auction on the date fixed, but, although the auction was well attended, the reserve price was not reached, and the property was withdrawn at £175,000. Despite the abortive auction, my firm continued to attempt to find a purchaser for the property. Messrs. D. E. & J. Levy continued their negotiations, and negotiations also continued with Ibex Property Corporation, Ltd., with whom my firm had been in communication and who had been 'nibbling' before the date of the auction. When it appeared that both these parties were seriously interested, the auctioneers informed Messrs. M. A. Jacobs, and they took the directions of the master and then instructed the auctioneers to negotiate conditional contracts at prices which they could recommend from as many proposed purchasers as they could find. The auctioneers acted on these instructions, and two conditional contracts for the purchase of the property were entered into, one by Gleniffer Finance Corporation, Ltd., for £175,000 and a later one by Ibex Property Corporation, Ltd., for £182,500. Both the contracts were reported to the master, who decided to hold an auction of the property in his room on May 1, 1951. No advertisement of this auction was published, but Messrs. M. A. Jacobs informed the agents of the Gleniffer and Ibex companies that it was to take place, and both companies were represented before the master. The master, on May 1, 1951, did not inform those present what offers had been received before he offered the property for sale. Only one bid was forthcoming, namely, £140,000 on behalf of the Gleniffer company. No other bid was made, and the master than said that the property was withdrawn and that he proposed to consider a conditional contract which he had before him. The solicitors for the Gleniffer company protested against this procedure, stating that they did not know against whom or against what sum they were bidding."

As a result, the matter was brought before WYNN-PARRY, J., in chambers on May 7, 1951, and he directed a further auction by the master at which the terms of all conditional contracts were to be disclosed and the highest bid (including those embodied in the conditional contracts) was to be accepted. There was no advertisement of this auction, and notice was given only to the Gleniffer and Ibex companies.

The auction took place before the master on May 8, 1951. Mr. Legg was there ready to assist the master. The affidavit continues:

"£190,500 was bid on behalf of the Ibex company, £192,500 was bid on

behalf of the Gleniffer company, and the property was knocked down to the latter company at that price."

A That was the figure of the sale of the property in question. On Apr. 3, 1952, there was an appointment to fix the auctioneers' remuneration. It was attended, according to the master's note, by M. A. Jacobs & Co., the solicitors having the conduct of the sale, two other firms of solicitors, whom I assume to have been for the plaintiff and the defendant respectively, and, as the master's note records it, "a representative of the auctioneer". There seems to be no dispute about the representative of the auctioneer. It was not Mr. Legg who had been throughout conducting this matter on behalf of his firm, but a less senior member or an employee of the firm. No notice had been given to the auctioneers of the appointment to fix their remuneration. They were not invited to attend for the purpose of arguing about their remuneration, and no suggestion seems to have been made that they had any right of audience. The master fixed their remuneration, without their having been formally invited to be present (though, as I say, they were, in a sense, present through a clerk), at five hundred guineas plus out of pocket expenses. The out of pocket expenses are agreed to have been £455 (and not the five hundred pounds mentioned by Mr. Legg) and those would be allowed in any event. The question is: Was five hundred guineas in the circumstances the right fee?

B I want to say a word about the general practice at this point. There is a scale fee for sales up to £25,000, and when the master contemplates allowing the appropriate scale fee for a transaction not exceeding £25,000 it is plainly unnecessary to invite the auctioneers to be represented at the appointment. That would only add unnecessary expense to the sale, because they cannot get more than the full scale fee. Wholly different considerations seem to me to apply when, for some special reason in a sale under £25,000, the parties intend to challenge the right of the auctioneers to the full scale remuneration or when the sale is for over £25,000. Whether it is good or bad policy to leave the fee payable in respect of sales over £25,000 completely at large is a matter for the authorities to consider, but so long as it is left entirely at large I should have thought natural justice required that the auctioneers should be entitled to attend in person or by solicitor or counsel in order to claim the maximum to which they thought they were entitled and make their submissions to the master before he exercised his discretion. I may say that I should have thought that where a big sale is involved—one far exceeding £25,000—it was very desirable that some kind of arrangement should be made with the auctioneers before they were employed, but, if that is not done, then the least, I think, that can be done is to hear them argue their own case on the quantum meruit when it arises *ex post facto*. I think the procedure adopted here is open to criticism, but, on the other hand, I think (though this in the end does not amount to much) that the auctioneers took a wrong turning thereafter. It would have been very difficult, perhaps, after the master had once exercised his discretion, to re-exercise it after hearing them, but they could, undoubtedly, have given notice of motion to discharge this order on any ground which seemed fit to them—on the ground either that it had been made in breach of natural justice because they had not been given an opportunity of being heard, or that it was not a proper figure, or on any other ground which seemed good to them. Instead of doing that, they took out a summons to have the remuneration fixed. That, of course, will not do, because it had already been fixed, and I suppose, even if there were not some formal summons before the master on Apr. 3, 1952, it was too late to take out a summons afterwards for this purpose. That is a small matter, and I only mention it so that this procedure should not be repeated in future. The proper course was to have moved to discharge this order, though I anticipate that on any future occasion of this sort the auctioneers will be invited to attend the appointment, and then, of course, their proper course is to ask the master to adjourn the

summons to the judge if they do not like the master's proposed determination.

That being so, and the master having exercised his discretion without hearing anybody on behalf of the auctioneers, it seems to me that I must re-exercise the discretion on this matter. I find it very difficult to fix the figure. I am satisfied that five hundred guineas is much too low, but from that point onwards I feel doubt. There is a scale which seems to me to be very relevant, and that is the scale which prevails in sales in bankruptcy. That scale does deal with sales for an unlimited amount, and the remuneration is payable for sales by auction and sales by private contract. Technically the auctioneers did not sell this property either by auction or by private contract, but the difference, in my judgment, is purely technical. The work they did was as considerable as it would have been if they had in fact sold the property. The property was sold, and there was no question of paying any commission to anybody else for selling it. The bankruptcy scale strikes me as high when one comes to deal with a sale in which the price is as large an amount as £192,500, but it is to be borne in mind that great services are rendered in such a case to the court, not so much by the work done by the auctioneers as by the expert knowledge which they are able to put at the disposal of the court, e.g., the fixing of the reserve price was a vital factor in this particular sale. Nobody but an auctioneer of wide experience of property in London could possibly have fixed that reserve price satisfactorily. If this had been a sale in bankruptcy, the commission, according to the scale, would have been £1,977 10s. I admit that that does strike me as a lot of money, but from a practical point of view it seems to me that the auctioneers here did everything they could have been expected to do. On the whole I think the proper figure to award is £1,600, to which is to be added the expenses of £455.

Order accordingly.

Solicitors: *Fladgate & Co.* (for the plaintiff); *Eland, Nettleship & Butt* (for the defendant); *Norton, Rose, Greenwell & Co.* (for the auctioneers).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

BARRON (INSPECTOR OF TAXES) v. LITTMAN.

[HOUSE OF LORDS (Viscount Simon, Lord Normand, Lord Oaksey, Lord Reid and Lord Asquith of Bishopstone), June 10, 11, 12, 16, 17, July 31, 1952.]

Income Tax—Deduction against profits—Loss—Set-off against profits—Excess rent of immediate lessor—"Profits"—Leasehold properties sub-let at rents exceeding head rents and net annual values—Other properties sub-let at rents below head rents and not sub-let—Finance Act, 1927 (c. 10), s. 27 (1)—Finance Act, 1940 (c. 29), s. 15 (1).

The taxpayer, a dealer in property, held a number of leasehold properties, some of which he had sub-let at rents which exceeded both the respective head rents and the respective net annual values under sched. A to the Income Tax Acts, and others of which he had sub-let at rents which were below the head rents and the net annual values, still others being not sub-let. For the year 1942-43 he was assessed to tax under Case VI of sched. D by virtue of the Finance Act, 1940, s. 15 (1), on the excess rents arising from the properties sub-let at rents exceeding the head rents and the net annual values. It was not disputed by the taxpayer that he was liable to be assessed in respect of the excess rents, but he claimed to be entitled, under the Finance Act, 1927, s. 27 (1), to set against them the losses in rent which he had suffered during the same year in respect of the properties which he had sub-let at rents below the head rents and the net annual values and of those which were not sub-let.

Held: the operations in which the taxpayer had been engaged were

"transactions" within s. 27 (1) of the Act of 1927; he had sustained a loss in them; the excess rents taxable under s. 15 (1) of the Act of 1940 were "profits" in respect of which the taxpayer was liable to be assessed under Case VI of sched. D; and, therefore, under s. 27 (1), he could claim that the amount of the loss sustained by him should be deducted from or set off against the amount of the profits or gains arising from the transactions.

A Decision of the Court of Appeal ([1951] 2 All E.R. 393), affirmed.

EDITORIAL NOTE. Section 27 (1) of the Finance Act, 1927, and s. 15 (1) of the Finance Act, 1940, are repealed by the Income Tax Act, 1952, s. 527 (1) and sched. XXV, and are reproduced in that Act in s. 346 (1) and s. 175 (1) respectively, for which see HALSBURY'S STATUTES, Second Edn., Vol. 31, pp. 332 and 172.

AS TO DEDUCTION OF LOSSES, see HALSBURY, Hailsham Edn., Vol. 17, p. 207, para. 425; and FOR CASES, see DIGEST, Vol. 28, pp. 46, 47, Nos. 233-236.

Cases referred to:

- (1) *Fry v. Salisbury House Estate, Ltd.*, [1930] A.C. 432; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266; Digest Supp.
- (2) *Ryall v. Hoare. Ryall v. Honeywill*, [1923] 2 K.B. 447; 92 L.J.K.B. 1010; 129 L.T. 505; 8 Tax Cas. 521; 28 Digest 81, 453.
- (3) *Lyons v. Cowcher*, (1926), 10 Tax Cas. 438; Digest Supp.
- (4) *Ystradyfodwg & Pontypridd Main Sewerage Board v. Bensted*, [1907] A.C. 264; 76 L.J.K.B. 876; 97 L.T. 141; 71 J.P. 425; 5 Tax Cas. 230; 28 Digest 7, 15.
- (5) *Kensington Income Tax Comrs. v. Aramayo*, [1916] 1 A.C. 215; 84 L.J.K.B. 2169; 113 L.T. 1083; *sub nom. R. v. Kensington Income Tax Comrs. Ex p. Aramayo*, 6 Tax Cas. 613; 28 Digest 102, 622.
- (6) *London County Council v. A.-G.*, [1901] A.C. 26; 70 L.J.Q.B. 77; 83 L.T. 605; 65 J.P. 227; 4 Tax Cas. 265; *reversg. S.C. sub nom. A.-G. v. London County Council*, [1900] 1 Q.B. 192; 28 Digest 73, 392.

APPEAL by the Crown from an order of the Court of Appeal (COHEN and SINGLETON, L.JJ., JENKINS, L.J., dissentiente), dated June 15, 1951, and reported [1951] 2 All E.R. 393, reversing an order of WYNN-PARRY, J., dated Feb. 28, 1951, and reported [1951] 1 All E.R. 701, made on a Case stated by the Special Commissioners for Income Tax.

The Special Commissioners held that "excess rents" within the Finance Act, 1940, s. 15 (1), did not constitute "profits" within the Finance Act, 1927, s. 27 (1), so that the taxpayer was precluded from claiming an allowance under s. 27 (1) in respect of losses suffered by him in relation to certain of his leasehold properties which were either sub-let by him in the course of his business as property dealer at rents less than those payable by him or were not sub-let. WYNN-PARRY, J., affirmed the decision of the Special Commissioners. The Court of Appeal held that s. 15 (1) of the Act of 1940 directed a tax on profits under Case VI of sched. D; the word "profit" in s. 27 (1) meant a profit ascertained as directed by Parliament, and it was immaterial, in considering the application of that sub-section to the present facts, that part of the commercial profit might be taxable under sched. A; and, therefore, the acquisition and management of each of the properties in question was to be regarded as a transaction of such a nature that, if profits had arisen therefrom, the taxpayer would have been liable to be assessed in respect thereof under Case VI of sched. D, and he was entitled to set-off his losses under s. 27 (1).

Sir Frank Soskice, Q.C., and *Sir Reginald Hills* for the Crown.
Millard Tucker, Q.C., and *Mustoe* for the taxpayer.

The House took time for consideration.

July 31. The following opinions were read.

VISCOUNT SIMON: My Lords, the question in this appeal arises on a Case stated by the Special Commissioners pursuant to s. 149 (1) of the Income Tax Act, 1918. The Special Commissioners' decision was in favour of the Crown, and this decision was confirmed by WYNN-PARRY, J. In the Court of Appeal there was a difference of opinion, COHEN, L.J., and SINGLETON, L.J., being in favour of the taxpayer, while JENKINS, L.J., would have upheld the decision of the court below. The taxpayer's appeal was, therefore, allowed, but, on the Crown undertaking by its counsel not to seek to disturb the order of the Court of Appeal as to costs, it was given liberty to lodge a petition of appeal to the House of Lords, and this appeal is the result.

The matter under discussion concerns certain assessments to income tax for the years 1940-41, 1941-42 and 1942-43. It is only necessary to consider and decide the issue in the third and last of these years, since it is agreed that this decision will equally govern the two previous years. The controversy that has arisen between the Crown and the taxpayer involves the consideration of s. 15 (1) of the Finance Act, 1940, under which the taxpayer, who is a dealer in property, has been charged to tax under Case VI of sched. D in respect of excess rents in twenty-three cases where he has succeeded in re-letting property so as to attract tax under that section, and raises the question whether, under s. 27 (1) of the Finance Act, 1927, he may set-off against the amounts so assessed losses which he has incurred in five other cases where he acquired properties on lease for the purpose of re-letting, but only succeeded in re-letting them at a substantially lower rent or failed to re-let them at all.

In the well-known case of *Fry v. Salisbury House Estate, Ltd.* (1), it was decided that the holder of property assessed under sched. A, who received rents from letting the property which gave him a profit over and above the sched. A annual value, was not liable to tax under sched. D in respect of that extra profit inasmuch as the annual income derived from the ownership of lands, tenements and hereditaments could only be assessed under sched. A and in accordance with the rules of that schedule. While the Revenue have an option to choose under which Case of sched. D they will claim tax, they have no option as between schedules, and the annual value to the taxpayer of property assessed under sched. A did not, as the law then stood, expose the holder to additional tax under another schedule on the ground that he was receiving more profit from the properties than was represented by sched. A values. At the time of the decision in the *Salisbury House* case (1), the annual value of London properties was fixed under the Valuation (Metropolis) Act, 1869, while the annual value of properties elsewhere was measured by r. 1 of the Rules Applicable to sched. A, and was the annual rent if the hereditament had been let at a rack-rent within seven years of the assessment, or, if not, the rack-rent which they were actually worth subject to the statutory allowances. This difference of treatment was got rid of by s. 31 of the Finance Act, 1930, which, in effect, made the rules for ascertaining annual value under sched. A in the rest of England applicable also in London. Schedule A was, however, itself preserved as the schedule under which all income from the ownership of land continued to be taxed.

Partly for the reason that the *Salisbury House* decision (1) left the profit which the Revenue sought to tax in that case untaxed and partly because a quinquennial valuation of properties was due to be carried out at a time when the country was involved in war and those concerned in such a valuation would be otherwise occupied, Parliament enacted s. 15 of the Finance Act, 1940. That section is as follows:—

" (1) If, as respects any year of assessment, the immediate lessor of a unit of assessment is entitled in respect of the unit to any rent payable under a lease or leases to which this section applies, he shall be chargeable to tax under Case VI of sched. D in respect of the excess, if any, of the amount which

would have been the amount of the assessment of the unit for the purposes of sched. A, as reduced for the purpose of collection, if the annual value of the unit had been determined (in accordance, in whatever part of the United Kingdom the unit is situated, with the Rules Applicable to sched. A set out in sched. I to the Income Tax Act, 1918) by reference to that rent and the other terms of the lease or leases, over whichever is the greater of—(a) the actual amount of the assessment of the unit for the purposes of sched. A, as reduced for the purpose of collection; or (b) the amount of any rent payable by the immediate lessor in respect of the unit under any short lease or short leases. (2) Where the immediate lessor of any unit of assessment is occupying any part thereof, sub-s. (1) of this section shall apply as if the rent to which he is entitled in respect of the unit under any lease or leases to which this section applies were increased by so much of the annual value of the unit (as ascertained for the purposes of sched. A) as is attributable to the part which he is occupying. (3) Where for any year an assessment has been made on an immediate lessor by virtue of this section, the amount of any relief which may be claimed by him under r. 8 of No. V of sched. A shall be such amount as could have been claimed by him if the annual value of the unit had been determined in the manner described in sub-s. (1) of this section. (4) A lease shall be deemed to be a lease to which this section applies if, and only if, the following conditions are fulfilled with respect to it—(a) that it is a short lease; (b) that the land comprised in it is or forms part of a single unit of assessment; (c) that the rent under it is payable to the immediate lessor of that unit; (d) that the estate or interest of the immediate lessor of that unit is not, as respects any part of that unit, subject to any short lease which comprises also land not wholly within that unit, being a lease the rent under which is payable to that immediate lessor.”

The expression “immediate lessor” is, by s. 13 (1) of the Finance Act, 1940, defined in relation to any premises as—

“(a) if different parts of the premises are the subject of separate tenancies or separate occupations, a lessor of the whole or any part of the premises whose estate or interest extends to the entirety of the premises and is not subject, immediately or mediately, to a lease of the entirety thereof; and (b) in any other case, a lessor whose immediate tenant is occupying or entitled to occupy the entirety of the premises: Provided that if, in any case to which para. (a) of this definition applies, there is more than one lessor satisfying the conditions set out in that paragraph, that one of those lessors shall be deemed to be the immediate lessor whose estate or interest is not reversionary on the estate or interest of any of the others.”

The portion of this definition that is applicable to the present case is the portion at (b) above. The phrase “short lease” is defined by s. 13 (1) as a lease which is not a long lease, and “long lease” means a lease granted for a term exceeding fifty years, other than a lease which is or takes effect as a lease for a term of years determinable after the death or marriage of any person. The phrase “unit of assessment” means, by the same section, any land which forms a unit of assessment for the purposes of sched. A.

The taxpayer does not dispute that the “excess” in respect of which he is chargeable to tax under Case VI of sched. D has been correctly calculated in accordance with s. 15 of the Act of 1940. For example, he held 22, Oxford Street on a short lease and re-let it at a net rent of £3,500. The actual sched. A assessment on this property was £2,100, but, if its annual value had been determined by reference to the rent he received, it would have been £3,500. The rent payable by him is not stated in the Case, but it was less than £2,100, or, at any rate, not more than that figure, and, consequently, the excess to be charged to tax under s. 15 (1) was £1,400. Similar calculations in twenty-two other cases bring out other figures of “excess”, making a total of £4,830. The

taxpayer, however, claims to deduct from or set-off against this total of £4,830 losses which he has sustained in five other instances. For example, he took a short lease of 220, Edgware Road at a rent of £550, but only succeeded in re-letting it at a rent of £100. The rent of £550 paid by the taxpayer exceeded the net annual value of this property for the purpose of sched. A. Comparing the rents paid and received, he sustained a loss of £450. The question to be decided is whether, in virtue of s. 27 (1) of the Finance Act, 1927, he is entitled to set-off this and four other similar losses totalling £3,575 against the £4,830.

Section 27 of the Finance Act, 1927, is as follows:

"(1) Where in any year of assessment a person sustains a loss in any transaction, whether he was engaged therein solely or in partnership, being a transaction of such a nature that, if any profits had arisen therefrom, he would have been liable to be assessed in respect thereof under Case VI of sched. D, he may claim that the amount of the loss sustained by him shall, as far as may be, be deducted from or set-off against the amount of any profits or gains arising from any transaction in respect of which he is assessed for that year under the said Case VI, and that any portion of the loss for which relief is not so given shall, as far as may be, be carried forward and deducted from or set-off against the amount of any profits or gains arising from any transaction in respect of which he is assessed under the said Case VI for any of the six following years of assessment. (2) In the application of this section to a loss sustained by a partner in a partnership the expression 'the amount of any profits or gains arising from any transaction in respect of which he is assessed' shall be taken to mean in respect of any year such portion of the amount on which the partnership is assessed under Case VI in respect of any transaction as he would be required under the Income Tax Acts to include in a return of his total income for that year. (3) Any relief under this section by way of the carrying forward of the loss shall be given as far as possible from the first subsequent assessment in respect of any such profits or gains as aforesaid for any year within the said six following years, and, so far as it cannot be so given, then from the next such assessment and so on. (4) The provisions of this section shall extend so as to apply to a loss sustained in the year ending on Apr. 5, 1927."

This section cannot, of course, have been framed with s. 15 (1) of the Act of 1940 in mind for it was enacted thirteen years earlier. Counsel for the Crown pointed out that its introduction may well have been due to such decisions as *Ryall v. Hoare* (2) and *Lyons v. Cowcher* (3). The effect of those decisions was to make the profits of certain isolated transactions taxable under Case VI, and without s. 27 (1) the taxpayer would have been without redress if in a subsequent year a similar transaction of his left him with a loss. The question now to be decided, however, is not what were the illustrations of hardship which the legislature had in mind when the taxpayer was given the relief of s. 27 (1), but what on its true construction is the extent of the operation of s. 27 (1), and whether it authorises the setting-off of these losses in the present case.

The argument of the Crown that s. 27 (1) does not apply involves two main contentions, first, that the loss was not sustained "in any transaction", and, secondly, that, even if it was, it was not "a transaction of such a nature that, if any profits had arisen therefrom, the taxpayer would have been liable to be assessed in respect thereof under Case VI of sched. D". In my opinion, there was in each case a transaction out of which the loss arose. The transaction consisted in taking a lease of property with a view to re-letting it and either succeeding or failing to re-let it. It is just as much a transaction as would be the purchasing of an article by a trader, who seeks to re-sell it at a profit, and who either does sell it at such a profit or sells it at a loss or does not succeed in selling it at all. On the facts of the present case, there clearly is a transaction, and this was the view of every member of the Court of Appeal. If all that could be said

was that an owner of property, freehold or leasehold, had tried to find a tenant for it and had failed, it would be a question whether his unsuccessful effort could be regarded as a transaction. A similar difficulty would arise if the taxpayer had become the owner of property by bequest or inheritance, which he failed to re-let. But, in the present case, no real difficulty arises on this first point.

A On the second and much more difficult point, the Crown's argument is that "loss" means what he calls "commercial loss", and that, correspondingly, "profits", where this word first appears in s. 27 (1), means what he calls "commercial profits". Assuming this, he then argues that s. 15 (1) of the Act of 1940 does not assess a dealer in property on the commercial profits he might make from re-letting, since the "excess" on which tax under Case VI of sched. D is charged is the result of a formula. The formula might bring out a figure of excess when there was no commercial profit, and there might be commercial profit though the formula would bring out no excess to be taxed. Finally, it is argued that before a set-off of loss under s. 27 (1) can be authorised, the total figure of profits referred to in the section, neither more nor less, must be liable to be assessed under Case VI of sched. D, and that this condition is not fulfilled in these transactions. I agree with the majority in the Court of Appeal in thinking that these arguments are unsound. It is not disputed that losses occurred to the extent claimed, and, even if the word "loss" is treated as equivalent to "commercial loss", this would not justify interpreting the word "profits" as meaning something different from what the law of income tax regards as profits. The Crown suggests that "profits or gains" lower down in the section is to be contrasted with the word "profits" standing alone. This is not so. The EARL OF HALSBURY, in an income tax case with a name which only Welshmen can pronounce—*Ystradyfodwg & Pontypridd Main Sewerage Board v. Bensted* (4) ([1907] A.C. 267)—observed:

"It appears to me that there is a mixture, not to say a confusion, of thought in using the word 'profits' in a sense which is not consistent with the mode in which it is used in the statutes relating to income tax."

E "Profits" means "profits or gains" in the income tax sense, and this can be illustrated from many places in income tax legislation, for example, in the rules relating to Case III of sched. D. LORD WRENbury pointed out in *Kensington Income Tax Comrs. v. Aramayo* (5) ([1916] 1 A.C. 225) that income tax legislation is not entirely consistent in using the same phrase for the same thing throughout.

F The question, therefore, comes to be whether the tax imposed on an "excess" under Case VI of sched. D is to be regarded as a tax in respect of profits or gains. Case VI itself is described as:

"Tax in respect of any annual profits or gains not falling under any of the foregoing Cases, and not charged by virtue of any other schedule."

G It appears to me that the tax on "excess" under s. 15 (1), assessed as it is under Case VI, must be regarded as a tax in respect of annual profits or gains, notwithstanding that the figure of assessment is arrived at by the formula contained in the section. Tax under sched. A remains unaffected. Section 15 (1) does not modify or enlarge the operation of sched. A in any way. The section imposes, in the circumstances to which it applies, a tax on an "excess" which is assessed under a different schedule, and which is paid by the immediate lessor. Once the conclusion is reached that the tax on this "excess" is a tax in respect of profits and gains, the main difficulty which has been suggested by the Crown disappears. This conclusion is reached by putting a correct interpretation on the relevant sections, but it is legitimate to add that it is also the conclusion which one would expect, for there are many instances in income tax law where Parliament has thought proper to allow losses to be brought into account for the purpose of reducing what would otherwise be the taxpayer's liability. I move that the appeal be dismissed with costs.

LORD NORMAND: My Lords, the taxpayer, who is a dealer in property, made a practice of acquiring leasehold properties with a view to sub-letting them at a profit. In the year ended Apr. 5, 1943, he had twenty-eight such properties of which twenty-three had been sub-let by him, each of them at a rent in excess of the sum at which it had been assessed under sched. A. The difference between the aggregate of the rents under the sub-leases for these properties and the aggregate of the sched. A assessment was £4,830. The excess of the aggregate of the sub-rents over the aggregate of the rents paid by the taxpayer in respect of the same twenty-three properties was a still larger sum. Of the remaining five properties the taxpayer failed to let three, and two had been sub-let by him at rents lower than those payable by him. The difference between the rents received by the taxpayer and the rents paid by him in respect of these five properties was £3,750. The assessment for the year 1942-43, now under appeal, was made under Case VI of sched. D by virtue of s. 15 (1) of the Finance Act, 1940, in respect of the excess of the aggregate rents received by the taxpayer for the twenty-three properties over the aggregate of the sched. A assessments. The original assessment was for the estimated sum of £5,000, but the Special Commissioners have corrected it to the sum of £4,830. Assessments on the same principles were made for the years 1940-41 and 1941-42. They also are under appeal and the decision on the 1942-43 assessment will govern them. It is admitted by the taxpayer that he was liable by virtue of s. 15 (1) of the Finance Act, 1940, to be assessed to income tax under Case VI of sched. D on the "excess" in respect of the twenty-three properties. But he claims that under s. 27 (1) of the Finance Act, 1927, he is entitled to deduct from that excess the loss of £3,575 suffered on the other five properties.

Before s. 15 (1) of the Finance Act, 1940 (which I call "s. 15 (1)" for short hereafter), came into force the total income tax liability in respect of the twenty-three properties would have been ascertained and measured by the assessment made under sched. A. That is not to say that the taxpayer would have been entitled, according to income tax law, to enjoy part of his profit free of tax. In principle, income tax is a single tax levied on the whole profits or income of the subject, and it is assessable, according to the nature of the profits, under one or other of the schedules to the Act. The whole taxable profits from property were assessable under sched. A, and an assessment under that schedule exhausted the tax liability of the lessor in respect of it. Schedule A is based on annual value, and annual value was the measure of the whole taxable profits from the property. These principles were settled by decisions of this House in *London County Council v. A.-G.* (5) and *Fry v. Salisbury House Estate, Ltd.* (1). Section 15 (1) of the Finance Act, 1940, innovated on these principles. The reason for the innovation appears to have been twofold. The *Salisbury House Estate* case (1) had shown that, whatever might be the theory of the Income Tax Acts, there might be a margin between the annual value of property and the actual net receipts of the lessor, and after the quinquennial valuation of property was suspended by s. 25 of the Finance Act, 1940, this margin became of greater importance. It was, therefore, considered expedient to deal with the discrepancy by new legislation even at the cost of violating the principle that a sched. A assessment subjects to tax the whole profits from property.

Section 15 (1), which deals with leases for a period not exceeding fifty years, imposes a tax on an "excess". It involves a subtraction sum in which the figure in the upper line is the amount of a notional sched. A assessment (as reduced for the purposes of collection) based on an annual value determined by reference to the rent under the lease and the other terms of the lease, and the sum to be subtracted is the greater of (a) the amount of the actual sched. A assessment (as reduced for the purpose of collection) or (b) the rent payable by the immediate lessor. The excess so arrived at is made chargeable to tax

under Case VI of sched. D. The first thing to notice about the provisions of the section is that they do not in any way affect the sched. A assessment, nor is the new tax liability created by them a tax liability under a sched. A assessment, though both the actual sched. A assessment and a notional sched. A assessment are used in computing the taxable profits. The tax is, in fact, a new tax on taxable profits derived from property, which are now not to be deemed to be exhaustively charged under sched. A. It is a tax under sched. D, Case VI, and, therefore, by definition a tax in respect of profits or gains not falling under any other schedule. Accordingly, the total profit is divided into two parts, one assessable under sched. A and the other under sched. D, Case VI, but both parts are "profits" or "profits and gains" in income tax law.

It is under s. 27 (1) of the Finance Act, 1927 (which I shall call "s. 27 (1)" for short hereafter) that the taxpayer claims to deduct "losses" in respect of the five properties. This section was, no doubt, enacted to redress an injustice which arose when the profits of an isolated transaction of a commercial nature (as in *Ryall v. Hoare* (2) and *Lyons v. Cowcher* (3)) were taxed under Case VI, and when in another year a similar transaction resulted in a loss which could not be set-off against the taxed profits. But the origin of the section is irrelevant and the only relevant question is whether the taxpayer can bring himself within the language of the section. If the taxpayer is to succeed he must show (i) that as regards the five properties he had engaged in a transaction within the meaning of the section; (ii) that he made a loss in the transaction; and (iii) that the transaction was of such a nature that, if any profits had arisen therefrom, he would have been liable to be assessed in respect thereof under Case VI of sched. D. Neither the Special Commissioners nor WYNN-PARRY, J., decided whether there was a transaction within the meaning of s. 27. All three members of the Court of Appeal held that there was a transaction. In my opinion, "transaction" is a comprehensive word which includes any dealings with property. The "transaction" entered into by the taxpayer as a dealer in property was the acquisition of leases of property, the attempt to sub-let at a rent in excess of the rent payable by him, and the success or failure of this attempt. I, therefore, agree with the Court of Appeal on this point. I see no difficulty on the facts of this case, though there may well be difficulty on other facts. That the taxpayer sustained a loss in the transaction as regards the five properties admits of no doubt. The loss is ascertained by ordinary business methods. But, though the Income Tax Acts do not impose a special meaning on the word "loss", the loss is none-the-less a loss in the sense in which the income tax law has regard to losses.

The real crux of this appeal, however, is the meaning of the word "profits" in s. 27 (1). "Profits" and "profits and gains" are terms often used interchangeably in the Income Tax Acts with the meaning "assessable" or "taxable profits": *London County Council v. A.-G.* (6) ([1901] A.C. 45 per LORD DAVEY. In my opinion, that is the meaning of the word "profits" standing alone in s. 27 (1) as it is also the meaning of the words "profits and gains" lower down in the section, and it is impossible to draw a distinction which would assign to the words "profits and gains" the ordinary meaning in income tax law and to "profits" the meaning of commercial profits. The Crown contended that, since the word "loss" means "commercial loss", the word "profits" must correspondingly mean commercial profits. It was further suggested that, unless that were so, some absurdity would result such as arises when peas are to be deducted from beans. The difficulty is imaginary, for there is nothing absurd in a contrast between losses and profits, provided that the losses and profits are reckoned on principles recognized by income tax law, though for each of them a different but appropriate mode of reckoning is used. The Crown maintained, as a last resort, that a tautology is involved if "profits" means assessable or taxable profits. That is not so. The words "he would have been

liable to be assessed in respect thereof under Case VI of sched. D " define or describe the category of taxable profits which would have arisen from a transaction, if it had had a successful issue. The section is not saying the same thing twice. It is saying two things—that the transaction would have given rise to taxable profits, and, that these profits would have been assessable under Case VI of sched. D. Given that the word " profits " means taxable or assessable profits, the taxpayer has to show that, if the transactions as regards the five properties which led to a loss had given rise to any profits, he would have been liable to be assessed in respect of them, and of the whole of them, under Case VI of sched. D. The section does not expressly say that all the profits would have been assessable under Case VI, but I think the Crown was right in submitting that that was its meaning. It is, however, quite plain that all the profits, if there had been any, would have been assessable under Case VI. In strictness, it may be more accurate to say that the whole profits would have been liable to be assessed under s. 15 (1) and would have been chargeable under Case VI of sched. D. But the language of the Income Tax Acts does not always strictly observe the distinction between assessing and charging. The Crown did, indeed, show that if " profits " means commercial profits, not all these profits would be chargeable under Case VI, sched. D. The example given was a sub-letting at a net rent greater than the rent payable by the lessor but less than the sched. A assessment. But this argument falls to the ground if " profits " is given its correct meaning. Then it was said that not all the taxable profits were assessable under Case VI of sched. D, because the sched. A assessment remained and tax would still be payable in respect of it. The answer to this is that it is impossible to say that the profits and gains assessable under sched. A arise from the transaction. The very reason for the enactment of s. 15 was to create a new liability to tax with new rules of assessment in order to trap " profits and gains " which sched. A failed to trap, and the sched. A assessment would have been the same both in amount and in the ultimate liability whether there had been a " transaction " or not. In view of the terms of s. 15 (1) and the express provision that the profits shall be chargeable under Case VI of sched. D, I find it impossible to accept the view that the new tax is an additional sched. A tax directed to more effective taxation of " annual value ". I, therefore, agree with my noble and learned friend on the Woolsack that the appeal should be dismissed.

LORD OAKSEY: My Lords, I agree that this appeal should be dismissed. The main argument of counsel for the Crown, if I understood him aright, was (i) that the word " profits " in the fourth line of s. 27 (1) of the Finance Act, 1927, means actual profits and not profits computed in accordance with the Income Tax Acts; (ii) that the word " any " in the third line of that section means " all "; (iii) that s. 15 of the Finance Act, 1940, in charging to tax excess rents does not charge profits within the meaning of s. 27 (1) of the Act of 1927; and lastly, that, in any event, as the properties in question are assessed under sched. A it cannot be said that " all " the profits which arise from such a transaction as those in question are liable to be assessed under Case VI of sched. D.

In my opinion, these arguments are fallacious. The word " profits " cannot mean actual profits since the hypothesis is that, if there had been profits arising from the transaction, they would have been liable to be assessed under Case VI of sched. D. The words used are to define the nature of the transaction in which a loss, if sustained, may be set-off against profit from any transaction which had been assessed on the taxpayer under Case VI of sched. D. In the next place, the word " any " in the third line of s. 27 (1) does not, in my opinion, mean " all ". The word can mean " all ", but it can also mean " some ". But it is also necessary to interpret the words " if any profits had arisen therefrom ". The transactions in question were the sub-letting of, or attempting to sub-let, properties of which the taxpayer was the lessee, and the profits which arose therefrom were not the profits chargeable under sched. A. Schedule A is a tax

on the ownership of land, not on its letting, although rent is used as the measure of the tax.

A Counsel for the Crown then argued that the profits and losses which arise from such transactions as these do not arise from them within the meaning of s. 27 (1) and that the transactions are merely instances of *causae sine qua non*, but I do not think any such investigation of the nature of causes is necessary for the true interpretation of the section. Section 27 (1) of the Act of 1927 and s. 15 (1) of the Act of 1940 both deal with profits which are liable to be assessed under Case VI of sched. D, and not with profits assessable under sched. A or any other schedule. Section 27 is a perfectly general section providing for a set-off of losses against profits which are assessable under Case VI of sched. D. When, therefore, the Act of 1940 made excess rents chargeable under the same case of sched. D it required clear words to show that it was not the intention that losses arising from transactions of the same nature should not be set-off against such profits. What the taxing authorities have to investigate is whether there has been a transaction in which, if it had resulted in a profit, that profit would have been assessed under Case VI of sched. D. If there has been such a transaction and the transaction has resulted in a loss, then that loss may be set-off against any profits which have been assessed under Case VI of sched. D in respect of transactions for that year.

D LORD REID: My Lords, the taxpayer acquired a number of leases with a view to sub-letting the properties at a profit. In the year in question in this case, 1942-43, he was successful in this in many cases, but in other cases he incurred losses either because he had to sub-let at rents lower than the rents which he paid, or because he could not sub-let at all so that the whole rent which he paid was a loss to him. He now seeks to set-off those losses against certain assessments under Case VI of sched. D in respect of the cases where he made profits, and I think that the question whether he is entitled to do that is best approached by considering first what the position would have been if these events had occurred before 1940 and then considering the effect of s. 15 (1) of the Finance Act, 1940, and s. 27 (1) of the Finance Act, 1927.

E If s. 15 had not been passed the position would have been that when the taxpayer acquired the leases he became liable in each case on coming into occupation to pay income tax on the amount of the sched. A assessment, but in paying rent to his lessor he was entitled to deduct tax at the standard rate from that rent up to a maximum of the amount of tax which he had himself paid. So, if the rent which he paid was equal to or exceeded the amount of the sched. A assessment he passed on the whole burden of tax and in the end bore no tax himself. But if the rent which he paid was less than the amount of the sched. A assessment he could not pass on the whole burden, but had to bear tax himself to the extent of the difference between the whole tax payable and the amount which he could deduct from the rent which he paid. If he sub-let he never had to pay any more tax however large the rent might be which he got from the sub-tenant and however large his profit from sub-letting might be. But, on the other hand, he got no relief if he failed to sub-let. And if he sub-let at a loss all that he was able to do was to pass to the sub-tenant any liability to pay tax under sched. A: he could get no relief in respect of his loss through paying more rent than he received. There are a number of provisions in the Income Tax Acts which permit losses of various kinds to be taken into computation in various ways, but there was none which then applied to a loss of that character. The Finance Act, 1940, contains provisions for the taxation of lessors who make profits. It deals differently with long leases and short leases. All the leases with which this case is concerned were within the definition of short leases in the Act and came within the scope of s. 15 (1). The provisions of the Act dealing with long leases are so different that I do not think that any assistance can be got from them in interpreting s. 15 (1) and I do not propose to consider them further.

The provisions of s. 15 (1) do not alter in any way rights or liabilities in respect of assessment or taxation under sched. A. They create a new subject of taxation assessable under Case VI of sched. D, and Case VI deals with profits or gains not falling under any other Case of sched. D and not charged by virtue of any other schedule. It is true that the provisions of s. 15 (1) involve, as a step in the calculation which it directs, a notional re-valuation of the property according to the Rules Applicable to sched. A, and that in certain cases the actual sched. A assessment must be taken into account as a deduction. And it may well be that the reason or one of the reasons for these provisions in the Act of 1940 was that on account of delay in re-valuation for the purpose of sched. A those who let property were thought to be inadequately taxed. So the provisions of s. 15 (1) can be regarded as supplementary to sched. A. But they are not an extension of sched. A. They tax a new kind of profits or gains, and they tax it under Case VI of sched. D because it does not come within the scope of any other schedule or Case. Moreover, liability to pay tax under s. 15 (1) is imposed directly on the lessor who makes the profit, whereas the occupier pays tax, at least in the first instance, under sched. A. Section 15 imposes liability to tax if a notional re-valuation of the property based on the rent which the taxpayer actually receives exceeds whichever is the greater of the actual sched. A assessment or any rent which he has to pay under a short lease. Broadly speaking, that is a case where the taxpayer has made a profit by letting or sub-letting, and where tax on the amount of his profit would exceed the tax due under sched. A or such part of that tax as he has to bear himself, and the amount of tax payable under s. 15 (1) when added to the tax under sched. A or that part of it which he bears himself will roughly correspond to what he would have had to pay in tax if he had had to pay nothing under sched. A but had been taxed on his whole profit from letting or sub-letting the property. The correspondence may be far from exact because, as is well known, allowances under the Rules Applicable to sched. A may differ widely from expenses which the taxpayer has had to incur. It must have been fairly obvious when s. 15 (1) was enacted that there would be cases of the kind to which it applies where the taxpayer incurred a loss—as the taxpayer did here in some instances. Section 15 is silent about such cases. The taxpayer says that that is because the terms of s. 15 (1) are such as to bring s. 27 (1) of the Finance Act, 1927, into operation with regard to such losses, and, therefore, Parliament must be held to have intended that losses should be dealt with under that section. The Crown denies this and contends that the taxpayer must pay tax under s. 15 (1) in respect of adventures in which he has made a profit without any deduction in respect of any other adventures in which he has made a loss. The Crown asserts that s. 27 (1) has no application to losses of this character, and if that is right it follows that Parliament must be held to have intended that this new tax should be paid in every case where the taxpayer has made a profit sufficient to bring s. 15 (1) into operation without the taxpayer having any right to bring into computation losses which he has sustained in other cases of exactly the same kind.

So the case turns on the proper interpretation of s. 27 (1). That section applies where and only where “a person sustains a loss in any transaction . . . of such a nature that, if any profits had arisen therefrom, he would have been liable to be assessed in respect thereof under Case VI of sched. D”; and it allows such a loss to be “deducted from or set-off against the amount of any profits or gains arising from any transaction in respect of which he is assessed for that year under the said Case VI” with a provision for carrying forward losses which cannot be so set-off. At first sight the provisions of s. 27 (1) might appear to fit the present case exactly. There is no doubt that the taxpayer sustained a loss, and there is no doubt that each of the operations in which he sustained the losses was of such a nature that if it had been more successful s. 15 (1) of the Act of 1940 might have applied and the taxpayer would then have been chargeable to tax under Case VI in terms of that section. And the taxpayer only seeks to

set-off his losses against assessments under Case VI. But the Crown argues that that is not enough to satisfy the requirements of s. 27 (1).

A In the first place, the Crown contends that the taxpayer's operations in which he sustained loss were not "transactions" within the meaning of the section. I can see no substance in this contention and I agree with your Lordships that it is wrong. Then the Crown founds on the limited nature of the wording of the condition "if *any profits* had arisen therefrom, he *would* have been liable to be assessed *in respect thereof* under Case VI". First, counsel says that s. 15 (1) of the Act of 1940 is not dealing with profits; no doubt there must be profit before it can apply, but it does not tax profits, it taxes excess rents; if profits arise, there may be an assessment under Case VI, but it will not be an assessment "in respect thereof"; and, therefore, the condition in s. 27 (1) of the Act of 1927 is not satisfied. I think that the answer to that can be shortly stated. Chargeability
B under s. 15 (1) must be in respect of profit of some kind. The fact that Case VI applies shows that profit is being dealt with. The definition of Case VI at the beginning of sched. D makes it clear that Case VI only applies to "annual profits or gains", and it is well established that the words "or gains" add nothing to the word "profits". The calculation which s. 15 (1) directs is simply the
C method by which the profits from the transaction are to be measured for income tax purposes, and the assessment and charge to tax under the section are in respect of the profits so measured.

Then the argument of counsel for the Crown is put in another way. He says that, whatever "profits" may mean in s. 27 (1), this section has no application to a case where, if "profits" had arisen, those "profits" might or might not have been assessable under Case VI. So far I think that he is right. The section
D requires that, if any profits had arisen, the taxpayer *would* have been liable to be assessed—not *might* have been liable to be assessed—under Case VI. Then he says that "profits" must mean actual or commercial profits and that such profits might arise in a case of this kind without there being any possibility of an assessment under Case VI. If that were the meaning of "profits", here again I would agree with him. There can be no assessment under Case VI unless there
E are sufficient profits to bring s. 15 (1) into operation, and there can be actual or commercial profits in a case of this kind without there being any such profits. For example, let me suppose a property with a sched. A assessment of £500. If a taxpayer acquires a lease of that property under which he pays a rent of £200 and then sub-lets it for a rent of £350 he makes a profit. The commercial profit might be somewhat less than £150, the difference between the rent he pays and
F the rent he receives, because there might be expenses which could be deducted from the gross profit. But I assume that there would be a substantial profit. Nevertheless, s. 15 (1) would not apply and there could be no assessment under Case VI. Section 15 (1) only applies if the notional re-valuation based on the rent which the taxpayer is receiving exceeds whichever is the greater of the sched. A assessment or the rent which he pays, and here the notional re-valuation,
G though exceeding the rent which he pays, would not exceed the sched. A assessment. So there would be an actual profit but no liability to assessment under Case VI. But I do not agree that "profits" in s. 27 (1) means actual or commercial profits. In legislation dealing with income tax one might expect profits to mean profits in the income tax sense or profits which have been made subject to taxation and that is not by any means the same thing as actual profits in a
H commercial sense: in some cases taxable profits are more than actual profits and in other cases less. Moreover, when s. 27 (1) refers to profits in respect of which the taxpayer would have been liable to assessment it must, I think, be referring to profits in the income tax sense because it is only in respect of such profits that a taxpayer can ever be liable to assessment. It appears to me that what the section means is that the transaction must be of such a nature that if any assessable profits arise from it the taxpayer will be liable to assessment in

respect of those profits under Case VI of sched. D and not under some other Case or schedule.

The Crown's argument that "profits" means actual profits was based largely on the contrast which is made in the section between "loss" and "profits". It was said that loss must mean actual loss, and, therefore, profits must mean actual profits. I do not think that the argument is valid. The section later makes the loss deductible for income tax purposes, and that would indicate that loss must mean loss in an income tax sense or a loss which can properly be taken into computation for income tax purposes. In a way, I think that the Crown's argument is right: there is no Rule Applicable to Case VI which deals with losses and no special meaning attaches to the word in this context, so one takes actual loss into this income tax computation. But that is not taking actual loss in contra-distinction to income tax loss: that is taking actual loss because in this case it corresponds with loss in the income tax sense. If that is so, there is plainly no reason to suppose that "profits", when contrasted with loss in this sense, means anything but profits in the income tax sense. If that is right, the crucial question comes to be this: Could there be assessable profits from a transaction of this kind which were not assessable or chargeable under Case VI of sched. D, but were assessable or chargeable under some other schedule or case? The Crown maintains that there could be. Taking the example which I have already given—sched. A assessment £500, rent paid by the taxpayer £200, rent received by him £350—the Crown would say that the taxpayer's actual or commercial profit of £150 (or somewhat less) would be an assessable profit and would be assessed under sched. A. But, in my opinion, it would not be an assessable profit at all. So long as there is no re-valuation for the purposes of sched. A it cannot come into any computation or calculation for income tax purposes, and the amount of the sched. A assessment would be exactly the same whether that profit had been made or not, and even on a re-valuation the amount of the profit from sub-letting would be irrelevant, though the rent under the sub-lease might be important. Until the profits from sub-letting are of such a character as to bring s. 15 (1) of the Act of 1940 into operation they are not profits in respect of which anyone is liable to be assessed and if those profits are such as to bring s. 15 (1) into operation then the only assessment in respect of them will be the assessment under Case VI of sched. D which s. 15 (1) directs. So it follows that the condition in s. 27 (1) of the Act of 1927 is satisfied. These transactions are of such a nature that, if any profits which were assessable arose from them, those profits would in every case be assessable under Case VI of sched. D, and could in no case be assessable under any other case or schedule. Accordingly, in my judgment, this appeal should be dismissed.

LORD ASQUITH OF BISHOPSTONE: My Lords, I concur. The activity on which the taxpayer was engaged was that of acquiring property—freehold or leasehold—with the design of letting or re-letting it at a commercial profit to himself. Under the *Salisbury House* decision (1) it had been established that profit resulting from a transaction of this kind and consisting of the difference between net outlay and net return could not be taxed as such under sched. D, and that the only income tax liability which could attach in such a case was one on the annual value of the property under sched. A. This was held to exhaust the tax gatherer's rights. The system worked fairly so long as sched. A value was frequently revised and so kept in step with commercial value. But when, during the war, quinquennial re-valuations under this schedule were suspended, an increasing disparity declared itself between the old sched. A values and the rents which the premises in fact commanded in the market, and therewith an increasing tax-free commercial profit lodged in the hands of the entrepreneur.

Section 15 of the Act of 1940 was clearly designed to "catch" this profit. It might have provided—I leave aside, for the sake of simplicity, freeholds—that in the case of property acquired on lease and re-let the subject-matter of tax

should be simply and in all cases the difference between rent payable and rent receivable, less expenses. It did not in fact so provide. The new, and the only new, subject-matter of tax was what may be called for short "excess rents": a figure arrived at by the application of an arbitrary formula laid down in the section. Excess rent (again leaving freeholds for simplicity out of account) would very frequently be the excess of the rent at which the premises were re-let over the sched. A value, a figure which might be almost unrelated to actual commercial profits. (The wording of the section is complex but I do not think this statement is a dangerous over-simplification of its gist at least on the facts of this case.) The section provided that "excess rent", computed according to this formula, should be "chargeable under Case VI of sched. D". Case VI deals, and deals solely, with "profits or gains" in the income tax sense of those terms, and it is impossible to suppose that the section would have operated differently if it had provided in terms that excess rents should be "deemed to be 'profits or gains' within Case VI" and chargeable as such.

The short point in this appeal is whether in a transaction of this kind losses, in any and what sense of that term, can be set-off against profits, in any and what sense of that term, for while twenty-three of the twenty-eight properties in this case were re-let at a profit, five were re-let at a loss. The answer depends mainly on the construction of s. 27 (1) of the Finance Act, 1927, and on the application of its language (and in particular of the word "profits" in its fourth line) to the new subject-matter of taxation created by s. 15 (1) of the Finance Act, 1940. The first five lines of s. 27 (1) read as follows:

"Where in any year of assessment a person sustains a loss in any transaction, whether he was engaged therein solely or in partnership, being a transaction of such a nature that, if any profits had arisen therefrom, he would have been liable to be assessed in respect thereof . . ."

The word "loss" in line 1 has, it would seem, no esoteric significance in fiscal statutes, and the taxpayer concedes (if it be a concession) that it may be taken to mean ordinary commercial loss, as when I take premises on lease at £500 a year and re-let them at £200 or fail to re-let them at all. But what of the word "profits" in line 3? The main contest was about the meaning of this word. Does this mean, in a transaction of this kind, actual commercial profit, or does it mean the notional profit represented by the "excess rent" as defined in s. 15 (1) of the Act of 1940, a "profit" which is capable of existing where there is no commercial profit at all, or, where such a profit exists, may bear little or no mathematical relation to it.

Section 27 (1) bids us to envisage "transactions" of various kinds. Your Lordships are only concerned with its construction in relation to the type of transaction involved in the present case. In regard to such transactions (resulting in an actual loss) we are enjoined to ask whether if any "profit" had arisen therefrom, the taxpayer would have been "liable to be assessed thereon under Case VI of sched. D". If, and only if, the answer to this question is "Yes", can the loss be set-off against the profit on other transactions similar or dissimilar in respect of which he is assessed in the same year. The main argument of the Crown was that "set-off" involves deduction and can only exist when the thing sought to be deducted and the thing from which it is sought to deduct it are homogeneous. ("You cannot deduct peas from beans".) And that since the losses are, *ex concessis*, true commercial losses, the profits we are bidden to imagine in line 3 must, to enable a "set-off", be true commercial profits, not the conventional or notional profits represented by excess rents in s. 15 (1) of the Act of 1940. I agree with your Lordships in rejecting this contention. It seems to me that the subtraction of an actual loss from that which, by s. 15 (1) of the Act of 1940, is deemed to be a profit is the subtraction, not of peas from beans, but of like from like, viz., of a sum of money from another sum of money, and these are none-the-less homogeneous because the second sum is to be computed

artificially. In a transaction of this character the only "profits" which can be assessed under Case VI are the excess rents which are deemed to be "profits or gains" by s. 15 (1) of the Finance Act, 1940, and these have no necessary relation to "commercial" profits, and may totally diverge therefrom. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Tobin & Co.* (for the taxpayer).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

Re BATLEY (deceased). PUBLIC TRUSTEE AND ANOTHER
v. HERT AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.),
July 24, 1952.]

*Income Tax—Annuity—Annuity free of income tax—Reliefs and allowances—
Liability to account to trustees—Payment to annuitant of one-third of the total
income of a fund after payment of income tax.*

By his will, dated Jan. 27, 1937, and made shortly after his divorce from the annuitant, his first wife, and on the day of his marriage to his second wife, the testator bequeathed "free of duty to my former wife . . . an annuity of £416 for her life . . . such annuity to be considered as a continuance of the alimony which I am paying her during my lifetime . . . thus continuing after my death the payments of alimony which I am making to her during my lifetime. But if at any time during the lifetime of my [second] wife . . . such annuity of £416 should exceed the amount of one-third of the total income of my estate after payment of income tax then and in such case the amount to be paid . . . by way of such annuity shall be such one-third of the total income of my estate after payment of income tax . . ." During his life the testator paid the alimony without deduction of income tax, no claim for any rebate of tax under the Income Tax Acts was made by the annuitant or her husband, and the testator never asked them to make a claim. On May 4, 1947, the testator died. On a summons taken out by the trustees of his will after his death it was held that the annuity was payable free of income tax, but without prejudice to the question whether the annuitant was liable to account for income tax relief in accordance with the rule in *Re Pettit* ([1922] 2 Ch. 765). A summons was issued by the trustees of the will to determine this question, the amount of the annuity of £416 for the time being exceeding the amount of one-third of the total income of the estate after payment of income tax.

HELD: the rule in *Re Pettit* was inapplicable to the gift of one-third of the total income after payment of income tax, and, therefore, in any year in which the annuitant received a one-third share of the said total income she was not liable to account to the trustees for any repayment of income tax attributable to her annuity.

Decision of VAISEY, J. ([1952] 1 All E.R. 1036), varied.

AS TO TAX-FREE ANNUITIES, see HALSBURY, Hailsham Edn., Vol. 28, pp. 214-216, paras. 386-388; and FOR CASES, see DIGEST, Vol. 39, pp. 166-168, Nos. 572-593.

Cases referred to:

- (1) *Re Pettit*, [1922] 2 Ch. 765; 91 L.J.Ch. 732; 127 L.T. 491; 39 Digest 167, 587.
- (2) *Re Batley*, [1951] Ch. 558.
- (3) *Re Lyons*, [1952] 1 All E.R. 34; [1952] Ch. 129.

APPEAL of first and second defendants from an order of VAISEY, J., made on Apr. 4, 1952, and reported [1952] 1 All E.R. 1036, on an originating summons.

VAISEY, J., held that, on the true construction of the will of Charles Gurson Batley, deceased, and in the events which had happened, the first and second defendants, the testator's first wife and her present husband, in accordance with the rule in *Re Pettit* ([1922] 2 Ch. 765), were accountable to the trustees of the will for any relief or allowances by way of repayment of income tax recovered or recoverable in respect of an annuity bequeathed to the first defendant.

J. F. Bowyer for the first and second defendants, the annuitant and her husband.

McMullen for the plaintiffs, the trustees of the will.

Fletcher-Cooke for the remaining defendants, the testator's second wife and her infant children, interested in remainder under the will.

SIR RAYMOND EVERSLED, M.R.: The question is whether the principle associated with *Re Pettit* (1) applies in the circumstances of this case.

By his will the testator bequeathed

"free of duty to my former wife [Mrs. Hert] an annuity of £416 for her life without power of anticipation during any coverture, such annuity to be considered as a continuance of the alimony which I am paying her during my lifetime and to be paid to her at the rate of £32 every four weeks, in this way thus continuing after my death the payments of alimony which I am making to her during my lifetime. But if at any time during the lifetime of my wife the said Grace Lucy Batley such annuity of £416 should exceed the amount of one-third of the total income of my estate after payment of income tax then and in such case the amount to be paid to the said [Mrs. Hert] by way of such annuity shall be such one-third of the total income of my estate after payment of income tax accordingly to be paid in similar manner by equal four-weekly payments . . ."

Finally, there is a direction that, subject to this annuity, the income was payable to the testator's widow for her life, and after her death, should there be any child or children of the testator's her surviving, the testator directed his trustees

"to set aside a sufficient portion of the capital of my said estate to continue the payment of the said annuity of £416 to the said [Mrs. Hert], or if at such time such annuity of £416 should exceed the amount of one-third of the total income of my estate after payment of income tax then and in such case the amount to be thus set aside shall be a sufficient portion of the capital of my said estate to pay as an annuity to the said [Mrs. Hert] an annual sum equal to such one-third of the total income of my said estate after payment of income tax accordingly and to pay the said annuity to the said [Mrs. Hert] for her life accordingly."

The first question which arose out of those directions was whether or not the provisions for the payment of £416 a year for her life to Mrs. Hert was free of tax. That matter came before the Court of Appeal in *Re Batley* (2) and it is quite plain, I think, that the court, in considering the problem, applied their minds, if not exclusively, at least primarily, to what I may call the first limb of this provision, the gift or bequest of an annuity of £416 a year. The conclusion was that the gift was free of income tax, or, in other words, that it was a gift of the net figure of £416. The circumstance which most strongly influenced the court in coming to that conclusion was the references to the alimony which the testator had been paying during his life—"such annuity to be considered as a continuance of the alimony which I am paying", and "in this way . . . continuing . . . the payments of alimony which I am making". It was proved that the testator had paid £8 a week, free of any deduction, by way of alimony. On that matter, then, this court concluded that the sum bequeathed was a net

sum. The court, however, left open the question: Did *Re Pettit* (1) apply or did it not? In other words, was Mrs. Hert liable to account to the trustees for any repayment which she was able to secure from the Revenue of tax paid in respect of the £416 annuity? So, in due course the matter again appeared before the courts, and VAISEY, J., was asked to decide whether *Re Pettit* (1) applied. The matter has been somewhat complicated in this case (for the first time in cases of this character, so far as is known) by the fact that the annuitant re-married, so that for tax purposes her income is brought into account by her husband who pays the tax and makes any claim for repayment. The husband has, therefore, been joined as a defendant.

The learned judge was of opinion that *Re Pettit* (1) did apply. He rejected an argument based on the testator having paid £8 a week during the ten years or so which elapsed between the divorce and his death and his not having made any suggestion to his former wife that she should account to him for any rebates that she got, and, indeed, it was not proved that she ever made any such claims against the Revenue. The learned judge did not, therefore, think that the circumstances concerning the payments of alimony were material, and he came to the conclusion that the effect of the numerous cases which have come before the courts from the time of *Re Pettit* (1) up to the present (*Re Lyons* (3), in this court, was the last) was that, in the absence of very strong language, a gift of an annuity of *x* pounds per annum must be construed in this way—that the testator's benefaction was intended to be that fixed sum, no more and no less, as an annuity, with the result that, if the annuitant obtained a repayment which would give her more than the fixed sum, she was liable to pay the sum recovered to the trustees of the will. I think it is clear that VAISEY, J., considered particularly the first limb of this gift, and the arguments were directed largely to it. It is true that counsel for the first and second defendants said that the impossibility of applying the *Re Pettit* (1) principle to the second limb should have, so to speak, a reflection back on the first. It appears, according to what we have been told, that the situation of the estate now is such that at all material times—certainly at the present time—the condition has been fulfilled that brings into play the second limb. In other words, £416 exceeds the amount of one-third of the total net income, and, therefore, the real question which we have to decide is: What is the effect, so far as any possible repayment of tax is concerned, of this second limb? For my part, I think that the second limb is plain in its effect. Let me read the material part of it again:

“ But if at any time during the lifetime of my wife . . . such annuity of £416 should exceed the amount of one-third of the total income of my estate after payment of income tax . . . ”

What is the calculation which the trustees have to make? They have to see whether one-third of the total net income—i.e., the income in their hands for distribution after payment by them of tax—is less or more than £416. If they find that it is less than £416 then, the testator goes on:

“ . . . the amount to be paid to the said [Mrs. Hert] by way of such annuity shall be such one-third of the total income of my estate after payment of income tax . . . ”

In all what I will call the “ *Re Pettit* (1) cases ” the problem has arisen in regard to a fixed amount, an annuity of so much, and the cases have proceeded on the view that payment of such a sum, no more and no less, is the intention of the testator and the limit of his bounty. Here, the event contemplated having happened, what Mrs. Hert is entitled to “ by way of such annuity ” would seem to be—and there can be, I should have thought, little question what it is—one-third of the total income after deduction of tax, i.e., one-third of the amount left in the trustees' hands available for distribution when they have paid the tax for which they are responsible. The whole principle of *Re Pettit* (1) seems to be

A inapplicable to a provision of that character. Indeed, counsel for the remaindermen was forced to the conclusion that, if he were right, there would have to be a different calculation each year to find what was the fixed sum that had to be substituted for £416. Enormous administrative difficulties would arise if that view prevailed, but, unless this were the result, I am far from clear what it was suggested would happen once any repayments had been recovered and were
B was increased beyond the original figure. When there is a provision for distributing income in shares among beneficiaries a beneficiary is entitled to get from the trustees the due proportion of the net figure after tax has been paid, and the trustees are treated as having paid tax on his or her behalf on the gross sum, so that the beneficiary also gets, as part of the benefaction, such rights in respect of that tax as are, so to speak, attached to the amount received. The whole
C conception of a gift of a third (or any other fraction) of the net income is for this purpose fundamentally different from the ordinary case of a fixed amount of money.

D There remain two problems. It was argued by counsel for the first and second defendants that the result (which seems to me, I confess, to be unanswerable)
E as regards this second limb must have the effect of reflecting back on the first limb and so making *Re Pettit* (1) inapplicable altogether—having the effect, that is, of reading into the first limb, first, the tax-free provisions applicable to the alimony, and, secondly, adding a qualification that by “free of tax” is meant “free of tax at the standard rate”. The learned judge was against that
F view. For my part, I prefer to express no opinion on it, except to say that I am far from persuaded that the learned judge was not right. But we are concerned with the second limb, and if the first limb and the second limb are not in all respects perfectly coherent it is not, I regret to say, the first time that that result has been achieved by a testator. A similar problem may arise under the third limb, because there is (as counsel for the remaindermen pointed out) at least a case for saying that, if Mrs. Hert should survive the widow and the
G sum then directed has to be set aside, it may be that the effect of the will is to substitute for the original figure of £416 some new fixed figure that has then to be calculated, and, if there is then an obligation to pay that figure as an annuity, there would obviously be a strong argument for saying that thenceforward *Re Pettit* (1) applied. That event, however, may not happen, and in any case the persons interested to argue one way or another may not be in all respects the same as those now before the court. Therefore, I express no view on it. On the question now before us the answer, in my judgment, is that, since the second limb of this provision has taken effect, Mrs. Hert is entitled to what she is there given, viz., one-third of the net income, and that does not involve any obligation on her part or her husband’s part to account for any rebates of income tax she or he may receive. I think, therefore, that the judgment of the learned judge must be varied.

H JENKINS, L.J.: I agree. When it was decided in this court on the first summons issued in the matter of this estate that the annuity of £416 given to the testator’s first wife was free of income tax, the question of the application or exclusion of the principle stated in the well-known case of *Re Pettit* (1) was expressly reserved, and that was the question that VAISEY, J., had to decide when the summons which forms the subject of the present appeal came before him for hearing. In deciding that question, the learned judge appears to have confined his attention to, or, at all events, concentrated on, what my Lord has called the first branch of the provisions relating to the annuity to be paid to the testator’s first wife. The learned judge found himself unable to hold that the language of that provision was such as to exclude the application of the principle of *Re Pettit* (1). He held that the circumstance that the annuity of £416 was expressed to be by way of continuance of the alimony which the testator was

paying his first wife during his lifetime, and the circumstance (which seems to have been indicated by extrinsic evidence) that while the alimony was being paid no question was ever raised on either side about the obtaining of reliefs by way of repayment of tax or the destination of those reliefs when obtained—which were part of the circumstances taken into account by the Court of Appeal in holding that the £416 was free of tax—were not sufficient to displace the well-established rule in *Re Pettit* (1).

If the first branch of the bequest had stood alone, in my view, it would have been reasonably plain that the learned judge had come to a correct conclusion on the principle laid down in the cases, for the position would then have been simply that the testator had given an annuity of a specified amount in terms and in circumstances justifying the conclusion that it was to be paid free of tax. There would have been nothing more than that, and in the absence of any indication of a contrary intention the principle of *Re Pettit* (1) would have been brought into play. But the first branch of the bequest cannot be read in isolation. It must be looked at in conjunction with the second branch, which makes special provision for the event of the annuity of £416 at any time during the lifetime of the testator's second wife exceeding one-third of the total income of his estate after payment of income tax. In that event the testator makes a gift to the first wife in these terms:

“ . . . then and in such case the amount to be paid to the said [Mrs. Hert] by way of such annuity shall be such one-third of the total income of my estate after payment of income tax . . . ”

Having regard to the proportion borne by the annuity of £416 to the total income of the testator's estate after payment of income tax, this gift of one-third of such total income has in fact become operative.

It is, to my mind, plain that a gift in that form leaves no room for the application of the principle of *Re Pettit* (1). The principle comes to no more than that where a testator leaves a beneficiary a specified annual sum free of tax, he means that the beneficiary should receive no less and no more than that stated amount, and to carry out the testator's intention it necessarily follows that where an annuity is paid in such circumstances out of a fund which has borne tax at the standard rate, the annuitant must be required to account to the trustees for any reliefs the annuitant may obtain by way of repayment of tax calculated with reference to the annuitant's total income, as otherwise the annuitant will be receiving more than the stipulated sum. The gift made by the second branch of this bequest is not a gift of a specified sum. It is a gift of a proportion, viz., one-third, of the total income of the testator's estate after payment of income tax. Under a gift of that character the beneficiary receives a gift comprising one-third of the net income of the estate plus the tax attributable to that one-third, and it cannot be said that, if a beneficiary entitled to such a share of income is able to recover some part of the income tax at the standard rate which has been deducted in arriving at the net figure for division, the beneficiary concerned has been overpaid. It seems to me that under a gift in that form the question of overpayment (which is the whole basis of the *Re Pettit* (1) principle) cannot arise. For the reasons given by my Lord and those I have myself expressed, I agree that the order in this case should be varied.

HODSON, L.J.: I agree. Whatever may be said about the earlier part of the provisions of this will, the words of the second branch are clear:

“ . . . if at any time during the lifetime of my wife the said Grace Lucy Batley such annuity of £416 should exceed the amount of one-third of the total income of my estate after payment of income tax then and in such case the amount to be paid to the said [Mrs. Hert] by way of such annuity shall be such one-third of the total income of my estate after payment of income tax . . . ”

That, I think, can only mean after payment of income tax at the standard rate. Counsel for the remaindermen endeavoured to argue that that was merely a standard by which the annuity was to be measured, but, as I have read it, it is not merely a standard, but a direction as to the actual annuity to be paid to Mrs. Hert, and in those circumstances there is no room for the application of the *Re Pettit* (1) doctrine. I agree, therefore, that the appeal should be allowed.

Appeal allowed.

Solicitors: *Maxwell, Batley & Co.* (for the plaintiffs); *Chalton Hubbard & Co.*, agents for *Marsh & Ferriman*, Worthing (for the first and second defendants); *Collyer-Bristow & Co.*, agents for *Birkett, Ridley & Bartley*, Ipswich (for the remaining defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

HADKINSON v. HADKINSON.

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), July 11, 25, 1952.]

Contempt of Court—Divorce—Child—Child taken by petitioner out of jurisdiction in disobedience of order—Application by respondent for enforcement of order—Right of petitioner to be heard.

On a petition by a wife for the dissolution of her marriage, a decree nisi was granted, and it was directed that the child of the marriage should remain in the custody of his mother, but that he should not be removed out of the jurisdiction without the sanction of the court. On the decree being made absolute, the mother re-married, and without the sanction of the court she removed the child to Australia. On a summons by the father an order was made directing the mother to return the child within the jurisdiction. On an appeal by the mother against the order the father objected that, as she was in contempt, she was not entitled to be heard.

HELD: it was the plain and unqualified obligation of every person against, or in respect of, whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt; where an order related to a child the court would be adamant on its due observance, for such an order was made in the interests of the welfare of the child, and the court would not tolerate any interference with or disregard of its decisions on those matters, and least of all would permit disobedience of an order that a child should not be removed outside its jurisdiction; in the present case the mother was not entitled to prosecute or be heard in support of her appeal until she had taken the first and essential step towards purging her contempt of returning the child within the jurisdiction.

Per DENNING, L.J.: The court would only refuse to hear a party to a cause when the contempt impeded the course of justice by making it more difficult for the court to ascertain the truth or to enforce its orders and there was no other effective means of securing his compliance. The court might then in its discretion refuse to hear him until the impediment was removed or good reason was shown why it should not be removed.

AS TO THE POSITION OF A PARTY IN CONTEMPT, see HALSBURY, Hailsham Edn., Vol. 7, p. 4, para. 4; and FOR CASES, see DIGEST, Vol. 16, pp. 88-92, Nos. 1099-1158.

Cases referred to:

- (1) *Chuck v. Cremer*, (1846), 1 Coop. temp. Cott. 205; 47 E.R. 820; subsequent proceedings, 1 Coop. temp. Cott. 247, 338; 47 E.R. 841, 884; 16 Digest 89, 1120.
- (2) *Garstin v. Garstin*, (1865), 4 Sw. & Tr. 73; 34 L.J.P.M. & A. 45; 164 E.R. 1443; 16 Digest 89, 1110.
- (3) *Gordon v. Gordon*, [1904] P. 163; 73 L.J.P. 41; 90 L.T. 597; 16 Digest 90, 1128.
- (4) *Parry v. Perryman*, (1838), 1 Coop. temp. Cott. 207; 47 E.R. 821; 16 Digest 90, 1123.
- (5) *Corcoran v. Corcoran*, [1950] 1 All E.R. 495; 2nd Digest Supp.
- (6) *Wilson v. Bates*, (1838), 3 My. & Cr. 197; 7 L.J.Ch. 131; 40 E.R. 900; 16 Digest 89, 1117.
- (7) *Broomhead v. Smith*, (1803), 8 Ves. 357; 32 E.R. 393; 16 Digest 68, 784.
- (8) *Ricketts v. Mornington*, (1834), 7 Sim. 200; 4 L.J.Ch. 21; 58 E.R. 813; 16 Digest 91, 1143.
- (9) *Re Wickham*, (1887), 35 Ch.D. 272; 56 L.J.Ch. 748; 57 L.T. 468; Digest, Practice, 557, 2159.
- (10) *Curtis v. Curtis*, (1846), 5 Moo. P.C.C. 252; 13 E.R. 487; 16 Digest 91, 1138.
- (11) *Cavendish v. Cavendish & Rochefoucauld*, (1866), 15 W.R. 182; 16 Digest 89, 1111.
- (12) *Leavis v. Leavis*, [1921] P. 299; 90 L.J.P. 302; 125 L.T. 28; 16 Digest 38, 401.
- (13) *Re Langworthy*, (1887), 3 T.L.R. 826; 16 Digest 89, 1112.
- (14) *Re Clements & Costa Rica Republic v. Erlanger*, (1877), 46 L.J.Ch. 375; *sub nom. Costa Rica Republic v. Erlanger*, 36 L.T. 332; 16 Digest 15, 92.

APPEAL by the wife from an order of WALLINGTON, J., dated May 29, 1952, whereby he ordered her to bring the child of the marriage, which had been dissolved, within the jurisdiction of the court.

On Dec. 21, 1950, a decree nisi was granted to the wife (hereafter called "the mother") by which she was given the custody of the child and it was directed that he should not be removed out of the jurisdiction of the court without its sanction. By arrangement between the parties it was agreed that the father should have reasonable access to the child. On Feb. 3, 1951, the decree was made absolute, the mother re-married, and in December, 1951, without the sanction of the court, she removed the child to Australia where she was living with her present husband. On Feb. 26, 1952, the father of the child applied by summons for an order that the mother should bring the child back within the jurisdiction, and WALLINGTON, J., directed that he should be returned to this country not later than Aug. 31, 1952. On this appeal by the mother counsel for the father took the preliminary objection that she was not entitled to be heard because she was in contempt. For the mother it was contended that, as the father was applying for an order to be made against her, she was entitled to appear and resist the application notwithstanding her contempt, and, the order having been made, she was equally entitled to be heard on an appeal against the order.

Beyfus, Q.C., and *Leslie Brooks* for the mother.

Levy, Q.C., and *Ormerod* for the father.

Cur. adv. vult.

July 25. **SOMERVELL, L.J.**: I will ask **ROMER, L.J.**, to deliver the first judgment, to which I have nothing to add.

The following judgments were read.

ROMER, L.J.: This is an appeal by a wife, who has now re-married, arising out of a divorce suit which she brought successfully against her former husband,

against an order made by WALLINGTON, J., on May 29, 1952, ordering her to bring the child of the marriage within the jurisdiction of the court. On the appeal being opened, and before the merits of the matter were argued, counsel on behalf of the father took the preliminary objection that the mother was not entitled to be heard by the court on the ground that she has been at all material times and still is in contempt. After this objection had been argued by both sides we intimated that, in our opinion, it should prevail, but that we would express in writing the reasons on which we based our conclusion. [HIS LORDSHIP stated the facts and continued:] Apart from the sudden and complete disruption of the child's life which the mother's action in removing him to, and keeping him in, Australia entailed, two comments on her conduct are obvious. First, her action was in direct violation of the order of Dec. 21, 1950, and constituted, prima facie, a gross contempt of court. Secondly, it nullified the arrangements to which she had agreed for access by the father. This second consideration need not, at present, be explored further beyond noting that the mother must have been fully aware that this consequence would ensue even if, as she says in her affidavit, she was unaware that she was disobeying the order of the court. It is this disobedience which is the matter now in issue before us and with which I now propose to deal.

It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. LORD COTTENHAM, L.C., said in *Chuck v. Cremer* (1) (1 Coop. temp. Cott. 342):

"A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it . . . It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid—whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed."

Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court (and I am not now considering disobedience of orders relating merely to matters of procedure) is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to the court by such a person will be entertained until he has purged himself of his contempt. It is the second of these consequences which is of immediate relevance to this appeal. The rule, in its general form, cannot be open to question. There are many reported cases in which the rule has been recognised and applied, and I need refer only to *Garstin v. Garstin* (2), and *Gordon v. Gordon* (3). No attempt, indeed, was made before us by counsel for the mother to challenge the rule itself. He sought only to bring the present case within one of the exceptions to which the rule is, undoubtedly, subject. Before explaining why, in my opinion, counsel has failed in this attempt, I will deal briefly with the first submission which he made and which was to the effect that the mother is not in contempt at all. This contention was based solely on the fact that, in the order under review, the mother was not directed to bring the child back within the jurisdiction forthwith, but not later than Aug. 31 next. This was relied on by counsel as impliedly authorising the retention of the child outside the jurisdiction until that date. I am quite unable to accept that as a legitimate or reasonable inference from the order. It would have been clearly wrong to have insisted on the immediate return of the child without any regard to matters affecting the boy himself, e.g., his current and

future educational and holiday arrangements, and I have no doubt that it was considerations of this kind that led the learned judge to fix a future date for the child's return to this country and that he was in no way intending to exonerate the mother from her contempt.

Is this case, then, an exception from the general rule which would debar the mother, as a person in contempt, from being heard by the courts whose order she has disobeyed? One of such exceptions is that a person can apply for the purpose of purging his contempt, and another is that he can appeal with a view to setting aside the order on which his alleged contempt is founded. Neither of those exceptions is relevant to the present case. A person against whom contempt is alleged will also, of course, be heard in support of a submission that, having regard to the true meaning and intendment of the order which he is said to have disobeyed, his actions did not constitute a breach of it, or that, having regard to all the circumstances, he ought not to be treated as being in contempt. The only other exception which could in any way be regarded as material is the qualified exception which, in some cases, entitles a person who is in contempt to defend himself when some application is made against him: see, e.g., *Parry v. Perryman* (4). The nature and limits of this exception were explained by this court in *Gordon v. Gordon* (3). In that case an order was made in divorce proceedings against a wife at the instance of her husband to hand over to him the child of the marriage, and she was ordered to pay the costs of the application out of her separate property notwithstanding that such property was subject to a restraint on anticipation. On the husband attempting to serve the order it was found that the wife had gone away with the child in spite of an undertaking which she had given not to do so. Thereupon a further order was made for the attachment of the wife for contempt and another order for her committal. These orders could not be put into effect, however, because the wife was abroad. She subsequently, whilst still in contempt, appealed against so much of the order first above mentioned as directed her to pay costs out of property of hers which was subject to a restraint on anticipation. The court entertained her appeal on grounds which VAUGHAN WILLIAMS, L.J., expressed as follows ([1904] P. 171):

" . . . taking it generally it has not been disputed in the discussion before us that this rule, that a person who is in contempt cannot be heard, *prima facie* applies to voluntary applications on his part—when he comes and asks for something, and not to cases in which all that he is seeking is to be heard in respect of matters of defence. I do not for one moment suggest that every matter of defence entitles a person in contempt to be heard; for instance, if an order has been made in the exercise of the discretion of the court, and someone who is oppressed, or thinks himself oppressed, by that order appeals, saying that the court has exercised its discretion wrongly, that person if he is in contempt cannot be heard to say anything of the kind until he has purged his contempt."

COZENS-HARDY, L.J., in concurring, said (*ibid.*, 174):

" . . . I desire expressly to limit my judgment to a case in which the [party in contempt] is saying that the order complained of is outside the jurisdiction of the court, as distinguished from the case of an order which, although it is within the jurisdiction of the court, ought not, it is said, to have been made."

Having regard to the nature of this exception to the general rule it was sought before us to bring the mother in the present case within it. It was represented that the summons which came before WALLINGTON, J., was one in which the father was asking that an order should be made against her; that, accordingly, and notwithstanding her contempt, she was entitled to appear in order to resist the application, and that she is equally entitled to appear before this court and appeal against the order which the learned judge thought proper to make. In

my judgment, this suggestion is untenable and fallacious. Assuming for the moment that all that the mother is seeking to do before us is to adopt a defensive role, she is, in fact, appealing against an order which was made against her in the exercise of the discretion of the court and is thus within the exception to the exception (if one may so describe it) which VAUGHAN WILLIAMS, L.J., envisaged in *Gordon v. Gordon* (3). Apart altogether from that, however, she is not, in my judgment, within the exception at all, and this for two reasons. First, the father was not, by his summons, asking the court to grant relief against the mother of a description which had not been granted before. All that he was asking for was a supplementary order for enforcing an order that had already been made. Secondly, the mother was not merely resisting the making of this supplementary order, but was, in effect, seeking to utilise the father's application for the purpose of discharging or varying the previous order—an order against which she had not appealed and, indeed, could not have appealed, for she had obtained it herself. This attitude on the part of the mother sufficiently appears from para. 10 of the affidavit which she swore in opposition to the summons and which is in the following terms:

"I ask this honourable court to allow me to purge my contempt by this humble apology and believe that what I did was in ignorance and that I may be allowed to keep my son in Australia notwithstanding my contempt, as it is in the best interests of the child that he should be with me and enjoy a home and good education and the love and affection of one of his parents. My present husband has a real affection for my son which my son has in return for him."

I would add in passing that an apology is no acceptable substitute for compliance with an order and will not in any circumstances be regarded in itself as a purging of contempt. Nor has the mother in any way, as I think, by virtue of any exception to the general rule or otherwise, shown that, notwithstanding her continuing contempt of court she should be allowed to be heard in support of this appeal, and by parity of reasoning she should not, in my opinion, have been heard in opposition to the father's application in the court below.

It appears to me that this is the very kind of case in which the ordinary rule should be applied in all its strictness. Disregard of an order of the court is a matter of sufficient gravity, whatever the order may be. Where, however, the order relates to a child, the court is (or should be) adamant on its due observance: cf. the recent case of *Corcoran v. Corcoran* (5). Such an order is made in the interests of the welfare of the child, and the court will not tolerate any interference with or disregard of its decisions on these matters. Least of all will the court permit disobedience of an order that a child shall not be removed outside its jurisdiction. The reason for this is obvious. The court cannot exercise its quasi-parental powers in relation to a child unless effect can be given to its orders and it cannot enforce its orders if the child is taken abroad. Once a child is removed from the jurisdiction no satisfactory means have ever been devised of ensuring or enforcing its return. It is because of this that applications for leave to take an infant even temporarily out of the country are jealously scrutinised and are only granted subject to every guarantee that is reasonably possible being exacted for the return of the child at the end of the authorised period. There is always the danger that a parent will be able, by wrongfully taking a child abroad, or by keeping him there after the sanctioned period has expired, to present the court with a fait accompli, and to argue that, the child having become firmly established outside the jurisdiction, it would be against his interests to bring him back within it. Indeed, an argument to this effect was foreshadowed during the discussion before us on the present appeal. It follows from what I have said that the mother's conduct in removing her son to Australia without the permission of the court and against its express order constituted, in my view, a contempt of the grossest kind. She says in her affidavit, to which I have already referred, that she

did not know that the decree nisi prohibited her from taking the child out of the jurisdiction. In the absence of cross-examination or of evidence to the contrary this statement cannot be rejected although, I confess, I accept it with some reserve, for she plainly knew that the order gave her the custody of the child. But counsel for the mother admitted that she knew of this prohibition last January or February at the latest and was constrained to concede that she has taken no step whatever since then towards putting the matter right. Further, her affidavit contained no offer to bring the child back to England, or any undertaking so to do in the event of the father's application being successful. This omission, coupled with her previous conduct, not unnaturally aroused a suspicion (possibly without foundation) that in her own contemplation she had something to gain and nothing to lose whatever the result of the appeal—on the ground that if she won it nothing further would be heard of her contempt whilst if she lost it she would flout the order in the same way that, for at least the last six months, she has flouted its predecessor.

For the reasons which I have endeavoured to explain, I am clearly of the opinion that the mother was not entitled, in view of her continuing contempt of court, to prosecute the present appeal and that she will not be entitled to be heard in support of it until she has taken the first and essential step towards purging her contempt of returning the child within the jurisdiction. I would like, however, in conclusion to say a word or two with regard to an argument which was addressed to us by counsel for the mother to the effect that, apart altogether from the considerations with which I have already dealt, this court ought to entertain the appeal on its merits. The order which he is seeking to challenge is, he said, one that affects the welfare of a child. The court cannot deal with such a matter without having before it the views of the child's mother, more especially when the mother has been granted its custody, and the court cannot discharge its duty to the child if the mother is precluded from audience. There would, I think, have been some force in this contention if the mother had desired to inform the court that, for reasons of health or otherwise, it was dangerous, impossible, or even impracticable, to bring the infant immediately from Australia to this country. The court would, undoubtedly, grant audience to anyone who desired to bring matters of this kind to its attention—even a person who was in contempt, for a refusal so to do might result in irreparable injury to the infant. Nothing of this kind, however, was or could be suggested in the present case. We were informed that the mother herself has means and is married to a man of wealth. No difficulty of any other kind was even hinted at in the way of the child's return—indeed, after we had announced our decision to allow the preliminary objection we were told by counsel for the mother that the boy would probably be returned to England within a fortnight or so. Although, therefore, there are circumstances in which the court would hear a parent who was in contempt (and I do not suggest that the examples which I have given are exhaustive) no such circumstances exist in the present case. Undoubtedly, the mother should be heard before a final decision is reached on a matter so vital to the infant as his future domicile. Let her be heard, however, when the boy's return within the jurisdiction will have produced the dual effect of partially purging the mother's contempt and of enabling the court to enforce such order with regard to the child as it may then think proper to make. I understand that, in fact, the child has already been, or that it will have been within a few days, returned within the jurisdiction, and, if so, the mother will then be able to have this appeal heard and determined on its merits. In these circumstances it will not, perhaps, be necessary to make a formal order now on the preliminary objection, but such an order, if made, would have been to the following effect:

“It appearing that the appellant is in continuing contempt of court by retaining the infant outside the jurisdiction of the court Let the appeal

stand over generally with liberty to the appellant to apply to restore after the infant has been returned within the jurisdiction."

DENNING, L.J.: I need hardly say that it is very rare for this court to refuse to hear counsel for an appellant. No matter how badly a litigant has behaved, nevertheless, generally speaking, if he has a right of appeal, he has a right to be heard, for the simple reason that, if he is not heard, his right of appeal is valueless. The present case is, I believe, the first occasion on which this court, since it was set up eighty years ago, has refused to hear an appellant who has been heard by the court below. Our course requires, therefore, to be justified.

The rule which we are asked to invoke—that a party in contempt will not be heard—was never a rule of the common law. It was a rule of the canon law which was adopted by the ecclesiastical courts and the chancery courts. Those courts exercised jurisdiction in personam, not in rem. They had no writs of fieri facias or elegit by which they could forcibly execute their orders, and so they adopted this rule as a means of getting the parties to obey the orders of the court. If an order of the chancery court or the ecclesiastical court was disobeyed, the party was held to be in contempt. This disobedience was not a criminal misdemeanour, but only what is called in the books a contempt in procedure. The common law courts had for centuries punished criminal contempts, such as interference with the judges or the course of justice, but they did not punish contempts in procedure of other courts. It was left to the ecclesiastical courts and the chancery courts to enforce their own orders in their own way. The chancery court used to issue writs of attachment or orders for committal, to imprison the parties who disobeyed its orders. The ecclesiastical court used to excommunicate its recalcitrants. But each of those courts also adopted the rule of the canon law that they would not hear a party who had disobeyed its orders. The question in this case is: How far does that rule apply today?

The history of the rule in chancery can be traced with some accuracy. It originated in the 78th ordinance of LORD BACON of 1618 (BEAMS' ORDERS IN CHANCERY, p. 35) which laid down that

"They that are in contempt . . . are not to be here [? heard] neither in that suit, nor any other, except the court of special grace suspend the contempt."

This ordinance was much used as a means of enforcing orders in chancery, but it was never applied unless and until the contempt had been established by the issue of a writ of attachment or an order for committal. As soon as that was done, the party became a party in contempt and the court would not hear him: see *Wilson v. Bates* (6) (3 My. & Cr. 202) per LORD COTTENHAM, L.C.; DANIELL'S CHANCERY PRACTICE, 6th ed. (1882), p. 906 n. (e); OSWALD ON CONTEMPT OF COURT, 1st ed. (1892), p. 150, 3rd ed., p. 246; HALSBURY'S LAWS OF ENGLAND (Hailsham ed.), vol. 7, p. 4, para. 4. Before the Judicature Acts the rule was much used in chancery, especially in cases where a party had not obeyed an interlocutory order, such as an order to pay costs or to put in an answer. In those days an attachment was issued ex parte by the clerks in the office without the defaulter being heard, with the result that he could not be heard in any subsequent proceedings in the suit until he had paid the costs or put in an answer, as the case might be, and also paid the costs of the attachment. This was a very effective weapon to secure his compliance. It is well described by GILBERT, C.B., in his book on CHANCERY PRACTICE (Forum Romanum) written about 1712, pp. 102, 216. Later developments will be found set out in *Broomhead v. Smith* (7). The ordinance of LORD BACON was, however, capable of working great injustice and in the course of practice, it came to be much restricted in scope. It was confined to cases where a party in contempt, that is, a party against whom a writ of attachment had issued or an order for

committal had been made, came forward voluntarily and asked for an indulgence in the self-same suit. It was no indulgence for a plaintiff to bring his cause to a hearing or for a defendant to defend himself. Even if he was in contempt, therefore, he was allowed to be heard, unless an order had been made staying the proceedings: see *Ricketts v. Mornington* (8), *Wilson v. Bates* (6). The rule, as so confined to indulgences, continued to be applied in the chancery courts so long as attachment could be issued as of right ex parte without the leave of the court: see *Chuck v. Cremer* (1) (1 Coop. temp. Cott. 205), but the rule has seldom been applied since that right was abolished. The Debtors Act, 1869, abolished, for the most part, attachment for non-payment of money or costs, and the Judicature Acts and rules thereunder abolished the issue of attachment without leave. Since that time a party does not lose his right to be heard simply by default of pleading or default in payment of costs, nor automatically by disobedience to other interlocutory orders. Other consequences may follow from his default, e.g., proceedings may in the discretion of the court be stayed until he complies with the order, but, unless there is a stay, he is not automatically shut out from being heard. It is a matter for the discretion of the court dependent on the circumstances of the case: see *Re Wickham* (9).

The history of the rule in the ecclesiastical courts is not so easily traced because their decisions did not form binding precedents and were not reported until much later than the decisions in chancery. One thing is certain, however, and that is that the rule was not tied to the issue of an attachment or committal for the simple reason that the ecclesiastical courts did not issue attachments or committals. The rule that the ecclesiastical courts applied was that, if a party was in contempt for disobeying an order, and his disobedience impeded the course of justice in the suit, the court might in its discretion refuse to allow him to take active proceedings in the suit until the impediment was removed. Thus, where a wife, who was charged with adultery, failed to comply with a decree for confrontation (which was a process for establishing her identity), she thereupon became in contempt and the court refused to let her put in a defensive allegation, such as connivance: see *Curtis v. Curtis* (10).

When the divorce courts were set up in 1857, they were given power to issue attachments and committals like the chancery courts, but they inherited the same rules of procedure as the ecclesiastical courts. In particular, they adopted the rule of the ecclesiastical courts about not hearing a party in contempt. Thus, where a wife had taken a child abroad in contravention of an order of the court she was held to be in contempt, and the court refused to hear her counsel until the contempt was cleared. In one case of this kind an attachment had been issued: *Garstin v. Garstin* (2); and in another it had not: see *Cavendish v. Cavendish & Rochefoucauld* (11); but in each case the court applied the rule. So, also, when a husband refused to comply with an order to provide security for his wife's costs, though he could quite well do so, he was not allowed to make an application in the cause until the costs were paid. HILL, J., said it was a matter for the discretion of the court, in all the circumstances of the case, whether to hear him or not: *Leavis v. Leavis* (12). *Gordon v. Gordon* (3) is an illustration of circumstances where the court heard a party despite his contempt. Since the Judicature Acts the same rule has been applied to the bankruptcy courts. Thus, when a bankrupt had disobeyed an order to make a statement of his affairs and had deliberately kept out of the way of the court and his creditors, he was held to be in contempt and the bankruptcy court refused to hear his counsel on an inquiry as to damages for breach of contract, even though no attachment had been issued against him, and this court upheld the ruling: see *Re Langworthy* (13).

Those cases seem to me to point the way to the modern rule. It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take

when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance. In this regard I would like to refer to what SIR GEORGE JESSEL, M.R., said (46 L.J.Ch. 383) in a similar connection in *Re Clements & Costa Rica Republic v. Erlanger* (14):

A "I have myself had on many occasions to consider this jurisdiction, and I have always thought that necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction."

B Applying this principle, I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.

C The present case is a good example of a case where the disobedience of the party impedes the course of justice. So long as this boy remains in Australia, it is impossible for this court to enforce its orders in respect of him. No good reason is shown why he should not be returned to this country so as to be within the jurisdiction of this court. He should be returned before counsel is heard on the merits of this case, so that, whatever order is made, this court will be able to enforce it. I am prepared to accept the view that in the first instance the mother acted in ignorance of the order, but nevertheless, once she came to know of it, she ought to have put the matter right by bringing the boy back. Until the boy is returned, we must decline to hear her appeal.

E July 29. The child having been brought back into the jurisdiction, the court heard and allowed the appeal.

Solicitors: *Carters* (for the mother); *W. F. Prior & Co.* (for the father).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

F COMMISSIONERS OF CUSTOMS AND EXCISE v. QUEEN'S PARK RANGERS FOOTBALL AND ATHLETIC CLUB, LTD.

[QUEEN'S BENCH DIVISION (Lloyd-Jacob, J., sitting as a judge of the Division), July 29, 30, 1952.]

G *Entertainments Duty*—"Lump sum paid . . . for the right of admission to a series of entertainments"—*Book of tickets for season's football matches—Sale at price equal to total of prices of individual tickets—Finance (New Duties) Act, 1916 (c. 11), s. 1 (4).*

H The taxpayers, a football club, were the "proprietors of an entertainment" within the Finance (New Duties) Act, 1916, s. 1. For the football season 1950-51 they issued to applicants books of tickets, each ticket being marked with a price and admitting one person to football matches to be played on their ground during the season. The total payment made by each applicant was equal to the aggregate of the prices of all the tickets in the book, but the price of each ticket was less than the amount which would be charged for a seat to a person not purchasing a book of tickets for the season. The Crown claimed duty on the sum paid in respect of each book.

HELD: the sum paid for each book of tickets could be directly equated

to the aggregate of the prices of the tickets contained in the book, and, therefore, it was an aggregate sum and not a "lump sum paid . . . for the right of admission to a series of entertainments" within the Finance (New Duties) Act, 1916, s. 1 (4), which, accordingly, did not operate so as to impose duty in respect of the price paid for each book as a single payment.

FOR THE FINANCE (NEW DUTIES) ACT, 1916, s. 1 (4), see HALSBURY'S STATUTES, Second Edn., Vol. 21, p. 814.

ACTION.

The Crown claimed £857 1s. 6d. entertainment duty from the taxpayers who were the "proprietors of an entertainment" within the meaning of the Finance (New Duties) Act, 1916, s. 1, carried on at their football ground at Shepherd's Bush. The Crown alleged that during the 1950-51 football season 1,076 persons paid for admission to the ground by means of a "lump sum" within s. 1 (4) of the Act in that they paid £6 6s. or £4 16s. 3d. for a book of tickets (according to the class of seat concerned) entitling them to admission to each of twenty-one Football League, twenty-two Football Combination, and thirteen London Mid-week League matches played at the ground. A person seeking admission to a single match without purchasing a book of tickets for the whole season would have been charged a higher price than that marked on a comparable ticket in a book. The amount claimed by the Crown was calculated on the total payment for each book as limited by the Finance Act, 1944, s. 3, and the Crown argued that it was proper to ascertain the limit indicated by s. 3 on the footing that the price paid for each seat to which the holder of a book was entitled was not the price shown by the relevant ticket, but the price that a person buying a single ticket would have to pay. The taxpayers denied that the price for the book of tickets amounted to a lump sum payment, and claimed that the duty payable was £520 7s. 10d., contending that the maximum amount of the duty was the aggregate of the duty chargeable in respect of each ticket according to the price shown thereon.

MacKenna, Q.C., and *J. P. Ashworth* for the Crown.

Millard Tucker, Q.C., and *J. W. P. Clements* for the taxpayers.

LLOYD-JACOB, J.: By the Finance (New Duties) Act, 1916, s. 1 (1), a duty chargeable on all payments for admission to any entertainment was prescribed, the scale of charges at present in operation being those contained in the Finance Act, 1948, sched. VII. The Crown contends that liability for duty in respect of the books of tickets the subject-matter of this action falls to be determined under s. 1 (4) of the Act of 1916, the relevant words of which are:

"Where the payment for admission to an entertainment is made by means of a lump sum paid . . . for the right of admission to a series of entertainments . . . the entertainments duty shall be paid on the amount of the lump sum . . ."

There is no question that the books of tickets do relate to a series of occurrences which are entertainments within the definition contained in s. 1 (6), and the question to be determined involves a consideration of the words "a lump sum".

On their ground and in respect of the stand accommodation thereon the taxpayers were proposing to offer accommodation to spectators to view the football matches played between the home teams and those teams with whom fixtures had been arranged for the football season 1950/51, and these matches are set out in a fixture list. That fixture list indicates that there were three teams, being the home teams, one being the team appropriate for playing in the Football League, Division 2, the second one being the team appropriate for playing in the Football Combination, and the third one being the team appropriate for playing in the London Mid-week League. These fixtures were provisionally determined by early May, 1950, but were subject to possible alteration within known limits

up to early June of that year. The evidence establishes that the possibility of such alteration was discounted by the board of directors when they met to fix the charges appropriate for admission, and that they proceeded on the basis (which subsequent events proved to be inaccurate) that twenty-one League matches and thirty-five Combination and Mid-week matches would be played on the ground. In fact, thirty-seven Combination and Mid-week matches required eventually to be played. The evidence further establishes that it is an advantage to the taxpayers to secure payment in advance for their stand accommodation if that is found to be possible, for it not only augments their funds during the close season, but it provides an assurance of support during the playing season.

The board determined to issue books of tickets which would ensure a reserved and allocated seat to the holder, and they caused to be distributed to potential subscribers application forms. The application form is headed: "Season 1950/51. Advance booking application form". It says:

"I hereby make application to reserve [the number and type of seat] for all Football League, Football Combination and Mid-week League games played at home by Queen's Park Rangers for the 1950-51 season, and enclose herewith remittance value . . . in payment thereof."

That is to be signed by the applicant. The cost is stated as to the centre stand to be £6 6s. per seat, and as to the wing stands £4 16s. 3d. per seat. At the foot of the document is a form of receipt in which there is a space for the name of the applicant, and a statement of the sum received (which would be either £6 6s. or £4 16s. 3d., or multiples thereof, according to the substance of the application). There follow the words

"in payment for . . . series of tickets for Football League, Football Combination and Mid-week League games during the 1950-51 season."

The practice was to send the tickets at some date subsequent to the delivery of the receipt, i.e., as and when the printing had been completed.

So far as the book for the centre stand is concerned, that book contained transferable and individually numbered tickets for each of the home matches in all categories, those relating to League matches being numbered 1 to 21 inclusive, and those relating to Combination or Mid-week matches 1 to 35 inclusive. The former are stated to be priced at 3s. 6d. inclusive of tax, and the latter at 2s. 6d. inclusive of tax, and to admit the holder to the centre stand where it is expected that he will identify the seat to which the book relates. The book of tickets for the wing stands similarly contained the same number of each category of tickets, expressed to be priced at 2s. 6d. inclusive of tax and 1s. 3d. inclusive of tax respectively, and to admit to the wing stands where a reserved seat corresponding to the book was available to the holder. The total prices borne by the tickets in each of these books amount to £6 6s. and £4 16s. 3d. respectively, being the charges set out in the application form. The taxpayers do not succeed in disposing of all the numbered and reserved seats in the stands to subscribers for books of tickets, and, accordingly, they offer, to the limit of the accommodation available, the right to occupy unsold stand seats to chance comers on payment of 5s. and 3s. 6d. respectively for centre and wing stand seats when Football League matches are being played, 2s. 6d. and 1s. 6d. respectively when Football Combination matches are being played, and 1s. 6d. and 1s. respectively when Mid-week matches are being played. It is argued that these sums identify the ascertained amounts at which admission to the entertainment is charged.

The first question concerns the construction of the words in the Finance (New Duties) Act, 1916, s. 1 (4), namely: "Where the payment . . . is made by means of a lump sum . . ." In this connection the word "sum" appears to have two connotations—that of an aggregate of currency tokens, e.g., so many

pounds and shillings, and that of an addition of individual amounts to create a sum, e.g., one guinea plus four half-guineas plus eight crowns, and so on. The first connotation must always be present in respect of a money payment, so that *prima facie* the word "lump" in relation to the sum must define or qualify the second connotation. In my judgment, it is used in contradistinction to the word "aggregate", and it applies to cases where the creation of the total sum cannot directly be referred to both the number of individual items to be included in the whole and the individual values at which each such item must be assessed. Both of these factors, i.e., the number of items and the value of each item, may be features in the estimation of the lump sum, but, unless the sum can be directly equated in terms of number and individual value so as to become an aggregate sum, it is, in my judgment, a lump sum. A

Are the sums of £6 6s. and £4 16s. 3d. here in question "lump sums" as so construed? There is no reason to question the reliability of the testimony that the board of directors met and determined the separate prices at which reserved seats in the stands would be offered to persons prepared to purchase tickets for all home games, and it is beside the point that they decided on different prices for purchasers who were not content to patronise the full programme of matches. Moreover, the variation in totals which a different number of games in the following season imposed on the subscribers supports this statement. In my judgment, the circumstances established in evidence do not bring the case within the terms of s. 1 (4) of the Act of 1916. It, therefore, becomes unnecessary to consider either the Entertainments Duty Regulations, 1921 (S.R. & O., 1921, No. 1388), or the effect of the Finance Act, 1944, s. 3. So far as concerns the regulations, it is sufficient to say that I did not find it necessary to refer to them for the purpose of my construction of the Finance (New Duties) Act, 1916, but, having regard to the argument of counsel for the taxpayers, it is right that I should say that I find his submission under the regulations consistent with the construction that I have been constrained to adopt. B C D

So far as concerns the Finance Act, 1944, a variation in the amount of duty payable was provided in respect of certain cases of lump sum payments. For the benefit of any future court which may have to consider the matters raised by the present case, I would desire to say only that s. 3 (b) of that Act requires that it shall be established that the person making the payment could have obtained the same rights of admission by making a number of separate payments of ascertained amounts. I should not be prepared to hold that the rights of admission secured by the delivery of a book of numbered and reserved tickets prior to the opening of the football season could be said to be equivalent to the right to apply for an individual ticket on each separate occasion of a match, if for no other reason because in the latter event no ticket may in fact be available for some of the more popular contests. As I see the matter, the only way in which equivalent rights of admission could have been secured would be for the applicant, at a suitable time before the opening of the season, to have attended on the defendants and asked for the individual tickets comprised in the appropriate book and tendered payment for each. The evidence establishes that such an applicant would have been granted the tickets, and I cannot regard the addition of a pair of board covers secured by two metal staples to the totality of such tickets as creating any difference in that which is supplied. The action, therefore, in so far as its purpose was to establish liability under s. 1 (4) of the Act of 1916 and the Finance Act, 1944, s. 3, fails. E F G H

Order accordingly.

Solicitors: *Solicitor for the Customs & Excise; Evan Davies & Co.* (for the taxpayers).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re GAPE'S WILL TRUSTS. VEREY AND ANOTHER v. GAPE AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Morris and Romer, L.J.J.), July 28, 1952.]

Will — Condition — Certainty — Condition subsequent — "Take up permanent residence in England" .

A By her will, dated Oct. 27, 1942, a testatrix, who died on Dec. 30, 1950, directed that her residuary estate should be held on trust for various people in succession. She further provided: "every person who under the trusts aforesaid (including the divesting limitations in this clause contained) shall become entitled in possession of my residuary estate as tenant for life or in tail male or in tail shall within six months from the date of becoming so entitled take up permanent residence in England and in default of continuance of compliance with this condition or in case of subsequent discontinuance of compliance with this condition the trusts hereinbefore declared in favour of such person and his issue shall determine . . ."

B
C HELD: the use of the word "permanent" in the phrase "take up permanent residence in England" imported into the phrase the notion of the intention of the person concerned, and, on its true construction, the phrase meant "making England one's permanent home", i.e., residing in England with the intention of continuing to reside there until one died (which was another way of referring to the characteristic essential to domicile), and, therefore, the phrase had a sufficient quality of precision and distinctness for the defeasance clause to be valid.

D *Sifton v. Sifton* ([1938] 3 All E.R. 435), distinguished.

Decision of ROXBURGH, J. ([1952] 1 All E.R. 827), affirmed.

AS TO UNCERTAINTY, see HALSBURY, Hailsham Edn., Vol. 34, pp. 219-222, paras. 274-277; and FOR CASES, see DIGEST, Vol. 44, pp. 440-444, Nos. 2667-2687.

E Cases referred to:

(1) *Sifton v. Sifton*, [1938] 3 All E.R. 435; [1938] A.C. 656; 107 L.J.P.C. 97; 159 L.T. 289; Digest Supp.

(2) *Clavering v. Ellison*, (1859), 7 H.L. Cas. 707; 29 L.J.Ch. 761; 11 E.R. 282; 44 Digest 440, 2667.

(3) *Re Sandbrook*, [1912] 2 Ch. 471; 81 L.J.Ch. 800; 107 L.T. 148; 44 Digest 444, 2686.

F (4) *Re Exmouth (Viscount)*, (1883), 23 Ch.D. 158; 52 L.J.Ch. 420; 48 L.T. 422; 44 Digest 441, 2668.

(5) *Bromley v. Tryon*, [1951] 2 All E.R. 1058; [1952] A.C. 276; 2nd Digest Supp.

(6) *Fillingham v. Bromley*, (1823), Turn. & R. 530; 37 E.R. 1204; 44 Digest 442, 2675.

G (7) *Re Coxen*, [1948] 2 All E.R. 492; [1948] Ch. 747; [1948] L.J.R. 1590; 2nd Digest Supp.

(8) *Winans v. A.-G.*, [1904] A.C. 287; 73 L.J.K.B. 613; 90 L.T. 721; 11 Digest 312, 38.

H APPEAL by the first defendant, James Nugent Gape, from an order of ROXBURGH, J., dated Mar. 13, 1952, and reported [1952] 1 All E.R. 827, whereby he held that, on the true construction of the will of Sibyl Marion Geraldine Gape, deceased, a condition subsequent contained therein requiring the persons beneficially entitled to "take up permanent residence in England" was valid.

C. Montgomery White, Q.C., and *Hunter-Brown* for the first defendant.

The second, third and fourth defendants (children of the first defendant) did not appear.

Gray, Q.C., and *T. A. C. Burgess* for the remaining defendants.

M. J. Fox (Peter Foster with him) for the plaintiffs, the trustees of the will.

SIR RAYMOND EVERSHED, M.R.: By her will, dated Oct. 27, 1942, the late Sibyl Marion Geraldine Gape, who died on Dec. 30, 1950, disposed of her residue in favour of a number of persons and their descendants in succession. Under cl. 8 of the will the first defendant would be, apart from the effect of the provision in cl. 10, the first tenant for life of the residue. The dispositions are made subject to the proviso in cl. 10, which reads:

" Provided nevertheless that every person who under the trusts aforesaid (including the divesting limitations in this clause contained) shall become entitled in possession of my residuary estate as tenant for life or in tail male or in tail shall within six months from the date of becoming so entitled take up permanent residence in England and in default of continuance of compliance with this condition or in case of subsequent discontinuance of compliance with this condition the trusts hereinbefore declared in favour of such person and his issue shall determine and become void . . . "

For the purposes of the argument that provision has been treated (I think rightly) as a condition subsequent, and the question before us is whether its effect is that it is liable to defeat the interest of the first defendant or his issue, or whether, according to the well established principles to which I shall presently refer, it is of so uncertain a character as to be wholly ineffective.

The first defendant is, at present, resident in Ohio in the United States of America, and has been so resident at all material times. If, therefore, the condition is effective, it would be necessary for him, within six months "from the date of becoming so entitled" as tenant for life, to "take up permanent residence in England". I observe that the condition relates to residence and not, for example, to his marriage or to his religion. It is well established that the courts are always adverse to conditions which may affect the free choice of anyone in matters relating to marriage or to conscience. These considerations of public policy have obviously no application in the present case. Still, I assume—and I think it is right to assume—that the test in all conditions subsequent of this character is the same, whether the condition relates to such a matter as religion or to such a matter as residence. It must now be taken to have been authoritatively stated in the judgment of the Privy Council delivered by LORD ROMER in *Sifton v. Sifton* (1) in 1938. The passage which is most frequently quoted from the judgment, and which was cited by ROXBURGH, J. ([1952] 1 All E.R. 829), in the court below, is this ([1938] 3 All E.R. 445):

" If the clause in question be in truth a condition subsequent—a point with which their Lordships will deal later on—it can be of no validity unless, to use the words of LORD CRANWORTH [in *Clavering v. Ellison* (2) (7 H.L. Cas. 725)], the court—and, their Lordships venture to add, the parties concerned—can see from the beginning precisely and distinctly upon the happening of what events it is that the payments to the appellant are to cease."

In *Sifton v. Sifton* (1) the condition in question was that payment of income to the appellant "shall be made only so long as she shall continue to reside in Canada". The trustees of the will formulated certain questions for the opinion of the court on the construction of this phrase. The Court of Appeal in Ontario, and also the judge of first instance, found that they were unable to answer the questions categorically, and LORD ROMER agreed that it was impossible to do so on account of the looseness of the phrase. LORD ROMER said ([1938] 3 All E.R. 445) that, in some contexts, the word "reside" could denote "be in residence" in a particular place, while, in other contexts, it could mean merely "maintain a house" there. He went on to say that neither of those extreme views could have been the intention of the testator in that case, and, therefore, the court found itself faced with a phrase to which it was impossible to attach a certain or precise significance. It will be noticed that in the present case the

words of the condition are different, for there is attached to the noun "residence" the very important adjective "permanent", and it is, in my view, that adjective—the quality of permanence which it imports—which, when attached to "residence", distinguishes this case from cases like *Sifton v. Sifton* (1), and makes it not only possible but right to say that in this case the event contemplated is one which can, within the language of LORD ROMER (*ibid.*), be "precisely and distinctly" ascertained.

A By way of explanation of those words of LORD ROMER I venture to draw attention to *Re Sandbrook* (3) and *Re Viscount Exmouth* (4), to both of which LORD ROMER had earlier referred in *Sifton v. Sifton* (1). In *Re Sandbrook* (3) PARKER, J., said ([1912] 2 Ch. 477):

B " . . . conditions subsequent, in order to . . . cause a forfeiture, must be such that from the moment of their creation the court can say with reasonable certainty in what events the forfeiture will occur."

In *Re Viscount Exmouth* (4) FRY, J., used the more general phrase (23 Ch.D. 164):

"It must be such a limitation that, at any given moment of time, it is ascertainable whether the limitation has or has not taken effect."

C It is quite clear to me that, in the passage from the judgment in *Sifton v. Sifton* (1) which I have cited, LORD ROMER was merely re-stating in his own language the principle which PARKER, J., and FRY, J., had stated. In other words, it is not necessary that the words of the condition should be of such a character that the question whether or not forfeiture has occurred, or will occur, can be ascertained, not only with certainty, but with perfect ease. Sometimes, no doubt, it is difficult to say whether, having regard to the particular events which have happened, the forfeiture has, according to the true construction of the document, been incurred. But that aspect of the matter is not essential to the validity of the condition, as is, I think, illustrated in *Bromley v. Tryon* (5). That was a case of a shifting clause in a will whereby certain interests in settled estates were determined on the happening of some rather complex events. In reference to that clause, LORD SIMONDS, L.C., said ([1951] 2 All E.R. 1066):

E "It does not follow because the words of a defeasance clause are sufficiently clear to give the clause validity, that there may not be cases in which its application is difficult, and I apprehend that, if there is a real doubt, the court will show the same favour to a vested estate in applying the clause as it does in construing it."

F But the question in the present case is not whether certain events might happen which might make it difficult to say whether the event contemplated had occurred, but whether the language used is sufficiently precise and definite to give validity to the clause, and, as I have already indicated, I think it is.

I agree, therefore, with the conclusion which ROXBURGH, J., reached and with the reasoning which led him to that conclusion. The word "permanent" seems to me here to make all the difference, for the notion or "concept", as ROXBURGH, J., said, of "taking up" and, thereafter, maintaining, a permanent residence in a particular country is, I should have thought, perfectly well understood and sufficiently precise. As was observed during the course of the argument, the intention permanently to reside in a particular country is one of the two essential characteristics of domicile. The fact that it is such a condition or characteristic has been repeatedly emphasised in these courts, and I find it impossible to suppose that the judges, in referring to that characteristic, were doing other than stating something which was, to the lawyer, both definite and precise. If a synonym be required, I would say that the condition of taking up permanent residence in England was another way of saying "making England one's permanent home", i.e., residing in England with the intention of continuing to reside there until one dies. It is, in other words, another way of referring to the characteristic essential to domicile. If that be the meaning of the

phrase "take up permanent residence in England", then a consideration of such questions as: "Does one cease to reside in England if one spends eleven months of the year on the continent?", though it may be, in vacuo, a difficult question to answer, is, in this context, irrelevant. It is, no doubt, true that prima facie the testatrix was thinking in terms of fact, viz., whether certain events had, in fact, occurred, but the state of a man's mind, as has been said many times, is as much a question of fact as the state of his digestion, and the use of the word "permanent" inevitably, I think, imports into the phrase the notion of the intention of the person concerned. One cannot take up a permanent residence at any particular point of time unless, at the time when one takes up residence, one intends that it should be permanent, i.e., that one should go on living there for one's natural days. To ascertain the state of a man's mind is a question which may, no doubt, involve difficulties, but, as I have already indicated by reference to the speech of LORD SIMONDS, L.C., in *Bromley v. Tryon* (5), that difficulty of ascertainment is, by no means, fatal to a clause of this kind. Accordingly, I am of opinion that the phrase "take up permanent residence" has a sufficient quality of precision and distinctness to give validity to the defeasance clause. I, therefore, think that the learned judge rightly concluded this case, and that the appeal should be dismissed.

MORRIS, L.J.: I am entirely of the same opinion. In *Fillingham v. Bromley* (6) LORD ELDON, L.C., said (Turn. & R. 536):

"There is great difficulty in saying that a forfeiture was incurred, when the court cannot see clearly what it was the testator meant."

In *Clavering v. Ellison* (2) LORD CRANWORTH expressed the same view when, in dealing with the situation where a vested estate was to be defeated by a condition on a contingency that was to happen afterwards, he said (7 H.L. Cas. 725):

"... that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine."

The fact that there may be difficulty in ascertaining whether an event has happened does not necessarily denote that the event has not been distinctly defined. That was pointed out by JENKINS, J., in *Re Coxen* (7), when he said ([1948] 2 All E.R. 501):

"There is, therefore, nothing in *Sifton v. Sifton* (1) which precludes me from holding the condition here in question to be a valid condition provided I am able to attach a sufficiently definite meaning to it in the context afforded by the codicil, and ... in deciding whether I am able to do so or not I must keep in mind the distinction between uncertainty as to the events prescribed by the testator as those in which the condition is to operate (which is, generally speaking, fatal to the validity of such a condition) and difficulty in ascertaining whether those events (sufficiently prescribed by the testator as a matter of definition) have happened or not, which is not necessarily fatal to such validity."

I am of the opinion that the phrase "take up permanent residence in England" embodies a conception which is clear and precise. I agree with all that my Lord has said, and I think that this appeal fails.

ROMER, L.J.: I agree with what the Master of the Rolls has said in regard to the word "permanent" being the decisive word, and the word which entirely removes the case from the area of *Sifton v. Sifton* (1). The phrase "take up permanent residence" immediately calls to one's mind the domicil cases. In *Winans v. A.-G.* (8) the EARL OF HALSBURY, L.C., said ([1904] A.C. 288):

"... where a domicil of origin is proved it lies upon the person who asserts a change of domicil to establish it, and it is necessary to prove that

the person who is alleged to have changed his domicile had a fixed and determined purpose to make the place of his new domicile his permanent home. Although many varieties of expression have been used, I believe the idea of domicile may be quite adequately expressed by the phrase—"Was the place intended to be the permanent home?"

LORD LINDLEY said (*ibid.*, 299):

A " . . . I take it to be clearly settled that no person who is *sui juris* can change his domicile without a physical change of place, coupled with an intention to adopt the place to which he goes as his home or fixed abode or permanent residence, whichever expression may be preferred. If a change of residence is proved, the intention necessary to establish a change of domicile is an intention to adopt the second residence as home, or, in other words, B an intention to remain without any intention of further change except possibly for some temporary purpose . . . "

So closely associated is that language with the language of the forfeiture clause in the will which is now before us that I asked counsel for the first defendant, in the course of the argument, what the position would be in regard to a condition C that, if a beneficiary had a foreign domicile, he should within six months acquire and thereafter retain an English domicile of choice, and that, if the beneficiary already had an English domicile, he should thereafter retain it and forfeit the bequest if he at any time acquired a foreign domicile of choice? What would be the position if that had been the condition in the present case (as, in my view, it substantially is)? Counsel for the first defendant conceded that he could not D say that such a condition would be void for uncertainty, notwithstanding that it involved an inquiry into the acquisition or retention of a permanent residence. But he said that, while he could not contend that it would be void for uncertainty, it could not apply here because such a condition would postulate the question of intention, and the testatrix was thinking, not about intention, but about fact. In regard to that, I agree with what my Lord has said. The expression "take up" E suggests volition and intention, and even more so does the word "permanent", since it postulates a decision to live in a place for the rest of one's life as opposed to living there temporarily or for a fixed period of time and no longer. As I see it, therefore, the suggested distinction is untenable. The test which is applied in relation to domicile is a perfectly ascertainable test and is relevant to the present case, and for this and the other reasons which my Lord has given this F appeal must fail.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co.* (for all parties).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

KING v. KING.

[HOUSE OF LORDS (Earl Jowitt, Lord Normand, Lord Oaksey, Lord Reid and Lord Asquith of Bishoptone), June 17, 18, 19, 23, 24, 25, July 31, 1952.]

Divorce—Cruelty—Nagging—Matters to be taken into consideration.

The general rule in all questions of cruelty in a matrimonial cause is that the whole of the relations between the husband and wife and all the relevant circumstances must be considered, and that rule is of special value when the cruelty consists, not of violent acts, but of injurious reproaches, complaints, accusations, or taunts. The test whether the conduct complained of was wilful and unjustifiable is not exhaustive. Wilful accusations may be made which are not true and for which there are no probable grounds, and yet they may not amount to cruelty—for example, they may have been provoked by the cruel conduct of the other spouse. Where it is appropriate to consider the justifiability of the respondent's accusations, "justifiable" does not mean simply "untrue". It is not the accusations themselves, but the acts of the spouse in making them, which have to be justified, and a spouse's conduct in making charges may be perfectly justified notwithstanding that the charges are untrue, for such data as he or she has may point almost irresistibly to the guilt of the accused spouse, although the latter is, in fact, innocent. The general circumstances must be considered, including conduct of the petitioner calculated to afford provocation or excuse for the making of charges which are untrue and in the absence of excuse would have been unjustifiable. It is not right first to ask whether the respondent's conduct was cruel in fact, and then to ask whether it can in any way be justified. The question whether the respondent treated the petitioner with cruelty is a single question only to be answered after all the facts have been taken into account. On the other hand, it is proper to have regard to conduct of the respondent which is not the result of provocation, but is designed to hurt the petitioner for the sake of hurting him. On a petition by a husband based on cruelty consisting of nagging by the wife in the form of reiterated and false charges of adultery, if the trial judge, in the exercise of his discretion, after considering the conduct of both parties and the whole of the circumstances in relation to the temperament and character of the wife, comes to the conclusion that the wife's conduct is, notwithstanding the provocation received or the difficulties and stresses endured, an inexcusable offence against the husband, his judgment should be treated as conclusive.

Observations of LORD HERSCHELL in *Russell v. Russell* ([1897] A.C. 445) and of BUCKNILL, J., in *Horton v. Horton* ([1940] 3 All E.R. 384), examined.

AS TO CRUELTY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 649-654, paras. 954-962; and FOR CASES, see DIGEST, Vol. 27, pp. 281-293, Nos. 2513-2694, and Digest Supps.

Cases referred to:

- (1) *Horton v. Horton*, [1940] 3 All E.R. 380; [1940] P. 187; 109 L.J.P. 108; 163 L.T. 314; 2nd Digest Supp.
- (2) *Usmar v. Usmar*, [1949] P. 1; [1948] L.J.R. 1418; 2nd Digest Supp.
- (3) *Russell v. Russell*, [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 27 Digest 291, 2661.
- (4) *Watt (or Thomas) v. Thomas*, [1947] 1 All E.R. 582; [1947] A.C. 484; 1947 S.C. (H.L.) 45; [1947] L.J.R. 515; 176 L.T. 498; 2nd Digest Supp.
- (5) *Squire v. Squire*, [1948] 2 All E.R. 51; [1949] P. 51; [1948] L.J.R. 1345; 112 J.P. 319; 2nd Digest Supp.

APPEAL by the husband from an order of the Court of Appeal (DENNING and HODSON, L.J.J., SOMERVELL, L.J., dissenting), dated Oct. 25, 1951, allowing an

appeal by the wife from an order of BARNARD, J., on a petition by the husband for divorce on the ground of cruelty.

The cruelty alleged was that the wife constantly nagged at her husband, making complaints of his adultery which, with one exception, were unjustified, and that she had thereby injured his health. BARNARD, J., held that the conduct of the wife was wilful and unjustifiable and granted the husband a decree. By a majority the Court of Appeal held that the judge had misdirected himself on the principle to be applied in such a case and reversed his decision.

Fearnley-Whittingstall, Q.C., and *Colin Duncan* for the husband.

Lloyd-Jones, Q.C., and *Fairweather* for the wife.

The House took time for consideration.

July 31. The following opinions were delivered.

LORD NORMAND: My Lords, I have been asked by **EARL JOWITT** to say that he agrees with the opinion which I am about to deliver.

After this opinion had been written I had the advantage of reading the opinion of my noble and learned friend, **LORD REID**. I agree with it, and I would have said no more but for the differences of judicial opinion which the case has occasioned.

The cruelty charged against Mrs. King in this action of divorce is that she constantly nagged at her husband by complaints of his adultery or of his light conduct towards women and that by her nagging she injured his health. Two acts of violence by the wife were proved, one committed about a month and the other about a fortnight before the husband finally left her. BARNARD, J., regarded these acts as not in themselves serious, but rather as symptomatic of the pass to which the marriage had come and of the state of mind of the parties. With this view I agree, and the case put forward is substantially one of cruelty by nagging. BARNARD, J., found that the wife was a most unsatisfactory witness, and that she prevaricated, gave untruthful answers, and lost her temper with counsel. The written record of her evidence shows that she was on several occasions reproved for evading a question which she had in fact answered, and we were told that this was explained by her failure to make herself heard. But after reading the whole of her evidence I am satisfied that there is even in the written record abundant justification for the finding of the trial judge. He found that the husband was a reliable witness and accepted his testimony when it conflicted with the wife's. The result is that the husband's narrative, with the explanations and qualifications and admissions made by him in cross-examination, must be taken as a substantially accurate account of the events which led to the break-up of the marriage, and that the only ground on which the judgment of the trial judge can be successfully attacked is that he misdirected himself. That that was the position was recognised by the Court of Appeal, and the majority (DENNING and HODSON, L.JJ.) found that there had been misdirection. SOMERVELL, L.J., on the other hand, thought that there had been no misdirection.

BARNARD, J., leaves no doubt about the principle which guided him in deciding whether on the facts proved by the husband the charge of cruelty was made out. Before he began his consideration of the evidence he said that the best guide for this class of case was a passage in the judgment of BUCKNILL, J., in *Horton v. Horton* (1). The passage, which he cites, is as follows ([1940] 3 All E.R. 384):

"Mere conduct which causes injury to health is not enough. A man takes a woman for his wife for better or for worse. If he marries a wife whose character develops in such a way as to make it impossible for him to live happily with her, I do not think that he establishes cruelty merely because he finds that life with her is impossible. He must prove that she has committed wilful and unjustifiable acts inflicting pain and misery upon him and causing injury to his health."

BARNARD, J., makes the comment that the last sentence is the vital part of the citation. In *Horton's* case (1) nagging, taking the form of accusations about the husband's associations with women, was one of the grounds of the action and it is to a case of nagging that the passage cited refers. There was no doubt that the nagging had been the cause of the husband's ill health and that it had inflicted pain and misery on him. But it had also been found that the wife's conduct towards her husband was malicious, and that the husband had throughout the consortium behaved as a good husband should. There was no disturbing element except the wife's conduct and no circumstances to be considered in relation to the accusations made by her except their falsity and the absence of any probable cause for them. That is the usual sense of the word "unjustifiable", and it is the sense in which the word was used by BUCKNILL, J., in *Horton's* case (1). It is used in the same sense by BARNARD, J., in his judgment in the present case. I think that he applied the test of "wilful and unjustifiable", though there are passages in his judgment, where he is dealing with particular incidents, which lend colour to the criticism that he considered only whether the charges were false. The conclusion of his judgment is, however, the clear finding that the wife's conduct was wilful and unjustifiable.

I have no doubt that the test whether the conduct was wilful and unjustifiable, as well as injurious, was an adequate test for what remained to be decided in *Horton's* case (1). What is open to question is whether it can be taken to be an adequate test in all cases of cruelty by nagging accusations. I think it is not always an adequate test, and that BUCKNILL, J., did not put it forward as a universal and exhaustive test in this type of case. The general rule in all questions of cruelty is that the whole matrimonial relations must be considered, and that rule is of special value when the cruelty consists, not of violent acts, but of injurious reproaches, complaints, accusations, or taunts. Wilful accusations may be made which are not true and for which there are no probable grounds and yet they may not amount to cruelty. To take an obvious example, they may have been provoked by the cruel conduct of the other spouse. There is in many cases no easy rule, no clear line of demarcation which divides cruelty from something which does not amount to cruelty. The issue may become one of great difficulty in which the decision must be largely a matter of the discretion of the judge who saw and heard the witnesses and has considered the conduct of both parties and the whole circumstances in relation to the temperament and character of the respondent spouse. If the trial judge, in the exercise of this discretion, comes to the conclusion that the conduct of the respondent is, notwithstanding the provocation received or the difficulties and stresses endured, really an inexcusable offence against the other spouse, his judgment should be respected and treated as conclusive. I have used the word "inexcusable", but "unpardonable" or "unforgivable" or "grossly excessive" would equally convey what I mean. In *Usmar v. Usmar* (2) WILLMER, J., in a case where each spouse charged the other with cruelty, said that the wife's persistence in nagging her husband went far beyond what was forgivable in the circumstances. He said elsewhere in the same judgment that he must, before coming to a conclusion, consider the impact of the personality and conduct of one spouse on the mind of the other, and he weighed all the incidents and quarrels between them from that point of view. In my opinion, that is the proper approach to the issue and the method which ought to be followed. But it was not followed by the trial judge in the present case. It, therefore, becomes necessary to inquire whether, on the whole facts and in all the circumstances, the husband has proved that his wife was guilty of injurious, wilful and inexcusable conduct towards him.

There is much in the history of the marriage which is very relevant to the question whether the false accusations made by the wife were, in the whole circumstances, inexcusable. The wife was a Swiss and a Roman Catholic. She married into a Protestant family in England. The husband could only afford to

pay her £2 10s. a week for food, and life was hard and domestic management difficult. The husband's business needed his close attention and he felt obliged to work late at his shop instead of spending his evenings at home. He was much attached to his mother, and, unfortunately, she had no affection for her daughter-in-law. The wife was certainly of a jealous disposition and she seems to have been deeply in love with her husband, on whose society she was specially dependent because she was a foreigner among strangers. I do not think that her jealousy was morbid or abnormal, but it was an unhappy trait in her character that if something excited her jealousy or offended her she sometimes kept silent at the time and even for a long time, and then made complaints to her husband when the incident which had given rise to them had passed from his mind. The husband was emotional, and it is clear that he was deeply in love with his wife. The evidence shows also that both spouses had strong sexual feelings and that each was physically attractive to the other. With these temperaments and in these circumstances both parties had great need of forbearance if the marriage was to be a success. The husband especially should have recognised the necessity of avoiding any conduct which might excite the wife's jealousy.

I do not propose to examine the evidence of the incidents which occurred in the earlier chapters of the marriage—the period from June, 1946, to the wife's first visit to Switzerland in June, 1947, and the period between her return from Switzerland in August, 1947, and her departure on her second visit to Switzerland on Aug. 1, 1948. I agree with BARNARD, J., that the crucial period is the last twenty months of the marriage—from Aug. 1, 1948, to the final parting on May 12, 1950. The events before Aug. 1, 1948, could not possibly have warranted an action for divorce on the ground of cruelty, and at most their relevance is that they were a prelude to what happened afterwards.

It was during his wife's absence in Switzerland in 1948 that the husband formed an attachment to Mrs. Rose, and he has admitted committing adultery with her at her house, at his mother's house, and in London between Sept. 14, 1948, and the end of January, 1949. He says that when his wife left for Switzerland in August, 1948, he thought she would never come back. He seems to have had no better reason for supposing this than that she took a single instead of a return ticket and that her attitude towards him was cold when they parted. However that may be, he learnt before the end of October that she was proposing to return. He then wrote to her a letter intended to induce her to remain in Switzerland and suggesting that "it would be wisest to be free." This letter was written when he was committing adultery with Mrs. Rose and wanted to be free to marry her. The wife returned to this country on Nov. 19, 1948. Her husband then disclosed to her that he had committed adultery with Mrs. Rose and asked her to divorce him. She, as a Catholic, refused to agree to this. They lived apart till Feb. 25, 1949, he in his mother's house, and the wife in the bungalow at Maidstone which was their home. On Feb. 25, 1949, the husband returned to the bungalow to live with his wife, and the next six months were the most tranquil part of their married life. The wife's forgiveness of her husband and her reconciliation to him is, I think, a very important point in her favour in judging her conduct, but its significance was not adequately recognised in the judgment of the trial judge. All that is said about it is that it is not for the court to blame her if her conscience did not approve of divorce, and that the husband "difficult as it was for him, and very difficult for the wife too—made a genuine effort to make a success of his married life." The parties decided to have a child and the wife became pregnant in July. But in the meantime the husband's former mistress became engaged to his brother and partner, David King. This engagement took place on Mar. 15, 1949, about six weeks after the husband had last committed adultery with her. This singular event did not cause any immediate disturbance of the tranquil relations then established between the parties, but the inevitable effect was only delayed. The engagement and subsequent marriage of David

King and Mrs. Rose is lightly passed over by BARNARD, J., and I respectfully think that he failed to appreciate its importance. He merely says that it meant that Mrs. Rose was satisfactorily disposed of, but that, on the other hand, it meant that Mrs. Rose was living in Maidstone with the husband's brother and that it was bound to be a source of irritation to the wife. The marriage was to take place at the end of September, and in August the wife had a conversation with her husband in which she called him a member of a very dirty family and said that she was going to Switzerland for the birth of the child so that the child would be born there and would never be contaminated by a very dirty father. The husband was a guest at the wedding. His wife did not go, and on that very day she fell ill and after a few days' illness had a miscarriage. Subsequently, in February, 1950, her husband accused her of having taken something to bring on an abortion. He had no reason to make such an accusation against his wife. Her retort that it was he who had given her something to cause a miscarriage was deplorable, but it was certainly provoked. At Christmas, 1949, the husband took a turkey as a gift to his brother David and his wife. Mrs. King insisted on going with him. He went into David's house and stayed about twenty minutes, leaving his wife outside in the car. When he and David and David's wife came out of the house Mrs. King in a temper called out: "Go indoors, you dirty adulterers." That was a horrible thing to say, especially in the public street, but Mrs. King is not a woman of refinement and she had reason to be incensed. I have dwelt on David's marriage at some length because the marriage and the continued social meetings between the husband and David's wife had certainly a great effect on Mrs. King's mind and, I think, also on her health. No doubt, she behaved badly, but her husband behaved with great want of consideration, and the charge of bringing on abortion was as cruel a charge as a husband can bring against his wife. The trial judge mistakenly thought that the husband had denied having made this charge, and it is a serious flaw in the judgment.

I must mention briefly the wife's finding of a woman's glove in her husband's car in March, and the incident of the contraceptives found by his wife in his wallet in March or May, 1949. These two incidents are of some importance in relation to the wife's conduct, for it is after them and after the time when she said that her husband was a member of a dirty family that her complaints of his misconduct with other women became frequent and even, as the husband deposed, almost continuous. In January, 1950, the husband told his wife that he would have an operation so that he could no longer have intercourse with women. Then there was the finding by the wife of a woman's comb in her husband's luggage in February, 1950. All these incidents and the discovery of the husband's handkerchiefs befouled with seminal stains were explained by the husband and his explanations were, no doubt, accepted by the trial judge. But he never considered the effect of such incidents on the wife's attitude and conduct. Nor did he make any allowance for the fact that she was pregnant when she brought the period of tranquillity to an end by threatening to go to Switzerland and to remove her child from the contamination of her husband. It was while she was pregnant that her husband, in a temper provoked by her accusations, flung his supper on the floor, and on another occasion broke a chair. I do not think that it is necessary to review the last dreary stage of the quarrels and complaints which followed the last time when sexual intercourse took place—on Apr. 8, 1950. By then the marriage had been shattered and had gone to ruin. The husband for some time before that had been again trying to persuade his wife to bring an action of divorce, the wife was consulting solicitors, and they were having the husband watched.

It is plain that after the period of tranquillity ended, the husband's conduct was not a wit better than the wife's. They were both blameworthy and each was guilty of behaviour which, considered without reference to the behaviour of the other, might be regarded as cruel. BARNARD, J., says that there came a

time near the end of the consortium when the wife enjoyed hurting her husband. I cannot find in the recorded evidence any support for this finding, and it is a finding essentially different from a finding that the wife had pursued a course of conduct deliberately intended to hurt her husband. When a husband and wife have reached the stage of unending accusations and recriminations, the wife's satisfaction in inflicting pain may be the reflex of the bitterness and pain suffered by her, and it is especially likely to occur when there had been formerly real affection and a strong bond of physical attraction between the parties. The injury to the husband's health was not serious, and it can as readily be attributed to the breakdown of the marriage brought about by the conduct of both parties as to the cruelty of the wife. In my opinion, the husband failed to prove conduct amounting to cruelty and the appeal should be dismissed.

B **LORD OAKSEY:** My Lords, I agree with SOMERVELL, L.J., that this is not a case in which the judgment of BARNARD, J., who saw and heard the witnesses, ought to have been reversed, and I am, therefore, of opinion that this appeal ought to be allowed.

C Divorce petitions on the ground of cruelty are, as has been said, cases in which it is especially important that the findings of the judge should not be interfered with. In the present case it is, in my opinion, clear that BARNARD, J., treated the case from the outset as one in which the petitioner had an exceptionally heavy onus to discharge in view of his admission of adultery, of his wife's forgiveness, and of the other unusual circumstances of the case. But he came to the conclusion, after hearing all the evidence, that the husband was telling the truth and that the wife was not and that a case of cruelty had been made out.

D The majority of the learned judges in the Court of Appeal, however, held that the learned judge had misdirected himself when, adopting the words of BUCKNILL, J., in *Horton v. Horton* (1), he said that the husband must prove that his wife had committed wilful and unjustifiable acts inflicting pain and misery on him and causing him injury to health.

E In the first place it is to be observed that the wife's notice of appeal to the Court of Appeal did not complain of any misdirection, but merely that the judgment was against the weight of the evidence. In my opinion, there was no misdirection. This is not a libel action in which the word "justification" has the sense that the words justified must be proved to be true. What the judge spoke of was the wife's conduct, and, in my opinion, it was not a misdirection when he said:

F "These are serious charges and the husband has got to establish them—that the wife's conduct towards him was wilful and unjustifiable, that it did cause him pain and misery, and that it was that conduct on the part of the wife which led to the injury to his health in May, 1950, when he finally left the matrimonial home. Therefore, I am satisfied that the husband has established his case of cruelty."

G In this connection it is important to observe, as SOMERVELL, L.J., did, that at the trial the wife's case was not that her accusations were justified, but that she had not made any such accusations.

H Apart from the suggested misdirection there is, in my view, no sufficient ground for reversing the learned judge's finding. It is said that the learned judge made a mistake on one matter and left out other matters. It is true that the judge was in error in stating that the husband had not accused his wife of bringing about her abortion in October, 1949. The learned judge said:

"I do not think he ever said it to his wife—I am sure he did not—but he did admit that he thought that the wife had deliberately brought about a miscarriage."

In this statement the judge was in error. It appears from the evidence that in the course of a quarrel each party accused the other of causing the abortion, but

that the husband made the first accusation. The wife's evidence on this matter in examination in chief was:

"Q.—You remember he accused you in the February of 1950 of having brought about a miscarriage—you remember that? A.—Yes. Q.—Was he, after showing some distress, nice to you for some time after that? A.—Oh, yes. He took me in his arms and said he was sorry."

In view of this evidence it seems to me improper to attach too much importance to this, the learned judge's only mistake in a long and difficult case. Similarly, I cannot attach importance to the fact that the judge did not specifically refer to the finding of Mrs. Rose's gloves in the husband's car in March, 1949, or the finding of a woman's comb in his pocket in February, 1950. I do not think it any part of my duty to examine every fact found by the learned judge and put my interpretation on it. If there was sufficient evidence by the husband to establish a case of cruelty and the husband is believed and the wife is disbelieved, I cannot think it is right for a Court of Appeal to accept his evidence in part and accept the wife's evidence in part and form its own conclusions of fact. But that is what the majority in the Court of Appeal appear to me to have done in this case. A B

In the Court of Appeal DENNING, L.J., who gave the leading judgment and dealt with all the facts, appears to me, while, doubtless, intending to accept the judge's findings, to have mis-stated them. For instance, after reciting events which happened from February, 1949, to August, 1949, the learned lord justice said: C

"On the top of all these things the woman Mrs. Rose with whom the husband had committed adultery was being taken into the King family." D

As a matter of fact the wife was informed that the husband's brother, David, had become engaged to Mrs. Rose in March, 1949, and the respondent did not suggest that she had complained in any way of the engagement. DENNING, L.J., proceeded to say:

"To make things worse, in September the husband's brother married Mrs. Rose." E

As it was common ground that the wife knew of the engagement and presumably of the forthcoming marriage, it appears to me that this was not a fair statement of the facts. Mrs. Rose's engagement to the husband's brother, David, created a position of much difficulty, but there is nothing to suggest that it was the husband's fault, nor is there any evidence that he ever saw Mrs. Rose again alone. F

The husband came back to his wife on Feb. 25, 1949, having admitted his adultery with Mrs. Rose, but, as his wife knew, he only came back because she refused to divorce him and threatened to commit suicide if he did not. Her conduct in forgiving him and taking him back as her husband was doubtless commendable. But when she heard in March, 1949, of his brother's engagement to Mrs. Rose she knew that Mrs. Rose was coming into the family. If she had felt that such a state of affairs made her life intolerable surely it was her duty to say so. But she did nothing of the sort. In my opinion, the wife's conduct after what has been called the most tranquil part of their lives, from March, 1949, to August, 1949, in saying that she was going to take the baby of which she had become pregnant in July, 1949, away to Switzerland so that the child should never be seen by the husband and not contaminated by a very dirty father, was a most cruel and terrible threat to make, and one which she never withdrew. It is said that she was pregnant and that much must be forgiven of pregnant women. No doubt this is true, but such considerations are, in my opinion, for the judge at the trial to weigh up and it is not for a Court of Appeal to review in detail and come to different conclusions on the findings of the judge who saw the witnesses. The husband's case was that his wife accused him from the earliest days of their marriage of undue familiarity and adultery with other women, G H

that she would take no steps to investigate his explanations, that she threatened to take his unborn child away to Switzerland so that it should not be contaminated by him, and that she nagged at him until his life became intolerable and his health gave way. The respondent's case was primarily a denial of the petitioner's evidence. The learned judge who saw the witnesses believed the husband, and in such circumstances I think his judgment should not have been reversed.

LORD REID: My Lords, in this case the husband alleges that his wife has treated him with cruelty, and the question is whether the court should be satisfied on the evidence that his case has been proved. **BARNARD, J.**, so held, and I accept without question his assessment of the witnesses. He found that the wife was a most unsatisfactory witness, and where the husband and wife were in conflict he entirely accepted the husband's evidence and not that of the wife. There was no other really material evidence, so the question is whether the husband's evidence is sufficient to prove his case. No difficulty arises as to injury to his health. That is proved. And I have no doubt that the wife's conduct in making nagging accusations against her husband was such that in some cases it could be held to amount to cruelty. The real difficulty is to decide whether in the circumstances of this case it was cruelty.

BARNARD, J., dealt with this matter by applying as the test a quotation from the judgment of **BUCKNILL, J.**, in *Horton v. Horton* (1) ([1940] 3 All E.R. 384):

"He must prove that she has committed wilful and unjustifiable acts inflicting pain and misery upon him and causing injury to his health."

BUCKNILL, J., took the phrase "wilful and unjustifiable acts" from the speech of **LORD HERSCHELL** in *Russell v. Russell* (3). I do not think that **LORD HERSCHELL** intended that that phrase should be for universal application. What he said was that there might be many wilful and unjustifiable acts, inflicting pain and misery, in respect of which relief could not be obtained. In *Russell v. Russell* (3) the wife's accusation that the husband had been guilty of an unnatural offence had been proved to be untrue, but she persisted in it and it was held that she did so without any belief in its truth. So her conduct was not only wilful, but malicious. But it did not injure or endanger the husband's health. **LORD DAVEY** said ([1897] A.C. 468):

"[The proposition of counsel for the husband] was that cruelty is such wilful infliction of bodily or mental pain as is calculated to render matrimonial relations unendurable."

But this House held by a majority that that was not sufficient in the absence of injury or danger to the husband's health. In that case the phrase "wilful and unjustifiable acts" was appropriate, and I think that it was not inappropriate in *Horton v. Horton* (1) because in that case **BUCKNILL, J.**, said ([1940] 3 All E.R. 381) with regard to the wife's charges:

"If made out, they show a malevolence which is likely to bear fruit in acts of cruelty. They show an evil, unwifely spirit, far more serious, to my mind, than mere nagging and possessiveness and jealousy."

But in a case like the present the phrase "wilful and unjustifiable acts" can, in my opinion, lead to misunderstanding or error. One, and, perhaps, the most natural, interpretation of it would be that, once the husband has proved conduct which, taken in isolation, would be cruelty, it is for the wife to justify that conduct. No doubt, she could justify it by proving something which could reasonably raise a suspicion in her mind, but it would hardly seem relevant on that view to consider blameworthy or inconsiderate conduct of the husband of a kind which bore no relation to the wife's charges. **BARNARD, J.**, does not explain in what sense he used the phrase. I hope that I am not doing the learned judge any injustice, but my impression is that he used it in some such sense as I have just

stated because he has omitted to deal with some matters which would be irrelevant on this view, and dealt with others in a manner entirely appropriate if this view is correct, but not, I think, if it is proper to take a wider view.

In my judgment, in a case of this character the wife's conduct must be judged in light of the whole history of the marriage. I would refer to *Watt (or Thomas) v. Thomas* (4). Briefly stated the important facts were that the husband became friendly with Margaret Stewart, an employee of his, and his wife deeply resented this friendship. Her jealousy was such that she lost control of herself and of her tongue. He retired into sulky silence. Then the employee left, but that did not improve matters, and during the next two months or so there were incidents including an assault by the wife. Then the husband left and later raised an action of divorce for cruelty. The Lord Ordinary (LORD PATRICK) said in a passage quoted by LORD SIMONDS (1947 S.C. (H.L.) 60):

" 'She had said and written bitter and unjustified things to and of him. His inconsiderate and foolish behaviour brought a highly strung and nervous woman to a state in which she could no longer command her thoughts and speech. If he had displayed to her the consideration and restraint which the marriage state demands, he would, I think, have evoked a similar consideration and restraint from her.' "

Commenting on these words LORD SIMONDS said (*ibid.*, 61):

" . . . there is in them the clear recognition, which I find elsewhere in the judgment of the Lord Ordinary, of the fact that the picture of the domestic lives of this man and woman must be surveyed as a whole, before a true judgment can be formed of their possible future relations."

LORD THANKERTON said (*ibid.*, 57):

" I desire to add that, having in view the opinion formed by the Lord Ordinary of the evidence, I am of opinion that he was justified in his strictures on the conduct of the respondent towards the appellant, for he neglected the duty of mutual forbearance and help when she was in a nervous and irritable condition, which his merely negative attitude was calculated to enhance. For the same reason, his persistent attitude as to Margaret Stewart was inexcusable, and the departure of the latter in July, 1940, could not be expected to remove from the appellant's mind and outlook the unfortunate results of that attitude."

LORD DU PARCQ said (*ibid.*, 63):

" The assault must be viewed, not as an isolated fact, but in its setting, as an incident in a complicated series of marital relations. The intent and the mental condition of the spouse against whom cruelty is alleged are always important considerations . . . The fact that the defender was suffering from a form of ill health likely to affect her conduct is not to be regarded as telling against her. I would not suggest that illness ought to be accepted as an excuse for cruelty, but when it is necessary to appreciate the quality of an act or a course of conduct, as it is when the grave accusation of saevitia is made, the law does not forbid a judge to have regard to any physical or mental strain under which the accused spouse was labouring."

VISCOUNT SIMON dissented, partly, I think, because he took a somewhat different view of the law. He said (*ibid.*, 53):

" It is deplorable that this degree of mutual friction and discord should have existed between them, but I cannot regard the behaviour of the husband in this case as having 'provoked' the assault of Sept. 7 in any relevant sense—in the sense in which a husband's shortcomings in relation to his wife may sometimes disentitle him to a decree for adultery or desertion. Neither can the husband's right to a decree for cruelty be denied on the

ground of the wife's pathological condition which was producing increased nervous irritability."

What was said by the majority in *Watt (or Thomas) v. Thomas* (3) may not be novel though it may make necessary a re-examination of the reasoning in *Squire v. Squire* (5). But it does, in my opinion, show that it is not right first to ask whether the wife's conduct was cruel in fact, and then to ask whether it can in any way be justified. The question whether the wife treated her husband with cruelty is a single question only to be answered after all the facts have been taken into account. With that in mind I must proceed to examine as briefly as I can the facts of the present case.

The parties were married in June, 1946, shortly after the husband had been demobilised. The wife was Swiss and a Roman Catholic. They had been engaged before the war and during the war she was in Switzerland with her mother who had a hotel or restaurant there. The evidence shows that there were at least three features in the wife's character which contributed to the unhappiness of their married life. She was extremely jealous, she was apt to jump to conclusions, and when she had a real or fancied grievance she often bottled it up for a time instead of taxing her husband with it. That is well illustrated by the first serious incident in the case. At the end of 1946 they went to a dance. About half way through the dance the husband saw that she was very upset about something. She would not say what it was and refused to speak to him for a day or two. When pressed she charged him with very improper behaviour on the dance floor with a Mrs. Breden, and would not accept his denials. What she alleged was highly improbable and quite untrue, but, no doubt, she saw or thought she saw something and then misinterpreted it. The husband had come back to a family business which was nearly bankrupt and he had to work long hours and she began to accuse him of seeing Mrs. Breden. After a time these accusations plainly implied adultery and they were made two or three times a month. She would neither accept his denials nor take opportunities to see for herself whether there was any foundation for her charges. She went to Switzerland to stay with her mother in the summer of 1947, but he could not go because he was too busy. On her return things went on much as before, though other women were brought in as well as Mrs. Breden. I do not think it necessary to examine this period in detail. But there is one other matter I should mention. The wife made a proposal that she should go back and enter the hotel business in Switzerland with her mother, and that the husband should come to see her when he could. The husband was very disturbed by this, but nothing came of it. I think that his case is based more on her accusations against him. In my judgment, throughout this period the husband was not to blame, but the wife was. The position was becoming serious, but as yet I do not think that the wife's conduct had reached that degree of intensity and persistence necessary before cruelty could be established. When she went to Switzerland for the second time in August, 1948, her leave-taking was so cold that her husband did not expect her to return. But he wanted her to return to him. In September, while the wife was in Switzerland, the husband went for a holiday and met a Mrs. Rose whom he had known before and who had obtained a divorce. There had previously been no improper relations, but during this holiday he committed adultery with her, and he soon decided that he wanted to marry her. So he wrote a letter to his wife to induce her to stay in Switzerland. But almost at once on receipt of the letter she came home. This was in November. He then confessed his adultery and asked her to divorce him. She refused. She wanted him to return to her, but for a time he stayed with his mother. Ultimately he realised that it would be impossible to marry Mrs. Rose. The last occasion when they committed adultery was in January, 1949, and in February he returned to his wife.

From February until August, 1949, both parties made a real effort to re-establish the marriage. Contraceptives had been used previously, but they

now decided to try to have a child and the wife became pregnant about July. There were three things which occurred during this period, but had no immediate influence. In March Mrs. Rose became engaged to the husband's brother who was his partner in business. About that time the wife discovered a pair of women's gloves in the car. And sometime before May she found contraceptives in her husband's wallet, and looking again some time later she found that one had gone. She did not mention these two matters at the time, but I do not think that she is to be blamed for that. I have said that her tendency to bottle up grievances was unfortunate, but on this occasion she might well think that to bring up these matters would endanger the better relations then prevailing. In August there was a quarrel. He said that it was about money and that she seemed to pick a deliberate quarrel. I do not consider her evidence, which may well be untrue, but I have some difficulty in understanding the matter on his evidence alone. It may, however, have some connection with what she said a few days later. She said she was going back to Switzerland and was taking the child away so that it would not be contaminated by a very dirty father, and that he was a member of a very dirty family because his brother was marrying Mrs. Rose. The husband brought in a clergyman to effect a reconciliation, and she told him about the gloves and the contraceptives. It was found that the brother had borrowed the car and the gloves were those of Mrs. Rose. As to the contraceptives, the husband said that they had simply remained in his wallet from the time before the previous August when he and his wife were using them. He admitted the disappearance of one. He said that, looking for something else one day in his wallet, he noticed that a small key which he carried had punctured one of them and that he took it out and threw it away. He does not appear to have said why, when his attention was drawn to them, he did not throw the other away too seeing that he had no use for it.

I follow BARNARD, J., in accepting his story as true, but, when one remembers that the husband did not return to his wife after his adultery because he was repentant and wanted to return, but only because he thought there was no other course open to him, I do not think that the wife could be blamed overmuch for doubting the husband's story. During the pregnancy they slept apart for a time and she discovered some stained handkerchiefs. He admits that there were more than one, but I do not think there were many. She accused him of masturbation and he hotly denied it and told her to see a doctor who would explain. On one occasion when the matter was mentioned he lost his temper and broke the leg of a chair, and he lost his temper on one other occasion about this time. I do not think he was much to blame because by this time her accusations were almost continuous and his nerves were on edge, but, nevertheless, I think that one must recognise that these were matters which might well disturb the mind of a pregnant woman.

The wedding of the brother and Mrs. Rose was towards the end of September. The husband went and did not get back until about seven o'clock. As ill luck would have it the wife became ill while he was away and had to go out in the rain to telephone for a doctor and this was the beginning of an illness which led to a miscarriage. The next incident of importance occurred in December. The husband had a turkey to deliver at his brother's house and his wife insisted on going with him in the car. Instead of just leaving the turkey and coming away he went into the house leaving his wife in the car. He did not stay very long, but he came out accompanied by his brother and his former mistress, now his sister-in-law. The wife lost her temper and shouted out something about dirty adulterers. Later he asked her to apologise, but she would not. He says that he consulted the clergyman who had been called in before, and was advised that she must apologise. He agreed in cross-examination that he regarded this incident as of enormous importance. By this time the wife was quite unreasonable. There was one occasion when at the husband's shop she made accusations which could have been immediately proved or disproved, but when asked to see

for herself she just went away. Then there was one final short period in January, 1950, when things were better. The husband had visited a friend and found that the friend's wife was dying though she did not know it, and he was so affected that, as he said, he made a final effort to make it up with his own wife. But his own nervous condition was too much for him. He said that he was so sick of the whole business of sex that on one occasion he said to his wife that he was going to have an operation so that he could have no more intercourse. BARNARD, J., said he was driven to this and I would not dispute that. But there was another incident which it is not so easy to dismiss. In February he accused her of having taken something to get rid of the baby. Owing to the learned judge having misapprehended the evidence about this—the only occasion in a long judgment on which I think that he was inaccurate about an important fact—we do not have the advantage of his opinion about it. But it is clear that it was not just a wild charge made on the spur of the moment because, when asked in cross-examination: "Were you accusing her of something which you believed to be true?", he answered: "Yes". It is true that he was sorry as soon as he had said it and did his best to make amends by consoling his wife, and also she made counter-accusations in reply, but still, the charge must have had its effect, and he had absolutely no grounds for making it.

Then there was another unfortunate incident. The husband on a trip to Leeds forgot to pack his brushes and comb. He went out to buy a comb and could only get a woman's comb and this was in his bag when he came back. He told his wife this when she asked him about it and she said: "You have got one in your pocket all the time". To his surprise he found she was right. Indeed, she produced it from his pocket so quickly that he wondered if she had put it there. He often carried a comb, but he says that it did not occur to him to look in his pocket in Leeds, and, looking to his mental state at the time, that could well be true. But it must have seemed strange to the wife. Both parties had long before this consulted solicitors and the wife kept threatening him with legal proceedings, but would never say for what. He again brought up the subject of a divorce, but she would not have it. His worry turned to something like despair and early in March he collapsed in the house and was found by his wife. In April there was a last unsuccessful attempt at intercourse. Again he complained of her accusations, and put it to her that it was impossible to have a row about them all the evening and expect to have intercourse later. In reply she struck a blow. I do not think I need describe the last stages before he left her in May. Neither party was normal. There was a scuffle one night at the end of April when he came back after a wedding at eleven o'clock. He had not even gone to the wedding reception, but had been working. And there was another incident the next night when he came back at about half-past ten. Some days later he left her.

There is one part of the judgment of BARNARD, J., which requires separate notice. One reason given by the wife for her delays in making her complaints known to her husband was that she did not want to hurt him. In rejecting this evidence BARNARD, J., said:

"I come to the conclusion that it was one of the things that I think certainly towards the end she enjoyed more than anything else, and that is hurting him."

It has long been recognised that a malevolent intention, while not essential to cruelty, is a most important element where it exists. For example, BUCKNILL, J., dealt with this in the passage which I have quoted from his judgment in *Horton v. Horton* (1). BARNARD, J., followed that judgment in this case. So, if he intended to find that this wife had a malevolent intention and deliberately set out to hurt her husband, he must have recognised the importance of that finding, and I do not think that he would have brought it in merely as a comment on part of her evidence. Moreover, counsel were unable to refer to anything

in the printed evidence to support such a finding. No doubt malevolence can be inferred from a witness's demeanour, but when a witness has given evidence at great length one would expect to see some trace of it in what she says, and one might also expect something in the husband's evidence. So I must conclude that BARNARD, J., did not intend to make such a finding, but rather meant that when in the heat of a quarrel she derived some satisfaction from hurting her husband. Looking to her state of mind towards the end, that is not surprising.

In considering whether the husband has proved his case, I think that the vital period is that between the wife's return from Switzerland in November, 1948, and the last stages in the spring of 1950, and one must start with the facts that at the beginning of that period the husband was committing adultery and was urging his wife to divorce him. I think that those facts had a continuing influence and must be kept in mind in dealing with the subsequent events. The part of the case which has given me most difficulty is the picking of a quarrel by the wife in August, 1949, her threat to take her unborn child to Switzerland, and her subsequent conduct. But I cannot dissociate those events from the marriage of Mrs. Rose to the husband's brother or from the series of incidents where in some cases, although the husband was innocent, appearances were against him, and in other cases the husband was, to say the least, inconsiderate. I have said that I think that BARNARD, J., applied too narrow a test. I think that he did so when he said of the marriage of Mrs. Rose "in some ways that was a good thing, it meant that Mrs. Rose was satisfactorily disposed of". That might be a proper comment if one were merely considering what justification there was for the wife's continuing charges of adultery, because it could hardly be supposed that the husband would commit adultery with Mrs. Rose after she became his sister-in-law. But if one looks at the case more broadly, far from Mrs. Rose being satisfactorily disposed of, she was not disposed of at all. She was there as the wife of the husband's brother and partner and the effect of that is illustrated by the turkey incident. No doubt this marriage was not the husband's fault. But if a husband commits adultery and is unrepentant, he can hardly complain if later developments make it harder for his wife to put that out of her mind and aggravate an already difficult situation.

I do not intend to try to define cruelty. I doubt whether any definition would apply equally well to cases where there has been physical violence and to cases of nagging, or to cases where there has been a deliberate intention to hurt and to cases where temperament and unfortunate circumstances have caused much of the trouble. But in cases like the present, the wife's conduct must at least be inexcusable after taking everything into consideration. To my mind, this case is narrow and difficult, but in all the circumstances I am unable to hold that this wife treated her husband with cruelty and I am, therefore, of opinion that the appeal should be dismissed.

LORD ASQUITH OF BISHOPSTONE: My Lords, unfortunately I find myself unable to concur with the opinions of the majority of your Lordships, from which I dissent, I need hardly say, with appropriate diffidence, though fortified by agreement with the opinion expressed by my noble and learned friend, LORD OAKSEY.

In substance the husband's petition is based on "cruelty"—on cruelty consisting in what is called "nagging" by the wife. The nagging is alleged to have taken the not unusual form of constantly reiterated and (except in one case) false charges of adultery. There are two allegations against the wife of physical violence, but these are unimportant except in so far as they may operate in law to revive, after a period of condonation, the effect of acts of the wife done before that period. In a matrimonial offence such as cruelty where often the cumulative effect of a chain of acts is in question, such revivor, by lengthening the chain, is often important. It is accepted that where cruelty is alleged the petitioner must prove two things—(i) That the acts were cruel; (ii) that they damaged the

petitioner's health. If in the present case the acts were cruel, there was ample evidence on which the trial judge could find, as he did, that they damaged the husband's health. The real issue was whether the acts complained of were sufficient to constitute cruelty or not. It is true that, generally speaking, a man marries at his peril as to the character his wife may disclose. She may develop on quite unexpected lines. She may prove, contrary to all rational expectation, touchy, perverse, cross-grained and temperamental. She may make wild, unfounded charges against him, and he may, in the circumstances, have no remedy. But it does not follow from this that the indefinite repetition of false charges, however frequent the repetition, and however wounding the charges, may not reach a point at which it passes into the realm of cruelty affording a ground for divorce. Indeed, it has often been held to do so.

The test which has commonly been accepted for determining whether this point has been reached is that laid down by BUCKNILL, J., in *Horton v. Horton* (1). The material passage has been repeatedly cited by my noble and learned friends, and I will not again repeat it, but merely observe that the word "unjustifiable"—the key word in the formula—is left undefined. What does it mean? One thing is plain: "unjustifiable" cannot in this context mean simply "untrue". What has to be "unjustifiable" is not the charges themselves, but the "acts" of the spouse in making them, and a spouse's conduct in making charges may be perfectly justifiable notwithstanding that the charges are, as it happens, untrue. Human beings can do no more than act according to their lights. Such data as the wife has (I will for brevity speak of the accuser as "the wife" because she happens to be the accuser in this case, but needless to say the same applies where the accuser is the husband) may point almost irresistibly to the guilt of the accused, although he is, in fact, innocent. Few would defend Othello's act in killing Desdemona. But was his conduct "unjustifiable" in any sense relevant to cruelty in believing and preferring the charges he did, however unjustified the charges themselves were in fact and in truth? Nor do I consider that this factor—the presence or absence of plausible data—though it may well be an ingredient in "justifiability", exhausts the content of that expression. It is, in my view, proper to include within its ambit the general circumstances, so far as relevant, in which the accusing wife was placed. These vary infinitely with the facts of individual cases, but must necessarily include any conduct on the part of the husband which was calculated to afford provocation or excuse for charges, in fact untrue, which in its absence would have been "unjustifiable". In the other scale it is proper to have regard to conduct on the part of the wife which is not the mere result of provocation, or of a mere desire to relieve her feelings by some explosion of temper or temperament. The "flash and outbreak of a fiery mind" is one thing, conduct which is designed to hurt the husband for the sake of hurting him is another. I am not, in this connection, forgetting the case of *Squire v. Squire* (5) in which the Court of Appeal held that a deliberate intention to hurt is not an indispensable concomitant of cruelty, a person being in this field, among others, presumed to intend the natural consequences of his or her acts.

Subject to the meaning of the word "justifiable" or "unjustifiable", which is in part a question of legal construction, the questions involved in such a case as the present are almost wholly questions of degree. What was the intensity and frequency of the acts complained of? Was their intention to hurt for hurting's sake? Did the victim, through provocative conduct in part, and if so how far, invite the nemesis of which he complains? These are, in my view, provided the judge has directed himself accurately on the meaning of "justifiable", questions of pure fact, as questions of degree generally are. As to one fact there can be no argument. The husband, during the wife's absence in Switzerland in 1948, did commit adultery on four occasions with a woman called Mrs. Rose. This he frankly admitted to her on her return—I mean the adultery though not, perhaps, the identity of his partner—and it is clear that at this time he wished to be

released from his existing marriage and to marry Mrs. Rose. There is another circumstance which is beyond dispute, and important when we are in the realm of facts. The experienced judge who tried this case for five days heard and saw the husband and wife in the witness box. He deliberately affirms, basing himself largely, but not wholly, on demeanour, that on every contested question of fact he accepts the testimony of the husband and rejects that of the wife. I must add that even in cold print her evidence seems to me, as it did to the learned judge, in many respects flagrantly evasive, in others flatly incredible. But apart from that, this House has emphasised, in *Watt (or Thomas) v. Thomas* (4), that there are no cases in which the demeanour of the witnesses as assessed by the trial judge is more important than cases of cruelty. The learned judge had no doubts about the relative credibility of the parties.

The married life of these parties fell into three chronological sections: (i) from June, 1946 (the time of the marriage) till June, 1947, when the wife went for some considerable time to Switzerland; (ii) from her return from Switzerland at the end of August, 1947, to her second visit to Switzerland in 1948 (August to November); (iii) from her return in November, 1948, till May 12, 1950, when the husband parted from the wife. The wife alleges that apart from Mrs. Rose—adultery with whom he admitted—she never on any single occasion accused him of adultery at all. If we accept the judge's findings of fact, this is wholly untrue. Her story is not: "You gave me reasonable cause for suspicion or accusations—and appearances justified me in making them!" It is, except quoad Mrs. Rose: "I never made any accusations of adultery at all." Of course, the fact that the wife lied is not conclusive. But once the judge has directed himself properly in law, the questions, in cruelty, are, as I have already suggested, questions of the intensity and degree of the conduct of the wife, due allowance being made for the intensity and degree of any provocation offered by the husband, and for all other relevant circumstances. At the risk of repetition I would again emphasise that these are pure questions of fact—questions on which the demeanour of the parties in the witness box is, as I have said, highly important, and often decisive, and questions on which it is for the judge to measure the weight of the wife's conduct, the weight of the provocation, and that of the other circumstances. If the first is assessed by him as wholly out of proportion to the second and to any other relevant circumstances which might extenuate it, and he proceeds to find cruelty established, his finding should, in my view, not be lightly disturbed. If he is not mistaken in law as to the nature of the calculation he has to make, it is peculiarly within his province to estimate the weight of the factors necessary to work out the sum.

The judge has asked himself the right question and is guilty of no misdirection. In the field of fact there is one legitimate criticism of his judgment. The husband, on his own admission, had, in the third period, accused the wife of inducing in herself an abortion. The judge finds that the husband suspected this, but gave no voice to his suspicion. This was an undeniable error. The husband said he did make the charge, though he adds that in doing so he acted on information, and that he is not certain she did not first make it against him. The other criticisms of the learned judge's judgment seem to me ill-founded. It is said that he nowhere mentions three incidents (which the wife could have prayed in aid as provocative of her suspicions and her accusations) in relation: (i) to contraceptives found in some wallet of his; (ii) to a woman's comb found in his pocket; (iii) to a pair of gloves (belonging to Mrs. Rose) and found in his car. On all these issues the judge accepts the husband's explanations, but the point is not so much whether these were true as whether the appearances were such as to excite so much suspicion as to "justify" the wife's conduct. It is true that the judge in an extemporary judgment of inevitably considerable length makes no express mention of these episodes, but I am quite satisfied he did not overlook them. He joined in cross-examining the wife on some of them, and, as a matter of psychological fact, I can testify that a judge rarely forgets a point in respect of which

(acting selectively) he has descended into the arena and engaged in interrogations on his own account. Finding as he did for the husband on all issues of fact on which his evidence differed from the wife's, I have no doubt that the judge was a good deal influenced by what he found to be the reiterated and baseless charges of adultery with Mrs. Breden in period (i), on the reiterated charges of adultery in period (ii), and in period (iii) (after a few months of attempted reconciliation) incessant charges of the same tenor, and also by the wife's reluctance to put her accusations to the test when she could have done so and was invited to do so, together with his strong impression, no doubt inspired partly by her demeanour in the box, that she wanted to hurt her husband for hurting's sake and that latterly she enjoyed nothing so much.

On the whole, while I think the learned judge's judgment not above criticism—what judgment is?—I am of opinion that he did not misdirect himself in law, and that the questions remaining were questions of fact and degree on which he had to make findings to size up and weigh against each other the various relevant factors. Having seen and heard the witnesses, he enjoyed in this task so great an advantage over any appellate tribunal that his findings should, in my view, stand. In these circumstances I agree with my noble friend, LORD OAKSEY, and feel bound to record my respectful dissent from those members of your Lordship's House who constitute the majority and whose views must, accordingly, prevail.

Appeal dismissed.

Solicitors: *Bird & Bird* (for the husband); *Scadding & Bodkin* (for the wife).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

Re PEETE (deceased). PEETE v. CROMPTON.

[CHANCERY DIVISION (Roxburgh, J.), July 16, 17, 18, 1952.]

Family Provision—Marriage—Proof—Certificate—Wife described as widow—No proof of death of first husband.

Marriage—Proof—Certificate—Wife described as widow—No proof of death of first husband.

In a claim under the Inheritance (Family Provision) Act, 1938, s. 1 (1), the plaintiff produced a certificate of her marriage, on June 23, 1919, to the testator in which she was described as a widow. She was unable to produce a certificate of the death of her first husband, but she stated in her evidence that he was killed on Apr. 2, 1916, in an explosion at the factory in which he was employed. She said that she learned of his death, about a week after it occurred, when she met his sister who told her that she had been asked to identify his body, but that the bodies she saw were unidentifiable.

HELD: prima facie a marriage certificate was evidence of the valid marriage of the parties mentioned therein, but that presumption could be displaced if some evidence were given which caused the court to doubt the validity; in the present case there was such evidence since the statement in the certificate that the plaintiff was a widow depended on her uncorroborated statement made to the registrar at the time of the ceremony, which statement was in turn based on the hearsay communication made by the first husband's sister; and, therefore, the plaintiff had not proved that she was the widow of the testator and so had no claim under the Act of 1938.

Tweney v. Tweney ([1946] 1 All E.R. 564) and *Re Stollery* ([1926] Ch. 284), applied.

Spivack v. Spivack (1930) (99 L.J.P. 52), explained and distinguished.

AS TO PRESUMPTION AND PROOF OF MARRIAGE, see HALSBURY, Hailsham Edn., Vol. 16, pp. 598-603, paras. 931-939; and FOR CASES, see DIGEST, Vol. 27, pp. 64-72, Nos. 453-567.

Cases referred to:

- (1) *Spivack v. Spivack*, (1930), 99 L.J.P. 52; 142 L.T. 492; 94 J.P. 91; Digest Supp.
- (2) *Spurgeon v. Spurgeon*, (1930), 46 T.L.R. 396; Digest Supp.
- (3) *Russell v. A.-G.*, [1949] P. 391; [1949] L.J.R. 1247; 2nd Digest Supp.
- (4) *Tweney v. Tweney*, [1946] 1 All E.R. 564; [1946] P. 180; 115 L.J.P. 60; 174 L.T. 335; 2nd Digest Supp.
- (5) *Re Stollery*, [1926] Ch. 284; 95 L.J.Ch. 259; 134 L.T. 430; 90 J.P. 90; Digest Supp.

ADJOURNED SUMMONS by which the plaintiff applied under the Inheritance (Family Provision) Act, 1938, s. 1 (1), for reasonable provision to be made for her out of the testator's estate.

The preliminary point was taken that, as the plaintiff could not prove that her first husband was dead on the date when she went through a form of marriage with the testator, she had failed to show that she had capacity to marry him, and, in consequence, was not his widow.

F. B. Marsh for the plaintiff.

Winterbotham for the defendant.

ROXBURGH, J.: This is a difficult case which has been most ably argued on both sides. The plaintiff, Mrs. Peete, claims to be the widow of Ernest Herbert Peete, and, as such, she asks for provision under the Inheritance (Family Provision) Act, 1938, s. 1. The preliminary question is whether she is the widow of the deceased. In the first instance the burden of proof is on her to show that she is. For that purpose she produces a certificate which shows without any doubt that she went through a proper ceremony of marriage with the deceased on June 23, 1919. In that certificate she is described as a widow. She exhibits the certificate, and, at the same time, states that her first husband, Arthur Frederick Skinner, died in 1916. She was challenged to produce a certificate of his death and she was unable to do so. She said that Arthur Skinner was employed at Nobel's factory, at Faversham, Kent, and was killed in an explosion there on Apr. 2, 1916, and that she learned of his death about one week thereafter when she met a sister of his in Faversham. In her evidence before me she made it plain that her only source of knowledge, as regards the questions whether Arthur Skinner had been employed at Nobels' factory and whether he had been killed there, was his sister.

[HIS LORDSHIP stated the facts and continued:] There is, in fact, no admissible evidence to show that Arthur Frederick Skinner died in 1916, beyond the statement of the widow and the certificate. Both are obviously derived from the same source. Sometimes, I am told, registrars ask for certificates of death in the case of people who describe themselves as "widows", but if, in this case, the registrar asked for such a certificate he did not get one because none could be obtained. There is no doubt whatever that the plaintiff told the registrar that she was a widow because she believed what her former husband's sister had told her. But it is to be observed that her former husband's sister was unable to identify any body, and, therefore, must have told her something that she had been told by some person unknown. That, of course, is not evidence in any court. That being so, the question is: Has the plaintiff proved that she is the widow of the deceased? Her counsel submits that she has done this mainly in reliance on the presumption which is formulated in *Spivack v. Spivack* (1). That presumption is stated in that case in these words:

" . . . where there is evidence . . . of a ceremony of marriage, followed by cohabitation of the parties, everything necessary for the validity of the marriage will be presumed in the absence of decisive evidence to the contrary, even though it may be necessary to presume the grant of a special licence."

Spivack v. Spivack (1) was concerned, not with the capacity of the parties to be married, but with the validity of the marriage ceremony. Obviously, whatever

the ceremony, if the parties are not capable of being married, they will not be married. The two questions are quite distinct—(i) whether the parties can be married, and (ii) whether, if they can, they are. I am inclined to think, though I do not think it is necessary to reach a final conclusion on that point, that the presumption referred to in *Spivack v. Spivack* (1) relates to the ceremony of marriage and not to the capacity of the parties who are being married. The cases on which counsel for the plaintiff relied do not, I think, lead me to think the contrary. In *Spurgeon v. Spurgeon* (2) either the learned judge delivered no judgment or the judgment escaped the notice of the reporter, and I do not find the report of any assistance. *Russell v. A.-G.* (3) plainly related, not to the capacity of the parties, but to a point in connection with the ceremony of marriage. *Tweney v. Tweney* (4), in my judgment, points strongly in favour of the view which I am expressing. There the question was in relation to the capacity of one of the parties. The petitioner's first husband disappeared and despite exhaustive inquiries no news was ever received of him. Ten years later the petitioner married the respondent, describing herself as a widow on the marriage certificate. She informed the registrar and the respondent of the circumstances of her first marriage. Her marriage to the respondent was conducted with all proper formalities and the parties cohabited together. Subsequently the respondent deserted the petitioner and she petitioned for a divorce on the ground of his desertion, and it was held that the petitioner's second marriage would be presumed a valid marriage until some evidence was adduced which would lead the court to believe the contrary. PILCHER, J., stated the proposition twice in forms which are not quite identical. I do not myself know what particular assistance he derived from *Spurgeon v. Spurgeon* (2) though he refers to it. Nobody seems to have referred him to *Spivack v. Spivack* (1), but he said ([1946] 1 All E.R. 565):

"The way in which the matter should be regarded is in my view this.

The petitioner's marriage to the respondent being unexceptionable in form and duly consummated remains a good marriage until some evidence is adduced that the marriage was, in fact, a nullity."

It will be noticed that the words are not "decisive evidence" but "some evidence". Again, towards the end of the judgment the judge says (*ibid.*):

"This court ought to regard the petitioner, who comes before it and gives evidence of a validly contracted marriage, as a married woman, until some evidence is given which leads the court to doubt that fact."

That proposition is quite different from the proposition in *Spivack v. Spivack* (1) which refers to "decisive evidence", and it seems to me that PILCHER, J., was much nearer the proposition contained in *Re Stollery* (5), which is binding on me, and is, I think, very near the point.

At first blush I thought it would be very hard if a person who produces a certificate of marriage should be put to the proof of possession of capacity to be married, but when I looked at the Births and Deaths Registration Act, 1836, which provides for the registration of marriages—and, incidentally, births, because that is what actually arises in *Re Stollery* (5)—I find that the registrar is charged with no duty to require proof that the parties are capable of being married. According to the Marriage Act, 1836, s. 7, and sched. (B.), he must state in his certificate their condition, that is to say, "bachelor", "spinster", "widow", or "widower", and for that purpose under the Marriage Act, 1836, s. 36, he is empowered "... to ask of the parties to be married the several particulars required to be registered touching such marriage". He is not called on to satisfy himself by evidence that they are true. If anybody tells the registrar that he is of a particular condition and the registrar puts that information in the certificate without further proof, it would be surprising if that statement had any particular, or, shall I say, any paramount, validity. I ought, perhaps, to mention that there are penalties prescribed by the Perjury Act, 1911, s. 3,

for making false statements and there is also a provision dealing with the effect of a certificate. The Births and Deaths Registration Act, 1836, s. 38, provides:

" . . . all certified copies of entries purporting to be sealed or stamped with the seal of the said register office shall be received as evidence of the birth, death, or marriage to which the same relates, without any further or other proof of such entry."

It is noticeable that, whereas there is this section which provides that the certificate shall be received as evidence of the marriage, there is no section referring to the effect of a certificate of marriage in relation to the validity of the statements with regard to the condition of the parties. In *Re Stollery* (5) a birth certificate had been given, and the question was not whether the child in question had been born, but whether the father and mother of the child were married at the date of its birth. No evidence was obtainable beyond the fact that among the particulars contained in the birth certificate was a statement that "X" was the father and "Y" was the mother, and the question was: What was the effect of that statement in that certificate with relation, not to the birth of the child, but to the marriage of the child's parents? All the members of the Court of Appeal held that those statements were admissible evidence with regard to the marriage of the parents, but none of them suggested that it was in any degree special evidence with regard to that marriage. In my view, the same position prevails with regard to the statement in this certificate with regard to the capacity of the plaintiff. She is stated to be a widow, and I should, undoubtedly, have acted on that certificate if there had been no reason to doubt that she was a widow. In other words, if I may say so, I accept without hesitation what PILCHER, J., said in *Tweney v. Tweney* (4) ([1946] 1 All E.R. 565):

"This court ought to regard the petitioner, who comes before it and gives evidence of a validly contracted marriage, as a married woman, until some evidence is given which leads the court to doubt that fact."

I think that if the production by the plaintiff of the certificate and the statement that her previous husband died in 1916 had stood alone, and no evidence had been called which led the court to doubt the fact of his death, it would have been right and proper to act on the certificate and to hold that she had been duly married to the testator, and, therefore, was now his widow. On the other hand, it seems to me that once the matter is put in issue by evidence which suggests a doubt about it, the certificate is of little value. Once the circumstances are investigated, the certificate carries the matter no further.

That being so, it seems to me that the plaintiff has not proved that she was the widow of the deceased because she has not proved that her first husband died before June 23, 1919, and that she had the capacity to marry the deceased when she went through the ceremony of marriage to him.* It occurred to me that, if I was not prepared to accept the evidence of what the sister of the first husband had told the plaintiff, the latter might be able to set up a case that the husband had disappeared over a long period in circumstances in which she would be entitled to presume that he was dead at the time of the marriage, but the evidence does not prove any such case. Therefore, with great regret I must dismiss this application.

Application dismissed.

Solicitors: *Kinch & Richardson*, agents for *T. G. Baynes & Sons*, Bexley Heath (for the plaintiff); *Walter O. Stein* (for the defendant).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

Re D.'s SETTLED ESTATES.

[CHANCERY DIVISION (Roxburgh, J.), July 28, 29, 30, 1952.]

Settlement—Variation of trusts—Transaction not authorised by settlement or by law—No administrative problem—Jurisdiction of court to authorise transaction—Settled Land Act, 1925 (c. 18), s. 64 (1)—Trustee Act, 1925 (c. 19), s. 57 (1).

To minimise the incidence of estate duty in respect of land and capital money subject to a settlement a scheme was evolved which, not being authorised by the settlement or the Settled Land Act, 1925, could not be carried out without an order of the court. Application was, therefore, made to the court to authorise the scheme under its general jurisdiction or under the Settled Land Act, 1925, s. 64 (1). It was admitted that the purpose of the scheme was not to solve any administrative problem. The court found as a fact that the transactions involved in the scheme amounted in substance to a re-writing of the trusts, or a substantial part thereof, or to directions to administer the trust property on the footing of new trusts substituted for subsisting trusts.

HELD: (i) the court had no general jurisdiction to authorise transactions of the nature proposed unless their object were to resolve administrative difficulty, and it was not sufficient to show that the transactions would be of benefit to the beneficiaries as a whole.

Re New ([1901] 2 Ch. 534) and *Re Tollemache* ([1903] 1 Ch. 955), applied. *Re Wells* ([1903] 1 Ch. 848), considered.

(ii) section 64 (1) (like s. 57 (1) of the Trustee Act, 1925) did not authorise a transaction not of an administrative character, and under that section the court could not confer on the tenant for life power to execute a re-settlement or to deal with the settled funds on the footing that a re-settlement had been executed.

Quære: whether the extraordinary jurisdiction of the court as stated in *Re New* ([1901] 2 Ch. 534) has not been superseded by the Settled Land Act, 1925, s. 64 (1), and the Trustee Act, 1925, s. 57 (1).

AS TO GENERAL POWER TO EFFECT TRANSACTIONS UNDER ORDER OF COURT, see HALSBURY, Hailsham Edn., Vol. 29, p. 745, para. 1037; and FOR CASES, see DIGEST, Vol. 43, pp. 839-841, Nos. 2857-2865.

Cases referred to:

(1) *Re Tollemache*, [1903] 1 Ch. 457; 72 L.J.Ch. 225; 88 L.T. 13; *affd.* C.A., [1903] 1 Ch. 955; 72 L.J.Ch. 539; 88 L.T. 670; 43 Digest 841, 2867.

(2) *Re New*, *Re Leavers*, *Re Morley*, [1901] 2 Ch. 534; *sub nom.* *Re New's Settlement*, 70 L.J.Ch. 710; 85 L.T. 174; 43 Digest 840, 2866.

(3) *Re Wells*, [1903] 1 Ch. 848; 72 L.J.Ch. 513; 88 L.T. 355; 28 Digest 186, 446.

(4) *Re Craven's Estate* (No. 2), [1937] 3 All E.R. 33; [1937] Ch. 431; 106 L.J.Ch. 311; Digest Supp.

(5) *Re Mair*, [1935] 1 Ch. 562; 104 L.J.Ch. 258; 153 L.T. 145; Digest Supp.

(6) *Re Salting*, [1932] 2 Ch. 57; 101 L.J.Ch. 305; 147 L.T. 432; Digest Supp.

ADJOURNED SUMMONS by which application was made to the court to authorise, either under its general jurisdiction or under the Settled Land Act, 1925, s. 64 (1), a scheme for so dealing with the funds subject to a settlement that estate duty would, to the benefit of all the beneficiaries, be saved. The matter was argued in chambers, but judgment was delivered in open court.

Raymond Jennings, Q.C., and *J. A. Brightman* for D., the tenant for life.

N. C. Armitage for E., a tenant for life in remainder.

Peter Foster for F., interested in capital.

Jopling for the trustees of the settlement.

Cur. adv. vult.

July 30. **ROXBURGH, J.**, read the following judgment. The D. settled estates consist of land and capital money. In value approximately seven-

elevenths are capital money and four-elevenths land. D. is tenant for life in possession and is unmarried, but his life estate is subject to protective trusts, and, in the event of forfeiture, there is a discretionary trust during the rest of his life in favour of himself, his wife, and his issue. The limitations after his death are to his first and other sons successively according to seniority in tail male, with remainder to E. for life, with remainder to F. absolutely. Both D. and E. have powers of jointuring and of charging portions for younger children. There are no administrative difficulties and no questions of doubt, but a scheme has been devised for the avoidance of estate duty, and, if it can be made effective, such a large sum will be saved that advantage must accrue to all the persons beneficially interested under the settlement unless, of course, the incidence of estate duty is drastically altered before D. dies, and this is unlikely.

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The scheme contemplates the division of the capital money into three funds, D., E. and F. E. has released his life interest in all three funds, and is to release his powers of jointuring and charging portions. The trustees are to take out a policy providing for the payment of a certain sum in the event of a son being born to D., paying the single premium out of fund F., and such policy is to be held on the trusts declared by the settlement to take effect after the death of D., but excluding D.'s powers of jointuring and charging portions. D. is to surrender his protected life interest in fund F. without incurring a forfeiture, and the discretionary trust is to cease to affect any of the three funds. D. is to release all three funds from his powers of jointuring and charging portions. Powers are conferred on the trustees to enable them to protect themselves from liability to estate duty. Directions are given as to the incidence of certain estate duty which may become payable. Certain costs are to be paid out of fund F. Nothing in the scheme is to forfeit D.'s protected life interest in the settled land.

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The applicants invoke the Settled Land Act, 1925, s. 64 (1), and the general jurisdiction of the court. This general but "extraordinary" jurisdiction (it was so described by COZENS-HARDY, L.J., in *Re Tollemache* (1)) was formulated in the classic judgment of the Court of Appeal delivered by ROMER, L.J., in *Re New* (2) ([1901] 2 Ch. 544):

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"As a rule, the court has no jurisdiction to give, and will not give, its sanction to the performance by trustees of acts with reference to the trust estate which are not, on the face of the instrument creating the trust, authorised by its terms . . . But in the management of a trust estate, and especially where that estate consists of a business or shares in a mercantile company, it not infrequently happens that some peculiar state of circumstances arises for which provision is not expressly made by the trust instrument, and which renders it most desirable, and it may be even essential, for the benefit of the estate and in the interest of all the cestuis que trust, that certain acts should be done by the trustees which in ordinary circumstances they would have no power to do. In a case of this kind, which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust, where the trustees are embarrassed by the emergency that has arisen and the duty cast upon them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained by reason of some of them not being sui juris or in existence, then it may be right for the court, and the court in a proper case would have jurisdiction, to sanction on behalf of all concerned such acts on behalf of the trustees as we have above referred to . . . It is a matter of common knowledge that the jurisdiction we have been referring to, which is only part of the general administrative jurisdiction of the court, has been constantly exercised, chiefly at chambers. Of course, the jurisdiction is one to be exercised with great caution, and the court will take care not to strain its powers. It is impossible, and no attempt ought to be made, to state or define all the circumstances under which, or the extent to which, the court will exercise

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the jurisdiction; but it need scarcely be said that the court will not be justified in sanctioning every act desired by trustees and beneficiaries merely because it may appear beneficial to the estate; and certainly the court will not be disposed to sanction transactions of a speculative or risky character. But each case brought before the court must be considered and dealt with according to its special circumstances."

A Shortly afterwards came *Re Tollemache* (1), in which KEKEWICH, J., refused to sanction a modest proposal and said ([1903] 1 Ch. 462):

B "All the cases of refusal may be grouped under one of two classes. Either, notwithstanding the advantage actual and prospective of what is proposed to be done, there is no urgency for it, and the existing state of things may without great mischief be allowed to remain, or the terms on which the advantage can be gained are such that the court would by accepting them create a new trust in lieu of that which it is administering."

The Court of Appeal affirmed this decision. VAUGHAN WILLIAMS, L.J., said (*ibid.*, 956):

C "It is admitted that the applicant cannot succeed unless she can bring herself within *Re New* (2). Putting that case shortly, it is this—that a case may arise in which, in the course of the administration of an estate, such an emergency may occur that it must be dealt with at once; but it cannot be said that there is any such emergency here."

ROMER, L.J., said (*ibid.*):

"I agree. *Re New* (2) shows how far the court will go, and beyond what point it will not go."

D COZENS-HARDY, L.J., said (*ibid.*):

"I agree. I will only add that, in my opinion, *Re New* (2) constitutes the high-water mark of the exercise by the court of its extraordinary jurisdiction in relation to trusts."

E It is to be observed that this extraordinary jurisdiction is an administrative jurisdiction, that it is not necessarily enough to show that its exercise is beneficial, that it is to be exercised with great caution, and that the court will take care not to strain its powers. *Re New* (2) is the high-water mark, and, if the tide is flowing fast about it, then special caution is necessary. This is so, because the high-water mark is a crooked line. There is no straight line of cleavage between an act of administration and the writing of new trusts. Although *Re New* (2) related to a purely administrative matter not directly affecting beneficial interests, and although all the reported cases cited to me do relate primarily to an alteration of the subject-matter of the trust and not of the rights of the beneficiaries therein, I should not hold that a transaction was above high-water mark merely because beneficial interests were incidentally affected. It remains a question of degree, but, in my judgment, if there is no administrative difficulty urgent or otherwise, and if the proposals are primarily due to the desire of the beneficiaries to depart from the clear terms of the trust and re-arrange their beneficial interests to better advantage and modifications in the trusts are proposed to give effect to this purpose, that case is above high-water mark.

G I do not myself think that *Re Wells* (3) will carry the applicants any further. Under the will of the testator property was settled on trust for such of the children of his two daughters as should be living at the death of the last survivor of certain annuitants and should attain twenty-one or marry. The two daughters were past child-bearing and all their children were of full age, and, accordingly, a deed was executed under which (subject to the approval of the court) the trust was to be terminated, the annuitants were to be paid out, and the residue was to be paid to the children of the daughters then living or the trustees of those who had settled their shares. It will be seen that no infants were directly interested under the will. The approval of the court was needed only on behalf

of infants who were or might become interested under derivative settlements, and the scheme did not involve any alteration in their own beneficial interests but only in the subject-matter of the trusts under which they were interested. Such approval was given.

Interesting arguments have been addressed to me about the scope and effect of this decision by counsel for the trustees and for D. They submitted that it is not logical to argue that, because the court can deal with the property of an existing infant, it can deal with the property of an unborn infant who is merely an unascertainable person, and that the decision can only be justified on the basis that the court has unlimited jurisdiction to deal with beneficial interests of all persons who are infants, under disability, unborn or unascertainable, provided that its exercise is for their benefit. It is, I think, true that FARWELL, J., did not explain the transition from the born to the unborn infant, though he proceeded in the main on those lines, but it may be that he also considered the case to be covered by *Re New* (2), to which he referred. *Re Wells* (3) presents difficulties, but of two things I am certain. The first is that FARWELL, J., was not intending to enunciate by implication the broad jurisdiction which counsel suggest, the second is that, if and in so far as he was seeking to place the high-water mark higher up the beach, his purpose was soon afterwards defeated by the Court of Appeal in *Re Tollemache* (1). *Re Wells* (3), if and in so far as it is an extension of *Re New* (2), or derives its inspiration from a different source, must, I think, be confined in application to infants born or to be born. But in the present case there is a discretionary trust not confined to issue, and, if I merely approved the scheme on behalf of infants (and this is not what I am asked to do), the discretionary trust would still have to stand, and this would cut at the roots of the scheme. Therefore, in my view, the applicants are cast back on the shores of *Re New* (2) and *Re Tollemache* (1). Counsel for D. has, in effect, submitted that I should respond to a rising tide which he senses in the conditions prevailing today and carry the high-water mark further up the beach, but I think that, if the chart requires revision, it would be better to ask that of the Court of Appeal, who made it. Those two cases bind me, and I have no right to move the mark.

I now come to the Settled Land Act, 1925, s. 64, and I do so bearing in mind that before 1926 the court as a rule had no jurisdiction to give its sanction to the performance by trustees of acts which were not authorised by the terms of the instrument, but that it had an extraordinary jurisdiction exercisable in a case of urgency, so long as its exercise did not result in the substitution of a new trust in place of the old. I must also remember that there is an analogous provision in the Trustee Act, 1925, s. 57 (1), applicable to personalty settlements. These sections must, I think, be considered together. If there are any authorities which assist the construction I must, of course, give effect to them, but, surprisingly enough, their ambits have never even been discussed in a reported judgment during the twenty-five years during which they have been in force, apart from a cursory reference in *Re Craven's Estate* (No. 2) (4).

Looking at s. 64 (1), I observe that it does not begin with a reference to a "settlement" or the "trusts of a settlement", but to a "transaction". This suggests a practical step of some sort. A reference to the definition in s. 64 (2) suggests that the practical steps under consideration are of an administrative character, and a reference back to s. 64 (1) shows that they must be such as are capable of being effected by the tenant for life. The section does not empower the court to do anything beyond authorising the tenant for life to effect the transaction. Looking next at s. 57 (1), I notice that it does not begin with a reference to a "settlement" or the "trusts of a settlement", but to a transaction "in the management or administration of any property vested in trustees". This suggests a practical step of an administrative character. Further, this step must be capable of being effected by the trustees. The section does not authorise the court to do anything beyond conferring such a power on the trustees (either generally or in any particular instance and either conditionally or un-

conditionally) and directing how any expenditure so authorised is to be borne as between capital and income. The correspondence between the two sections is remarkably close.

A Counsel for D. argued that the legislature cannot have intended by these elaborate sentences to leave the rule in *Re New* (2) unchanged. It certainly has not done that. The jurisdiction is no longer "extraordinary". It extends to transactions which are neither urgent nor of an emergency character. But does it extend to a re-writing of the trusts of the settlement—to a re-arrangement of the beneficial interests thereunder—for the advantage of the beneficiaries generally where there is no administrative problem? As I look at these two sections together, it seems to me that they have been carefully framed so as to imply a negative answer. If it be asked why, in that case, the Act does not in express terms supply the negative answer, I would reply that it could not do so without defining the boundary between administrative action and re-writing the trusts, and that is a boundary which is incapable of precise definition. But it seems to me that neither section authorises a transaction which is not of an administrative character, and that the court cannot confer on tenant for life or trustees the power to execute a re-settlement or deal with the trust estate on the footing that a re-settlement has been executed. No language could be less apt than this for conferring such a novel and extensive power on the court. If I am wrong in this view, then I would hold in the alternative that the legislature has by its language given clear indication that the court ought not to exercise its discretion in favour of a transaction or series of transactions which, in its opinion, are not of an administrative character, but involve a substantial re-writing of the trusts in order to re-arrange beneficial interests to greater advantage.

D What, then, is the broad effect of the present scheme (which, if it is to be sanctioned under s. 64 (1), must be effected by the tenant for life)? Instead of settled land and capital money held on the same trusts, five funds are to be created each held on different trusts. Four of them are to be created by appropriations, and the fifth by an unauthorised purchase of a policy—not by the tenant for life, but by the trustees. These five funds are as follows: (i) settled land; (ii) policy; (iii) fund D.; (iv) fund E.; (v) fund F. They are to be held as follows: (i) The settled land is to be continued to be held on the original limitations, that is to say, protected life interest in favour of D., remainder to D.'s sons in tail male, remainder to E. for life, with remainder to F. subject to powers of jointuring and charging portions by D. and E. Not only the tenant for life, but the trustees, are to act on the footing that the scheme does not forfeit D.'s life interest. Now, as to this, it is settled that a transaction which is authorised by the court under s. 64 (1) or s. 57 (1) cannot operate as a forfeiture: see *Re Mair* (5); and I accept counsel's submission that a transaction may be authorised although it may prejudice, or pro tanto defeat, the persons interested under a discretionary trust: see the order referred to in *Re Salting* (6). But, in my judgment, these reflections do not justify the conclusion that express directions to administer one portion of the estate on the footing that there has been no forfeiture, though (but for any order) there would be, and to administer another portion on the footing that a protected life interest is an unprotected life interest, may not of themselves be a re-writing of the settlement. In any case, such directions cannot be ignored for the purpose of such an inquiry.

G (ii) The policy is to be held on trust for D.'s sons in tail male with remainder as in the original settlement, but free from D.'s powers of jointuring and charging portions. (iii) Fund D. is to be held on certain trusts for the protection of the trustees against estate duty, and, subject thereto, on trust for D. absolutely. (iv) Fund E. is to be held on certain trusts for the protection of the trustees from estate duty and subject to a contingent charge for certain estate duty, and subject thereto on trust for E. absolutely. (v) The balance of fund F., after payment of the premium on the policy, is to be held on trust to pay certain costs thereout, and is subjected to certain contingent estate duty, and subject thereto

is to be held on trust for D.'s sons in tail male, with remainder to F. absolutely.

I hold that the transactions involved in this scheme amount in substance to a re-writing of the trusts or a substantial part thereof, or to directions to administer the trust property on the footing that new trusts have been declared and old trusts have been struck out or varied, and the admitted purpose of the scheme is not to solve any administrative problem but to re-arrange beneficial interests to greater advantage. Such proposals fall, in my judgment, outside the scope of the court's "extraordinary" jurisdiction (if, indeed, it has not been superseded by s. 64 (1) and s. 57 (1)). They also fall outside the ambit of s. 64 (1), or, alternatively, are, for the foregoing reasons, of a kind which the court ought not to sanction under that section.

Order accordingly.

Solicitors: *Bird & Bird* (for the defendant F.); *Gustavus Thompson & Sons* (for the plaintiffs and the remaining defendants).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

JENNINGS' (a bankrupt) TRUSTEE v. KING.

[CHANCERY DIVISION (Harman, J.), June 27, July 1, 2, 30, 1952.]

Sale of Land—Contract—Rescission—Purchaser committing act of bankruptcy before completion—Right of vendor to rescind.

On Aug. 29, 1951, a written contract was made between A. and B. whereby B. agreed to purchase freehold property from A. The date fixed for completion was Nov. 30, 1951, and the National Conditions of Sale (15th ed., 1948) were incorporated in the contract. B. paid a deposit of ten per cent. of the purchase price. On Nov. 21, 1951, B. committed an act of bankruptcy. On Dec. 3, 1951, A. purported, by letter to B., to repudiate their contract and to forfeit the deposit. On Dec. 5, 1951, B. was adjudicated bankrupt. In an action by B.'s trustee in bankruptcy against A. for damages for breach of the contract,

HELD: A. was not entitled to treat the act of bankruptcy as an anticipatory breach entitling him immediately to repudiate the contract, or, after the passing of the date for completion, to treat the contract as though time were of its essence, entitling him to rescind the contract for B.'s failure to complete on the due date, and, therefore, A. was in breach of the contract and liable in damages.

Collins v. Stimson (1883) (11 Q.B.D. 142), explained.

Powell v. Marshall, Parkes & Co. ([1899] 1 Q.B. 710), distinguished.

AS TO BANKRUPTCY OF PURCHASER, see HALSBURY, Hailsham Edn., Vol. 29, pp. 359, 360, paras. 483-486; and FOR CASES, see DIGEST, Vol. 40, pp. 211, 212, Nos. 1778-1786, and Vol. 5, pp. 932-934, Nos. 7622-7632.

Cases referred to:

- (1) *Collins v. Stimson*, (1883), 11 Q.B.D. 142; 52 L.J.Q.B. 440; 48 L.T. 828; 47 J.P. 439; 5 Digest 732, 6347.
- (2) *Ex p. Barrell. Re Parnell*, (1875), 10 Ch. App. 512; 44 L.J.Bcy. 138; 33 L.T. 115; 5 Digest 948, 7769.
- (3) *Powell v. Marshall, Parkes & Co.*, [1899] 1 Q.B. 710; 68 L.J.Q.B. 477; 80 L.T. 509; 5 Digest 910, 7448.
- (4) *Brooke v. Hewitt*, (1796), 3 Ves. 253; 30 E.R. 997; 5 Digest 930, 7616.
- (5) *Lawrence v. Knowles*, (1839), 5 Bing. N.C. 399; 8 L.J.C.P. 210; 132 E.R. 1152; 5 Digest 938, 7670.
- (6) *Franklin v. Brounlow (Lord)*, (1808), 14 Ves. 550; 33 E.R. 632; 40 Digest 211, 1783.
- (7) *Lowes v. Lush*, (1808), 14 Ves. 547; 33 E.R. 631; 40 Digest 210, 1763.
- (8) *Ex p. Stapleton. Re Nathan*, (1879), 10 Ch.D. 586; 40 L.T. 14; 5 Digest 935, 7639.

- (9) *Ex p. Chalmers. Re Edwards*, (1873), 8 Ch. App. 289; 42 L.J.Bey. 37; 28 L.T. 325; 5 Digest 932, 7628.
- (10) *Miles v. Gorton*, (1834), 2 Cr. & M. 504; 3 L.J.Ex. 155; 149 E.R. 860; 5 Digest 932, 7624.
- (11) *Griffiths v. Perry*, (1859), 1 E. & E. 680; 28 L.J.Q.B. 204; 32 L.T.O.S. 315; 120 E.R. 1065; 39 Digest 639, 2350.
- (12) *Morgan v. Bain*, (1874), L.R. 10 C.P. 15; 44 L.J.C.P. 47; 31 L.T. 616; 5 Digest 933, 7629.
- (13) *Ex p. Newitt. Re Garrud*, (1881), 16 Ch.D. 522; 51 L.J.Ch. 381; 44 L.T. 5; 5 Digest 635, 5720.
- (14) *Smith v. Hamilton*, [1950] 2 All E.R. 928; [1951] Ch. 174; 2nd Digest Supp.
- (15) *Green v. Sevin*, (1879), 13 Ch.D. 589; 49 L.J.Ch. 166; 41 L.T. 724; 44 J.P. 282; 40 Digest 113, 911.

ACTION by the trustee of the property of Thomas Richard Jennings, a bankrupt, for damages for breach of a contract of sale of freehold land.

Muir Hunter for the plaintiff, the trustee in bankruptcy of the purchaser.

A. F. M. Berkeley for the defendant, the vendor.

Cur. adv. vult.

July 30. **HARMAN, J.**, read the following judgment. This action as at first constituted was in effect a claim by a trustee in bankruptcy for the specific performance of a contract by the defendant for the sale of land to the bankrupt. Whether the trustee could have succeeded in obtaining that relief is now of no importance, because by amendment the action is now framed as a claim for damages for breach of the same contract.

The facts are simple and not in dispute. A written contract was made, on Aug. 29, 1951, between the bankrupt and the defendant whereby the bankrupt agreed to buy and the defendant to sell certain freehold property at Ashtead in the county of Surrey at a price of £3,750. The contract provided for the payment of a deposit of £375 to the defendant's solicitors and that the bankrupt should have an immediate right to go into possession of the property for the purpose of proceeding with the conversion of a coach-house into dwelling accommodation, and, further, that, if the purchaser failed to complete the purchase, all work so done by him should enure for the defendant's benefit without any payment or allowance by the latter. The date fixed for completion was Nov. 30, 1951, and the National Conditions of Sale (15th ed., 1948) were incorporated. On the signature of the contract the bankrupt paid the deposit of £375 to the defendant's solicitors and exercised his right of taking possession and proceeding with the conversion of the coach-house. On this work he spent a considerable sum of money which consisted, so the defendant averred, largely of a loan by him. The details do not matter at this stage. On Nov. 21, 1951, the bankrupt, through certain accountants, announced to his creditors, one of whom was a company known as S. King, Ltd., in which the defendant was interested, that he was unable to meet his liabilities, and called a meeting of his creditors for Nov. 29. By this time the contract was ripe for completion, all the documents having been engrossed, including a proposed mortgage which would have rendered it unnecessary for the bankrupt to find further money for the purchase. The sending of the letter of Nov. 21, was, undoubtedly, an act of bankruptcy and was recognised as such by the defendant's solicitors, who, on Nov. 26, informed the bankrupt's solicitors that they could not advise the defendant to complete the conveyance, at any rate pending the result of the meeting of creditors. This meeting was held on Nov. 29, but I know nothing of its result.

There was no completion of the contract on Nov. 30, but on Dec. 3, the defendant, through his solicitors, purported to repudiate the contract and to forfeit the deposit by a letter of which the following are the relevant parts:

"We now write on behalf of our client Mr. King to inform you that he repudiates the contract for sale and purchase of freehold property as

above dated Aug. 29, 1951, on the ground that on Nov. 30 last, the date fixed for completion, you were incapable of making a valid payment of the purchase money in view of the act of bankruptcy and that, by reason of the announcement made at the meeting of your creditors on Nov. 29 that you would file your petition in bankruptcy, it is evident that you will not be capable within any reasonable time, if at all, of completing the contract. We further give you notice that Mr. King forfeits the deposit of £375 received by us from you on Aug. 8 last as agents for Mr. King and in accordance with condition 16B of the contract the benefit of the work done by you on the premises will enure to Mr. King without any payment or allowance by Mr. King in respect thereof. We have advised Mr. King to re-enter the property forthwith to finish the alterations to the buildings with a view to re-sale of the property."

On Dec. 5, the bankrupt filed his own petition, and a receiving order followed and also adjudication on that day. The plaintiff was appointed trustee in place of the official receiver on Dec. 21, and his appointment was certified by the Board of Trade on Jan. 3, 1952. Towards the end of January the trustee's solicitors inquired of the defendant's solicitors what the position was, and received a reply which contains the following passage:

"The contract between our client Mr. King and Mr. Jennings [the bankrupt] was rescinded by Mr. King on Dec. 3 last as appears from the enclosed copy letter written by us to Mr. Jennings on that date and we have evidence the letter was received by Mr. Jennings on Dec. 4 last."

The defendant's attitude was made clearer by a letter to the official receiver dated Feb. 1, 1952, in these terms:

"We act for Mr. W. A. S. King who contracted to sell to the debtor the property referred to in your observations under para. 4 (c) (ii) and you state that the purchase had not been completed at date of the receiving order. It is we think necessary to go further than this and to state that at the date of the receiving order the contract had been rescinded by our client and the deposit forfeited."

By this time the defendant had resumed possession of the property, and had contracted to re-sell it at a considerably enhanced price. That re-sale was completed on Mar. 26 after a caution lodged on behalf of the trustee had been withdrawn pursuant to an arrangement with which I am not at present concerned, but under which, I understand, some fund is available in the event of the trustee succeeding in the action. The only question with which I have now to deal is that of liability.

There appears to be no authority directly in point on the question at issue here, which can be stated shortly as being whether a party to a contract for the sale of land who receives notice of an act of bankruptcy by the other party pending completion of the contract can immediately put an end to it by accepting the repudiation implicit in the act of bankruptcy so as not only to deprive the person who commits the act of his rights, but also to prevent the trustee in bankruptcy, if adjudication follows, from adopting the contract or disclaiming it under the Bankruptcy Act, 1914, s. 54.

The argument of the defendant, as I understand it, runs as follows. Notice of an act of bankruptcy to the vendor means that he cannot safely perform the contract for a space of three months. In any case in which completion is by the contract fixed within that period, he is not bound to wait so long, and, in those circumstances, the notice is, in effect, a repudiation of the contract. This of itself, being unilateral, does not put an end to the contract, but it does give the vendor the right, by accepting the repudiation, to rescind and treat the contract as at an end, and, if he does so before adjudication, there is an end of the matter. It is admitted that, if adjudication follows before the vendor has accepted the

repudiation, he must deal with the trustee in bankruptcy, as he has the right to do under the Bankruptcy Act, 1914, s. 54 (4), by calling on him either to disclaim or to adopt the contract within twenty-eight days. Alternatively, he may apply to the court under s. 55 (5) of the Act. If this argument be right, it seems to me that the contract must be at an end directly the vendor accepts the repudiation constituted by notice of the act of bankruptcy and that he need not wait for the date fixed by the contract for completion, and this was the contention put forward in the letters I have read. It was, however, one of the defendant's arguments that he could, at any rate by waiting till the completion date, put an end to the contract by accepting the purchaser's repudiation of it. The defendant's proposition rests on a statement made in a well-known text-book, viz., WILLIAMS ON VENDOR AND PURCHASER, 4th ed., vol. 1, p. 584, where I find the following:

"If the vendor has notice of an act of bankruptcy committed by the purchaser, he cannot safely proceed with the contract so long as the act of bankruptcy remains available; for any money subsequently paid to him by the purchaser might be recovered back by the trustee under a consequent adjudication of bankruptcy against the purchaser. For this reason, a purchaser who has committed an act of bankruptcy which remains available against him cannot enforce the specific performance of the contract by the vendor. And it appears that, if time is of the essence of the contract, and on the day fixed for completion the purchaser's act of bankruptcy still remains available against him, the vendor will be entitled to treat the contract as broken and to claim the deposit as forfeited. And if time is not of the essence of the contract, it seems that the vendor receiving notice of an act of bankruptcy by the purchaser may at once take the objection that the purchaser is not and will not at the time fixed for completion be capable of making a valid payment of the purchase money, and may repudiate the contract on this ground."

Collins v. Stimson (1) is cited as authority for the author's last proposition, but, in my judgment, it is no authority for it. That case merely decides that a trustee in bankruptcy cannot recover from a stakeholder the deposit paid by the bankrupt on a contract for a purchase which the trustee has made no claim to complete. This appears from the headnote, which is in these terms:

"A bankrupt, having disposed of his goods in fraud of his creditors, opened an account in a bank with the proceeds, and having entered into a contract for the purchase of land in an assumed name, paid a deposit to the defendant, the auctioneer, by a cheque drawn upon the bank. The vendor and the defendant acted bona fide and without notice of the bankruptcy or of the fraudulent conduct of the bankrupt:—Held, that the bankrupt's trustee was not entitled to recover the deposit from the defendant so as to prevent it from being forfeited to the vendor upon the non-completion of the contract."

To the same effect is *Ex p. Barrell. Re Parnell* (2).

The case which comes nearest to the proposition is *Powell v. Marshall, Parkes & Co.* (3). The contract there was for the sale of a public house. The day fixed for completion was Dec. 15, 1897. The vendor committed an act of bankruptcy on Dec. 2 and on Dec. 9 the purchaser refused to complete and demanded the return of his deposit. The writ was issued by the purchaser against the vendor and a stakeholder to obtain repayment of this sum and he succeeded on the ground that at the date fixed for completion the vendor was not in a position to complete. It was admitted that time was of the essence of the contract, and it followed that failure to complete on the due date was repudiation which entitled the purchaser to rescind forthwith. A. L. SMITH, L.J., said this ([1899] 1 Q.B. 712):

"By the terms of the contract the purchase was to be completed on a certain day, and if the plaintiff, as vendee, neglected or refused to complete,

the deposit was to be forfeited. It is admitted that time was of the essence of the contract. Before the day fixed for completion a bankruptcy notice was served on the vendor, and as he did not comply with it an act of bankruptcy was committed by him. The plaintiff heard of this, and he gave notice that he should not go on with the transaction, and demanded back the deposit. The question whether he can recover it turns on this: Was the vendor in a position to complete on the day fixed for completion? I agree with the learned judge who tried the case that the vendor was not in a position to complete. If the vendor had conveyed the property, and afterwards had been adjudicated bankrupt on the act of bankruptcy which he had committed, his trustee could have intervened on the ground that his title related back to the date of the act of bankruptcy. If the purchase-money had been paid to the vendor, the trustee could have claimed it again from the plaintiff, on the ground that the payment to the vendor was made after notice of an act of bankruptcy by him. Under these circumstances, it seems to me to be clear that the vendor was not in a position to complete on the day fixed for completion."

In the article on sale of land in HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 29, of which the editor was Mr. Lightwood, part-author of the fourth edition of WILLIAMS ON VENDOR AND PURCHASER, I find the following (p. 358, para. 482):

"Accordingly, a vendor who has committed an act of bankruptcy is not in a position to obtain specific performance of the contract for sale until the three months have elapsed; and a purchaser who receives notice of an act of bankruptcy by the vendor which prevents the vendor being in a position to complete on the date fixed for completion can, if time is of the essence of the contract, immediately claim to treat the contract as broken and recover any deposit he has paid."

This statement is justified by *Powell v. Marshall, Parkes & Co.* (3), but it seems to me that the fact that time was of the essence of the contract is a crucial difference between that case and the present one. The statement in para. 484 at p. 359 in the same volume begs the question, as it does not state what is the proper time for completion. In DART ON VENDORS AND PURCHASERS, 8th ed., vol. 1, p. 272, the view taken in HALSBURY is, in effect, confirmed, and SUGDEN ON VENDOR AND PURCHASER, 14th ed., touches the point at p. 396, but throws no additional light on it.

The trustee's case rested on the view that an unpaid vendor of land should be no better off than other creditors of a man who becomes bankrupt before completion of a contract. It was argued that by virtue of the doctrine of relation back this bankruptcy began on Nov. 21 while the contract was still in force and not due for completion, that this was a chose in action vesting in the trustee under the Bankruptcy Act, 1914, s. 37 (1), and that the vendor is in the position of a creditor and cannot by his own act after that date withdraw from the trustee property which would be an asset in the bankruptcy. It was pointed out that, if the vendor here is right, he may retain, first, the deposit, secondly, the value of the work done by the bankrupt on the property, and, thirdly, the enhanced price obtained for the property, all of which would be assets in the bankruptcy, and that, in effect, the vendor has been preferred to this extent to other creditors. Moreover, it was argued that, if the defendant's claim be right, a bankrupt may be stripped between the act of bankruptcy and adjudication of all his profitable contracts, leaving the trustee only the burden of those which are unprofitable, and that this is contrary to the principle of the bankruptcy law, which is to realise all the bankrupt's assets for the benefit of all his creditors.

It was, I think, agreed on both sides that neither the act of bankruptcy, nor, indeed, the adjudication, automatically put an end to the bankrupt's contracts,

and for this there is, indeed, ample authority, going back as far as *Brook v. Hewitt* (4). In *Lawrence v. Knowles* (5) I find in the side-note these words (5 Bing. N.C. 399):

"Held, that the bankruptcy . . . of O., and the insufficiency of his assets, were circumstances from which the jury might properly infer that he and his assignees had not been ready and willing [to perform the contract]."

A The jury held on the evidence that the contract had been abandoned because the assigns (i.e., in effect, the trustee in bankruptcy) had not taken any steps within a reasonable time to perform it, but it was assumed that had they elected to perform it within a reasonable time they would have had the right to do so. Thus, TINDAL, C.J., says (*ibid.*, 408):

B "Now, the contract was to be performed on July 1, 1835. In February, 1835, Okill became a bankrupt, and his assignees were bound in a reasonable time after July 1, at the latest, to declare whether they meant to take to the contract or not."

He then goes on to say there was an unreasonable delay in the matter, and ends up with these words (*ibid.*):

C "There was enough in these circumstances to justify the jury in finding that the contract was abandoned . . ."

BOSANQUET, J., says (*ibid.*, 409):

D "Here, the bankrupt entered into extensive engagements, which he was incapable of fulfilling: his assignees might elect to adopt them, but their election ought to be declared within a reasonable time; and upon a contract which ought to have been completed in July, 1835, it is most unreasonable that assignees should hold their right of election in suspense till January, 1838."

In that case, however, there had been nothing done by the party charged to accept the repudiation of the contract and it was merely the passage of time which justified the jury's verdict that it had been abandoned by both parties.

E The trustee further admitted that the act of bankruptcy, so long as available, must deprive the purchaser of the right to specific performance on the ground that he could not allege or prove at the trial that he was always ready and willing to complete the contract. There is authority for this proposition in *Franklin v. Brownlow* (Lord) (6) and the immediately preceding case of *Lowes v. Lush* (7). The trustee argued, however, that this disability on the part of the F bankrupt did not disentitle his trustee to specific performance, or, at any rate, to damages for breach of contract.

Even on the footing that the act of bankruptcy may be itself such a repudiation as entitles the vendor to put an end to the purchaser's rights, the trustee argues that it does not follow that this also puts an end to the rights of the trustee. Support for this proposition seems to be afforded by *Ex p. Stapleton. Re Nathan* (8) G where the headnote is as follows:

H "When the purchaser of goods sold on credit becomes bankrupt before the vendor has parted with the possession of the goods, the trustee in the bankruptcy has a right to elect to complete the contract by paying the agreed price in cash within a reasonable time. But, if he does not do so, the vendor is entitled to treat the contract as broken, and to re-sell the goods, without first tendering them to the trustee. And the vendor is entitled to prove in the bankruptcy for damages for the breach of contract, the measure of damages, if the market is falling, being the difference between the contract price and the price obtained on the re-sale."

SIR GEORGE JESSEL, M.R., says (10 Ch.D. 590):

"I am of opinion that if a person who has entered into a contract of this kind gives to the vendor before he has parted with the goods that which

amounts in effect to this notice, 'I have parted with all my property, and am unable to pay the price agreed upon,' it is equivalent to a repudiation of the contract. Of course that would not affect the right of the trustee in the liquidation to elect to fulfil the contract on paying the price in cash, provided that he does so within a reasonable time. But, if he does not do that, I think that the vendor is entitled to treat the contract as broken, without making any tender of the goods to the trustee."

Ex p. Chalmers. Re Edwards (9) again shows that bankruptcy of itself does not discharge the contract. It does, however, it appears, modify a contract for delivery of goods by instalments so as to justify the vendor in withholding further deliveries except on being paid any arrears and on receiving cash on delivery. Subject to this modification the contract remains on foot, and I find this passage at the end of the judgment of MELLISH, L.J. (8 Ch. App. 292):

"What, then, is the position of the parties upon the bill becoming dishonoured and the vendee insolvent? According to LORD ABINGER's view of the law in *Miles v. Gorton* (10), the contract to deliver is thereby put an end to altogether. I am not inclined to go so far as to say that; but I think that, at all events, the vendor has a right, in such a state of things, to say to the vendee, 'I will not deliver the goods until I see that I shall get my price paid.' So, in the present case the plaintiff, or his assignees in bankruptcy, could not, I think, call upon the defendant to deliver the rest of the iron without paying him for it."

Later, he says (*ibid.*, 293):

"I admit that the mere non-payment of the price of the November instalment did not of itself give a right to the vendor to refuse to perform the contract; and I agree with what was said by CROMPTON, J., in *Griffiths v. Perry* (11), that the mere fact of the insolvency of the purchaser did not put an end to the contract. It certainly would be very unfair if it had that effect; for if the insolvent had any beneficial contracts remaining, it would be hard on him as well as on his creditors if they could not have the benefit of those contracts. But if an insolvent has any such beneficial contracts, it is his duty to inform his creditors or the Court of Bankruptcy, if the case be within its jurisdiction, of the fact, and he can then apply to have a sufficient part of his assets applied for the completion of the contracts, and if the contracts were beneficial this would, without doubt, be allowed by his creditors or by the court. If this were done, and due notice were given to the vendor, I entertain no doubt that he would be bound to complete the contract on his part, and would not be allowed to take advantage of the insolvency of the other party to put an end to the contract. But where the insolvent or his trustee does nothing of the kind, he practically gives notice to his creditors and those with whom he has contracted that he does not mean to pay any of his debts or perform any of his contracts."

That case, however, only shows that a trustee who wishes to adopt the bankrupt's contracts must act promptly.

In *Morgan v. Bain* (12), which was again a case of sale of goods by instalments, it was held that the conduct of the plaintiffs justified the defendants in believing that they had abandoned the contract. It was pointed out by LORD COLERIDGE, C.J., that rescission of a contract must be by both parties (L.R. 10 C.P. 22):

"The question that is raised for our consideration is, whether, on May 13, there had been a rescission of the contract. Rescission must be by both parties; either both must have intended to rescind, or one must have so acted as to justify the other in thinking that he intended to rescind. It is clear that the omission to perform certain acts incumbent upon a party to a contract may justify the other party in coming to the conclusion that, in

point of fact, the party guilty of the omission intends to abandon the contract, and is himself treating it as abandoned, and rescinding it."

He quotes from *Ex parte Chalmers* (9) (which I have already cited) and says (*ibid.*, 23):

"To sum up, therefore, we have in this case the fact of insolvency, coupled with the fact that upon such insolvency the insolvents take none of the steps essential to indicate that they meant to stand by the contract."

A This case, again, assumes that a trustee who acts promptly will be entitled to performance.

The defendant argued that the trustee only succeeds to the rights of the bankrupt and can be in no better position than he. In support of this was cited a passage in *Ex parte Newitt* (13) where JAMES, L.J., says (16 Ch.D. 531):

B "The broad general principle is that the trustee in a bankruptcy takes all the bankrupt's property but takes it subject to all the liabilities which affected it in the bankrupt's hands . . ."

This, of course, I accept if it be read in conjunction with the law as to relation back. In the present case the relevant date for considering the bankrupt's rights is Nov. 21, when this contract was valid and subsisting for all purposes.

C On the whole it seems to me that the argument of the trustee ought to prevail. It is, no doubt, unfortunate for the vendor that his purchaser should commit an act of bankruptcy pending completion, but he is not without remedy. If within a reasonable time no adjudication follows, he may himself, when the completion day arrives, file a petition in bankruptcy and so get someone with whom he can safely deal. In any event, he is no worse off than other creditors, and, in my judgment, he ought to be no better off. I am unable to agree that a vendor ought to be allowed to treat an act of bankruptcy before the date of completion as an anticipatory breach entitling him immediately to repudiate, or to wait for the day fixed for completion and then treat the contract as though time were of its essence, failure to complete on that day entitling the vendor immediately to rescind. I was reminded during the hearing of a decision of my own of *Smith v. Hamilton* (14).

E The present contract was made subject to the same general conditions as were applicable in that case. The defendant suggested that the act of bankruptcy by the purchaser entitled the vendor to act at once in reliance on condition 25 of the National Conditions of Sale. In my judgment, that is not the case, nor, I think, was the act such improper conduct, as those words are used by FRY, J., in *Green v. Sevin* (15), as to justify the vendor in serving what I ventured in *Smith v. Hamilton* (14) to call an ultimatum, by a notice, for instance, of fourteen days' duration. The legislature has made acts of bankruptcy available to creditors for three months, and it appears to me that the vendor must either await that period to see whether he can safely complete or he must file a petition in bankruptcy if no other creditor takes that step in the interim. Accordingly, I hold that the defendant was not justified in repudiating the contract as he did and that the trustee is entitled to damages for breach of contract, to be G ascertained by inquiry if not agreed beforehand.

Judgment for the plaintiff.

Solicitors: *J. M. Menassé & Co.* (for the plaintiff); *Ward, Bowie & Co.* (for the defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

STARKOWSKI (or. URBANSKI) (or. JUSZCZKIEWICZ)
(by his next friend) v. ATTORNEY-GENERAL (STARKOWSKI
and others cited).

[COURT OF APPEAL (Somervell, Denning and Romer, L.J.J.), July 21, 22, 23, 30, 1952.]

Conflict of Laws—Legitimation—Validity of Austrian marriage—Retrospective effect of Austrian legislation—Determination according to Austrian law—Legitimacy Act, 1926 (c. 60), s. 1 (1). A

On May 19, 1945, H. went through a ceremony of marriage in Austria with U. according to the rites of the Roman Catholic faith. At that time the German Marriage Law of 1938 was still in force, which required that a marriage, to be valid, must be contracted before the civil authorities. On June 26, 1945, the provisional government of Austria published an order, to take effect on June 30, 1945, whereby: "Marriages which were solemnized during the period from Apr. 1, 1945, to the coming into force of this law before incompetent lay authorities or before ministers of a recognised church or religious community have the effect of a marriage solemnized at a register office in accordance with . . . the Marriage Law of . . . 1938, as from the day of solemnization, as soon as they have been registered in the Family Book kept by the register office". In July, 1945, U. and H. left Austria for Italy, and in the autumn of 1946 they came to England. In the summer of 1947 U. and H. parted, and subsequently H. met S., and on Mar. 27, 1949, she gave birth to C., the petitioner, of whom S. was the father. On July 18, 1949, the ceremony of marriage between U. and H. of May 19, 1945, was registered in accordance with the law of June 26, 1945. On Feb. 11, 1950, H. went through a ceremony of marriage at a register office with S., then a bachelor and domiciled in England. On a petition by C. for a declaration that S. and H. were then lawfully married and that he, C., was rendered legitimate by and from the date of such marriage, B C D

HELD: the principle that a marriage valid according to the *lex loci celebrationis* is valid everywhere applies even though that law is not the law of the domicile, and it is not confined to a marriage which is valid according to the *lex* at the date of the ceremony, but extends to a marriage which is invalid at that date but is validated retrospectively by subsequent legislation; under the order of 1945 the ceremony between H. and U., although originally invalid, became a valid marriage under Austrian law as from the date of the solemnization when it was registered in 1949, and, even if at the date of the second ceremony on Feb. 11, 1950, H. had acquired an English domicile, on that date she was a married woman whose husband was still alive, and, therefore, her marriage with S. was invalid and the petitioner was not entitled to the declaration he sought. E F

Per curiam: A different question would have arisen if the second ceremony of marriage had taken place before the registration. In the absence of any express provision under the foreign law, the conclusion might depend on the state of knowledge of the parties as to the likelihood or possibility of validation. G

Berthiaume v. Dastous ([1930] A.C. 79) and observation of COTTON, L.J., in *Sottomayer v. De Barros* (1877) (3 P.D. 5), applied. H

Lynch v. Paraguay Provisional Government (1871) (L.R. 2 P. & D. 268), distinguished.

Decision of BARNARD, J. ([1952] 1 All E.R. 495), affirmed.

AS TO THE LAW GOVERNING THE VALIDITY OF MARRIAGE, see HALSBURY, Hailsham Edn., Vol. 6, pp. 285-288, paras. 341, 342; and FOR CASES, see DIGEST, Vol. 11, pp. 415-417, Nos. 812-834. •

Cases referred to:

- (1) *Berthiaume v. Dastous*, [1930] A.C. 79; 99 L.J.P.C. 66; 142 L.T. 54; Digest Supp.
- (2) *Lynch v. Paraguay Provisional Government*, (1871), L.R. 2 P. & D. 268; 40 L.J.P. & M. 81; 25 L.T. 164; 35 J.P. 761; 11 Digest 366, 458.
- (3) *Doe d. Breakey v. Breakey*, (1845), 2 U.C.R. 349; 27 Digest 61, l.
- (4) *Luna v. Godin*, 10 Clunet (1881), 621.
- A (5) *Sottomayer v. De Barros*, (1877), 3 P.D. 1; 47 L.J.P. 23; 37 L.T. 415; 27 Digest 36, 127.

APPEAL by the petitioner from an order of BARNARD, J., dated Feb. 18, 1952, and reported [1952] 1 All E.R. 495, on a petition for a declaration of legitimacy under the Legitimacy Act, 1926, s. 1 (1), and the Matrimonial Causes Act, 1950, s. 17 (1).

B On May 19, 1945, the petitioner's mother, Henrica Juszczkiewicz, went through a ceremony of marriage in Austria with Ryszard Urbanski, the second party cited, both being Polish nationals. On June 12, 1945, Barbara, the third party cited, was born. Owing to the law in force at the time of the ceremony the marriage was invalid, but by an order passed on June 26, 1945, and coming into force on June 30, 1945, all marriages solemnized between Apr. 1, 1945, and the coming into force of the order which otherwise would have been invalid were legalised as soon as they had been registered. In 1946 Henrica and Urbanski came to England, where they parted, and Henrica met Starkowski, the first party cited, and, as a result of their association, on Mar. 27, 1949, she gave birth to the petitioner. In July, 1949, the ceremony of marriage between Henrica and Urbanski was registered, and on Feb. 11, 1950, Henrica went through a ceremony of marriage with Starkowski. The petitioner, claiming by his mother as next friend, sought a declaration that his mother and Starkowski were lawfully married on Feb. 11, 1950, and as a result he became legitimated under the Legitimacy Act, 1926, s. 1 (1).

D BARNARD, J., held that the validity of the marriage between Urbanski and Henrica must be decided according to Austrian law; under the law of June 26, 1945, the ceremony between Urbanski and Henrica, though not originally valid, was constituted a valid marriage by its registration, which validated it from the date of the ceremony; that registration occurred before the ceremony of Feb. 11, 1950; and, therefore, even assuming that by Feb. 11, 1950, Henrica had acquired an English domicile, on that date she was a married woman whose husband was still alive and was not free to marry Starkowski, with the result that there was no valid marriage between her and Starkowski and the petitioner was not entitled to the declaration he sought.

E *Heathcote-Williams, Q.C.*, and *Dobry* for the petitioner and the first party cited. *Colin Duncan* and *Brian T. Neill* for the Attorney-General.

F *Latey, Q.C.*, and *Crispin* for the second and third parties cited.

G *Cur. adv. vult.*

H July 30. SOMERVELL, L.J., read the following judgment of the court. A child born on Mar. 27, 1949, suing by his mother as next friend, petitions for a declaration of legitimacy under the Legitimacy Act, 1926, and s. 17 (1) of the Matrimonial Causes Act, 1950. His father and mother went through a ceremony of marriage on Feb. 11, 1950. If that marriage was valid, the petition succeeds. Its validity is challenged on behalf of a previous child of the mother and the father of that child who allege that on Feb. 11, 1950, the mother was the wife of that father. The learned judge has held that the marriage of February, 1950, was invalid and the petitioner appeals.

The mother, Henrica Juszczkiewicz, and Ryszard Urbanski were Polish nationals domiciled and resident in Poland until the autumn of 1944, when they went to Kitzbuehel in Austria. Henrica was pregnant by Urbanski and they

were anxious to marry. They were Roman Catholics and wished to be married by a priest. Prior to 1938 marriage by a priest according to the rites of the Roman Catholic church constituted a valid marriage in Austria. In 1938 the German marriage law became part of the law of Austria under which a valid marriage could only be concluded before the civil authorities. It could, no doubt, be followed by a religious ceremony, but it was an offence for a priest to purport to celebrate a marriage between persons who had not been married civilly. On Apr. 27, 1945, Austria was liberated and this part of Austria was occupied by American troops. There was a good deal of confusion as to the law. Some, at any rate, according to the evidence, thought that the German marriage law which had been imposed by the Nazis in 1938 automatically went with the liberation, reviving the status quo ante. On May 19, 1945, Henrica and Urbanski went through a ceremony of marriage at the parish church at Kitzbuehel according to the rites of the Roman Catholic faith. The German marriage law was still in force and that ceremony did not, therefore, constitute a valid marriage according to Austrian law. A translation of the certificate is before us which gives the details as to the marriage according to Roman Catholic rites. On June 12, 1945, Barbara, the third party cited, was born. On June 16, 1945, the birth was registered by the midwife with the civil authorities, the name of the father being left blank and the mother's maiden name being given.

On June 26, 1945, the provisional government of Austria enacted Order 31, coming into force on June 30, 1945, which itself indicates that there had been the confusion to which we have referred and that other priests had conducted ceremonies, no doubt believing them to be lawful. The relevant sections are as follows:

"Section 3 (1): Marriages which were solemnized during the period from Apr. 1, 1945, to the coming into force of this law before incompetent lay authorities or before ministers of a recognised church or religious community have the effect of a marriage solemnized at a register office in accordance with s. 15 et seq., of the Marriage Law of July 6, 1938,* as from the day of solemnization, as soon as they have been registered in the Family Book kept by the register office. (2) The offices in which such marriages have been solemnized shall forward without delay to the register office which would have been competent to solemnize the marriage at the time of its solemnization in respect of the bridegroom, true copies of the entries made in their marriage register showing exactly the words, figures and letters . . . Section 5 (1): The register offices are to enter in their register the occurrences affecting personal status communicated to them in accordance with ss. 3 and 4."

On the evidence of three Austrian lawyers and as found by the learned judge, the marriages covered by the order were validated as from the day of solemnization when registration took place. It had been suggested that the marriages were validated as from the date when the order came into force. It is, however, clear that no act of the parties was required for, or could prevent, validation. The order clearly contemplated that registration should take place without delay. There was a long delay in the present case as will be seen. It was not really suggested to the lawyers that the absence of delay was a condition precedent and they all agreed that the marriage became a valid marriage under Austrian law as from the date of solemnization when it was registered on July 18, 1949. There was no direct evidence as to the cause of the delay, but one of the lawyers suggested that, Kitzbuehel being a small and remote place, the priest in charge might not have heard of the order. On July 15, 1945, the child Barbara was baptised according to the rites of the Roman Catholic church as a legitimate child. At the end of July the father and mother and child went to Italy. In

* German Official Gazette, I, p. 807.

1946 they came to England and lived together as man and wife. They separated towards the end of 1947. At or shortly after that the mother met Starkowski. They lived together and on Mar. 27, 1949, Christopher, the petitioner, was born. In June, 1949, Henrica wrote a letter of which no copy is available, to the Kitzbuehel register of marriages. She was informed that the marriage did not appear on the register, and she was, therefore, not married. It would appear that the registrar did not make inquiries to see whether there had been a ceremony covered by the order of June, 1945, but not yet registered. In June, 1949, there were proceedings with regard to the custody of Barbara before the magistrate at Marylebone. Henrica produced the civil birth certificate as showing the child as illegitimate. This led Urbanski to write to the priest at Kitzbuehel. The matter was investigated and the marriage was registered in accordance with Order 31 on July 18, 1949. The ceremony of marriage between Henrica and Starkowski took place at the register office at Croydon on Feb. 11, 1950. The learned judge held that Henrica and Starkowski were not free to marry on Feb. 11 because Henrica's marriage to Urbanski was valid according to the *lex loci celebrationis* and Urbanski was still alive.

The main point of counsel for the petitioner can be shortly stated. He admits, of course, that putting aside capacity—and there is no question here of capacity so far as the ceremony of 1945 is concerned—a marriage good by the law of the country where it is effected is good everywhere: *Berthiaume v. Dastous* (1) ([1930] A.C. 83). But he submits that that law, if, as here, it is not the law of the domicile, must be restricted to the law as it is at the date of the ceremony. In principle, this does not appeal to us. Legislative acts of the kind in question are passed to remedy what has been done in good faith, but which turns out not to have achieved the result which the parties intended. The defect can only be remedied by the legislature of the place of the marriage. We can see no reason why those who were at the time, or later became, domiciled elsewhere should be impliedly excepted from its provisions. The argument can be tested by taking cases which are, perhaps, simpler on their facts than the present. There are many Acts in our statute book validating marriages when it has been discovered that there was some legal flaw which had not been realised so that a number of marriages celebrated at a particular place or in a particular way are invalid: see HALSBURY'S LAWS OF ENGLAND, 2nd ed., vol. 16, p. 597, para. 928. If one of a group so validated had been between parties not domiciled here, it would, on this argument, remain invalid although otherwise, we are assuming, covered by the Act. That such a rule might produce the greatest possible injustice is manifest. Assume parties domiciled here who get married abroad. A flaw is discovered in the foreign country which is then covered by a validating Act. It is possible that the parties might not hear of it. They had no reason to doubt that the marriage as celebrated was valid. It might be discovered after their death that their children were illegitimate. If they did hear of it so that they could go through a second and valid ceremony, but children had been born in the meantime, at one time, at any rate in this country, they could not have been legitimated.

Counsel for the petitioner at one time suggested that the validating law should not apply if, at the time when it was passed, both or, perhaps, either of the parties had changed their minds and no longer wished to be married. He did not suggest this was the effect of the law in Austria. It certainly would not be the effect of a validating Act in England unless express provision was made to that effect. Whatever may be the legal solution to the problem, we are satisfied it is not to be found in any such principle. We were referred to *Lynch v. Paraguay Provisional Government* (2). In that case a man domiciled abroad had died, disposing by will of property in England. After his death retrospective legislation confiscating his property was passed. LORD PENZANCE held that succession to property was governed by the law of his place of domicile as it existed at the time of his death. As the learned judge said ([1952] 1 All E.R. 499), in dealing with that case, the

relevant date here is when the second marriage took place. Other distinctions could, if necessary, be drawn. Validation Acts give effect to the intention of the parties at the time of the ceremony. No one would describe the legislation in question in *Lynch's* case (2) as in any way analogous. Counsel put what is really the same argument in another form. He submitted that when Henrica landed here she was a spinster. On this basis she acquired, as the learned judge found, a domicile of choice here and her status could not, therefore, be affected by foreign law. As from June 30, 1945—the date on which Order 31 came into force—it seems to us misleading to describe her as a spinster. As from that date her status could be changed into that of a married woman without her consent, on any view, under Austrian law. If, as the learned judge held, our courts will have regard to a retrospective validating Act in respect of persons domiciled here, then that is an incident in their status which is not affected by a subsequent acquisition of domicile.

We have studied the other cases in our courts which were referred to, but we do not get any real assistance from them. The point is a short one and in a special subject-matter. The only cases dealing with that subject-matter to which we were referred were a Canadian and a French decision. In *Doe d. Breakey v. Breakey* (3) the court had to consider the effect in Canada of an Act of the United Kingdom Parliament validating an otherwise invalid marriage in Ireland (An Act for Confirmation of certain Marriages in Ireland, 1842, 5 & 6 Vict. c. 113). The statute was part of the law of Canada so that was decisive, but ROBINSON, C.J., expressed the opinion (2 U.C.R. 357) that effect would have been given to it if it had been the law in Ireland only, “for it is the *lex loci* that must govern”. We respectfully agree. In *Luna v. Godin* (4) the French court gave effect to a law passed in Mexico validating a marriage between French subjects which was invalid by the law of Mexico at the time of the marriage. In a legally perfect world all systems would apply the same rules to the subject under consideration. It is, therefore, some satisfaction that a French court proceeded on the principle which we regard as right. In *Sottomayer v. De Barros* (5) (3 P.D. 5) it was said:

“The law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted . . .”

We see no reason for excluding from that law in this case Order 31 and its effect.

Though we do not base our judgment on the fact that Order 31 was enacted before the parties left Austria, this might have been an obstacle in the way of the petitioner if counsel's main submission had commended itself to us. It is only necessary to add this. We agree with the learned judge that a different and more difficult question would have arisen if the second ceremony of marriage had taken place before the registration. In the absence of any express provision under the foreign law, the conclusion might depend on the state of knowledge of the parties as to the likelihood or possibility of validation, so it had better be left to be dealt with if and when it arises. The appeal is, therefore, dismissed.

Appeal dismissed.

Solicitors: *George & George* (for the petitioner and first party cited); *Treasury Solicitor*; *Culross & Trelawny* (for the second and third parties cited).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

CITY PERMANENT BUILDING SOCIETY v. MILLER AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.J.J.), July 23, 24, 1952.]

Land Registration—Overriding interest—Lease—Oral agreement, evidenced by memorandum in writing, to grant a tenancy for term exceeding three years—Land Registration Act, 1925 (c. 21), s. 70 (1) (k).

A On Oct. 15, 1950, M. agreed orally to grant a lease of a flat to Mrs. C., and on Oct. 16 he executed the following document: "I, [M.] hereby acknowledge to have received from [Mrs. C.] the sum of £228 being three years' rent at 30s. per week in advance in respect of unfurnished premises on the first and second floors of No. 8 Ongar Road, Earl's Court, S.W.5. I agree to grant to [Mrs. C.] an unfurnished tenancy of the above premises for three years from Oct. 16, 1950, and thereafter on a weekly basis, at a rental of 30s. per week." The property in question was registered land, and M. had no interest in it when he executed the document. On Jan. 4, 1951, the proprietor executed a transfer of the property in favour of M., and on the same day M. granted a legal charge on the property to a building society to secure a loan. On Jan. 11, 1951, M. was registered at the Land Registry as proprietor of the property and the building society was registered as chargee in respect of its legal charge. On Jan. 15, 1951, Mrs. C. went into possession of the flat, and, in reliance on the document of Oct. 16, 1950, she remained there after that date without paying rent. The building society now sought possession of the premises.

D HELD: (i) the agreement evidenced by the document of Oct. 16, 1950, related to a term which, under the combined effect of s. 52 (1) and (2) (d), s. 53 (1) (a), and s. 54 (2) of the Law of Property Act, 1925, could be created only by a deed, as it was for a term necessarily exceeding three years by a period of at least a week, and, therefore, the agreement did not create a legal term in the premises, and Mrs. C.'s interest thereunder was, at highest, that of a person who had a contract for the grant of a lease and a right to obtain the specific performance of that contract.

E (ii) notwithstanding that, by s. 3 (x) of the Land Registration Act, 1925, the definition of "lease" covered an "agreement for a lease" unless the context otherwise required, the words: "Leases for any term or interest not exceeding twenty-one years, granted at a rent without taking a fine", in s. 70 (1) (k) of the Act, did not include a mere agreement for a lease, as the word "granted" clearly imported the actual creation of a term, and this excluded, by force of the context, the case of an agreement for a lease having no more than contractual effect, and, therefore, the right which Mrs. C. had acquired under the document of Oct. 16, 1950, was not a "lease" within s. 70 (1) (k) so as to be an "overriding interest" within the sub-section, and she had not acquired an interest which took priority to the legal charge taken by the building society.

AS TO LIABILITY OF REGISTERED LAND TO OVERRIDING INTERESTS, see HALSBURY, Hailsham Edn., Vol. 19, pp. 436-439, paras. 884-888.

Cases referred to:

- H (1) *Coventry Permanent Economic Building Society v. Jones*, [1951] 1 All E.R. 901; 2nd Digest Supp.
 ✓ (2) *Universal Permanent Building Society v. Cooke*, [1951] 2 All E.R. 893; [1952] Ch. 95; 2nd Digest Supp.
 (3) *Woolwich Equitable Building Society v. Marshall*, [1951] 2 All E.R. 769; [1952] Ch. 1; 2nd Digest Supp.
 (4) *King v. Cadogan (Earl)*, [1915] 3 K.B. 485; 84 L.J.K.B. 2069; 113 L.T. 895.

(5) *Samuel v. Salmon & Gluckstein, Ltd.*, [1945] 2 All E.R. 520; [1946] Ch. 8; 115 L.J.Ch. 103; 173 L.T. 358; 2nd Digest Supp.

APPEAL by the second defendant, Mrs. Louie Isabel Cumberland, from an order of HARMAN, J., dated May 14, 1952.

On Oct. 15, 1950, the first defendant, Henry Wilder Miller, orally agreed to grant to the second defendant, Mrs. L. Cumberland, a lease or tenancy of a flat at No. 8, Ongar Road, Earl's Court, although he had no interest in the premises at the time. On Oct. 16, having received £228 from her, he executed the following document: A

"I, Henry Wilder Miller, hereby acknowledge to have received from Mrs. L. Cumberland the sum of £228 being three years' rent at 30s. per week in advance in respect of unfurnished premises on the first and second floors of No. 8 Ongar Road, Earl's Court, S.W.5. I agree to grant to the said Mrs. L. Cumberland an unfurnished tenancy of the above premises for three years from Oct. 16, 1950, and thereafter on a weekly basis, at a rental of 30s. per week." B

The document was signed "Henry Wilder Miller", and a sixpenny stamp was affixed to it. On Jan. 4, 1951, Ware Trading Co., then the proprietor of the property, which was registered land, executed a transfer of it in favour of the first defendant, and, on the same day, the first defendant granted a legal charge on the property to the plaintiff, the City Permanent Building Society, to secure an advance of some £600. On Jan. 10 he gave the key of the premises to the second defendant. On Jan. 11 he was registered at the Land Registry as proprietor of the property, and the building society was registered as chargee in respect of its legal charge. On Jan. 15 the second defendant went into possession of the flat, and, in reliance on the document of Oct. 16, 1950, paid no more rent. After she had been in possession for more than ten months, she learnt that the building society had a claim against the property and denied her right to remain in possession on the terms which she had made with the first defendant. On a summons by the building society claiming possession of the premises, the first defendant did not appear. It was contended on behalf of the second defendant that the agreement between the defendants, which was evidenced by the document of Oct. 16, 1950, created an overriding interest, within the meaning of the Land Registration Act, 1925, s. 70 (1), being a lease for a "term . . . not exceeding twenty-one years, granted at a rent without taking a fine", within s. 70 (1) (k). C D
HARMAN, J., held that the second defendant did not acquire an overriding interest in the premises, as the £228, the receipt of which was acknowledged in the document of Oct. 16, 1950, was a fine, and, accordingly, he gave judgment for the building society. E

F. B. Marsh for the second defendant, Mrs. Cumberland.

G. D. Johnston for the plaintiff, the building society.

The first defendant, the mortgagor, did not appear. F

SIR RAYMOND EVERSLED, M.R., stated the facts, and continued: It may be convenient to note that the effect (on the face of it) of the registration at the Land Registry was to show that, at one and the same time, Miller, the first defendant, became the proprietor of the premises in question and the building society became a chargee in respect of it. The point is this. In *Coventry Permanent Economic Building Society v. Jones* (1) (which was a case relating to unregistered land), HARMAN, J., held that the execution of the conveyance and the execution of the charge or mortgage to the building society [which took place on the same day] must be regarded as contemporaneous in every respect, so that there was no scintilla temporis during which the mortgagor was the unencumbered freehold owner of the property. That decision defeated the claim that a tenancy which the proprietor had purported to grant before he had become the proprietor was, by the operation of the doctrine of estoppel, made into an G H

effective legal interest in the tenant which was binding on the mortgagee notwithstanding that, in the mortgage deed, there was an express exclusion of any right to grant a tenancy without the consent of the mortgagee. In the *Coventry* case (1) the tenant was in possession at the date when the conveyance and mortgage were executed. The decision of HARMAN, J., in that case was considered in this court in *Universal Permanent Building Society v. Cooke* (2), but the court expressed no view on its validity. In *Woolwich Equitable Building Society v.*

A *Marshall* (3) DANCKWERTS, J., indicated that he did not share the view of HARMAN, J., in the *Coventry* case (1), and, in any case, he did not think that the *Coventry* case (1) should be followed where (as in the case before him) the mortgage deed contained a recital of the fact that the mortgagor was the freehold owner of the property. In the present case the two documents, the transfer and the charge, were executed on the same day. Counsel for the building society submitted that B since no legal estate passed to the proprietor until registration, the fact that the registration shows, on the face of it, that Miller was proprietor subject to the charge, which is certified at the same time, would support the application of the *Coventry* case (1) to the present case—in other words, that there is no room here for any *scintilla temporis* during which Miller was the unencumbered registered owner of the property. For reasons which I shall later explain, I do not think it C necessary to express any view on that matter.

The argument on behalf of the second defendant, Mrs. Cumberland, rests in this court, as it did in the court below, on the Land Registration Act, 1925, s. 70 (1), it being the contention of counsel on her behalf that the right or interest which, he says, she acquired from Miller is one which, within the meaning of s. 70 (1), overrode the registration in favour of Miller and the mortgagee. D Section 70 (1) reads:

“ All registered land shall, unless under the provisions of this Act the contrary is expressed on the register, be deemed to be subject to such of the following overriding interests as may be for the time being subsisting in reference thereto . . . ”

E There is then a list, in lettered paragraphs, and the one on which counsel for Mrs. Cumberland fastens his claim is para. (k):

“ Leases for any term or interest not exceeding twenty-one years, granted at a rent without taking a fine.”

It will be convenient to refer to para. (x) and para. (xvi) of s. 3, the definition section, before I proceed further. Section 3 (x) reads:

F “ ‘ Lease ’ includes an under-lease and any tenancy or agreement for a lease, under-lease or tenancy.”

Section 3 (xvi) is:

“ ‘ Overriding interests ’ mean all the incumbrances, interests, rights, and powers not entered on the register but subject to which registered dispositions are by this Act to take effect . . . ”

G In the circumstances, I do not think that the definition of “ overriding interests ” assists in the present problem. The real question is whether the definition of “ lease ” in s. 3 (x) so extends the terms of s. 70 (1) (k) as to cover this case. Section 3 opens with the well-known cautionary formula:

“ In this Act unless the context otherwise requires, the following expressions have the meanings hereby assigned to them . . . ”

H In my opinion, notwithstanding the expansion of the word “ lease ”, the answer to Mrs. Cumberland’s claim is that she did not at any time obtain and has not got a “ lease ”, within the meaning of s. 70 (1) (k), “ granted at a rent without taking a fine ” for a “ term not exceeding twenty-one years ”. That depends, as I shall show, on the view which I take that, in spite of the definition in s. 3 (x), “ lease ” cannot be treated for this purpose as comprehending an agreement not itself creating, and not effective to create, a term of years at all, but only operating

(at best) so as to give a right in a court of equity to specific performance of a contract to grant a lease.

Before I come to that point there is another question, namely, whether the application of s. 70 (1) (*k*) was excluded because the document of Oct. 16, 1950, was not a lease for a term granted at a rent "without taking a fine". It was the view of the learned judge, who decided in favour of the building society on a point which depends, primarily, on the construction of the document itself, that the £228 which Miller succeeded in extorting from Mrs. Cumberland was a premium and, therefore, a fine. The material passage in his judgment is this:

"When I look at this document, I find it an agreement to grant a term of three years for a sum of £228 payable in advance. It does not say that £228 is rent: it merely describes it as equivalent to 30s. a week . . . It does not seem to me to be a lease granted without taking a fine."

Criticising that passage in the judgment, counsel for Mrs. Cumberland suggested that the learned judge had misread the document, and, in a measure, I agree with counsel. I do not think it correct to say, as the judge is recorded to have said, that the document merely describes the £228 as "equivalent to 30s. a week". The document says:

"I . . . Miller . . . acknowledge to have received from Mrs. L. Cumberland the sum of £228 being three years' rent at 30s. per week in advance . . ."

As HODSON, L.J., pointed out during the argument, £228 is not a correct calculation for three years' rent at 30s. a week. The right amount is £234. As a matter of construction, however, I think that the effect would be the same if no sum had been done and if the document had read: "I, Miller, hereby acknowledge to have received from Mrs. Cumberland three years' rent at 30s. a week in advance". Moreover, I think that, when regard is had to such definitions or expositions of the words "fine" and "premium" as may be found, for example, in the Law of Property Act, 1925, s. 205 (1) (xxiii), in the Landlord and Tenant (Rent Control) Act, 1949, s. 18 (2), and in the language of WARRINGTON, L.J. ([1915] 3 K.B. 492) in *King v. Cadogan (Earl)* (4), and when regard is also had to the ordinary sense of the words, there is much to be said for the view that the sum of £228, expressed to be an advance payment of 30s. a week rent over three years, is neither a "fine" nor a "premium". On the other hand, it was obviously a device, expressed in a particular way, on Miller's part to get a lump sum, and to substitute a lump sum for a recurring weekly payment during the period from Oct. 16, 1950, to Oct. 16, 1953, and I certainly do not wish to lend any encouragement to the consequences which might flow from a decision of this court that a lump sum, paid like this so as to cover the financial obligations of the tenant for three years, was not capable of being regarded as a fine or premium, and thereby to encourage persons of Miller's calibre to enter into transactions of this sort. I prefer, therefore, to express no view one way or the other on the particular point which commended itself to the learned judge, since I do not think it is necessary that I should.

I can quickly pass over a point taken by the building society that the document of Oct. 16, 1950, is not a contract which would be capable of specific performance. As at present advised, I am disposed to think that it was an effective contract for the purposes of an action for specific performance, and that, if Mrs. Cumberland had sued for specific performance, she would have been entitled to succeed, assuming, of course, that Miller had an interest in the land capable of supporting such a decree. I, therefore, proceed on the view that, on the face of it, as a result of this transaction, Mrs. Cumberland acquired a right to obtain from a court of equity an order for the grant to her of a term of years as stated in the document in respect of the premises therein described. But, in my judgment, she never got anything more than that. As counsel for the building society pointed out,

the effect of the contract was that Miller obliged himself to grant to Mrs. Cumberland a term in the premises of three years plus one week at the least, and, having regard to that fact, and to the joint effect of s. 52, s. 53 (1) (a) and s. 54 of the Law of Property Act, 1925, such an agreement is not capable of conferring on the tenant any estate in the property. For a tenant to acquire an estate of over three years, a deed is necessary.

A I, therefore, proceed to a consideration of the main problem, bearing in mind that Mrs. Cumberland's interest was, at the most, that of a person who had a specifically enforceable contract for the grant of a lease for at least three years and a week. In his reply, counsel on her behalf said that she took an equitable term and that, during the moment of time when Miller was registered proprietor unencumbered by the charge, that equitable term ripened into a legal interest. I am unable to accept any stage of that argument. I do not think that she had an equitable term. Indeed, I do not think that that phrase can mean anything except that she had the right to get specific performance of the contract, and, assuming in her favour that there was a punctum temporis when Miller was the unencumbered proprietor of the property, I am clear that the effect of it was not to create any legal estate in Mrs. Cumberland, more particularly since she was not at that time in occupation.

B
C Having dealt with those points, I shall now give my reasons for the conclusion which I have already anticipated. It seems to me that the use of the word "granted" in s. 70 (1) (k) of the Land Registration Act, 1925, whether it be applied to the word "lease" or the word "term", indicates, on the face of it, that the lease or agreement for a lease which is to be an overriding interest must be a lease or agreement which is effective to create a term. An agreement for a tenancy or to grant a tenancy for a year would be so effective if the tenant were in possession, but I have felt compelled, on a review of the whole of the relevant legislation, to conclude that such a limitation of the expanded word "lease" is inevitably imposed by the use of the word "granted". As I have already said, the definitions in s. 3 of the Land Registration Act, 1925, are to be read subject to the requirement of the context, and, accordingly, I have come to the conclusion
D
E which I have stated. That view is clearly borne out by s. 48 (1) of the same Act, the opening words of which are:

"Any lessee or other person entitled to or interested in a lease of registered land, where the term granted is not an overriding interest . . ."

F If there be any doubts about the use of the word "granted", they are, to my mind, inevitably resolved by a consideration of the scheme of this legislation, looking not only at the Land Registration Act, 1925, but also at the Land Charges Act, 1925. It is not to be forgotten that, from the conveyancing point of view, the main purpose of the real property legislation of 1925 was, broadly speaking, to simplify legal estates and charges and conveyancing practice by keeping all equities off the title—a point emphasised by the terms of s. 74 of the Land
G Registration Act, 1925. It would, therefore, be surprising if, in the case of registered land, the registered proprietor found that the legal estate was subject to an equitable right of this kind, viz., the right of another person to specific performance of a contract to grant a tenancy of the land, and it would be particularly so when the other party to the contract was not, at the time of the contract, the registered proprietor and, therefore, the party claiming could in no circumstances
H have had any notice or caution entered on the register. If the contention of counsel for Mrs. Cumberland were right, it would also have the result (again surprising) that in this respect the proprietor of the registered land would be in a worse position than the transferee of unregistered land. These strange results are, I think, clearly negated by a consideration of the other matters to which I have already alluded.

A contract such as this contract is within the class of "estate contracts" covered by s. 10 (1), class (C), para. (iv), of the Land Charges Act, 1925, and

registrable as a land charge in the register of land charges. Section 23 (1) of the same Act says that as respects such land charges

“ . . . required to be registered . . . after the commencement of this Act, this Act shall not apply thereto, if and so far as they affect registered land, and can be protected under the Land Registration Act, 1925 . . . ”

—not, be it observed, as overriding interests, but

“ . . . by lodging or registering a . . . restriction, caution . . . or other notice.”

That provision is reflected by s. 59 (1) of the Land Registration Act, 1925, which says that

“ . . . [an] order . . . or other interest which in the case of unregistered land may be protected by registration under the Land Charges Act, 1925, shall, where the land affected . . . is registered, be protected only by lodging a . . . caution . . . ”

That makes it quite clear that, if there is a contract which could, and should, be registered as a land charge in the case of unregistered land pursuant to the provisions of the Land Charges Act, 1925, then there is a corresponding provision in the Land Registration Act, 1925, which entitles the person claiming under it to register a caution or notice. If it is not so capable of protection under the Land Registration Act, it continues to be covered by the Land Charges Act. In other words, it is quite plain that the Land Charges Act is not wholly excluded quoad registered land.

Those provisions, I think, also make it clear that, if counsel for Mrs. Cumberland is right, there would be two mutually repugnant provisions in the legislation: (i) the sections under the Land Charges Act, 1925, read with s. 59 of the Land Registration Act, 1925, giving protection by notice of certain interests and providing that, in the absence of such protection or of registration under the Land Charges Act, they are avoided, and, at the same time (ii) another section (namely, s. 70 (1) (k) of the Land Registration Act, 1925) providing that, though there be no notice of any protection or right to protection, still they are overriding interests to which the proprietor is subject, and, as I understand the argument, they are such even though they could never have been registered since the other party to the contract was never at any relevant date proprietor of the land. I think that such a repugnance in the Act itself must be avoided if a fair construction which avoids it can be given to the language. That is, perhaps, another approach to the conclusion which I have already reached on the use of the word “granted” in s. 70 (1) (k) of the Land Registration Act, 1925. Without, therefore, further elaboration, I think that the right which Mrs. Cumberland acquired, if any (and I assume that it was a right against Miller which, if Miller had the land, would have been specifically enforced against him), is not such a right as is comprehended by s. 70 (1) (k) as an “overriding interest”. It will be observed that I have not said, and I do not say, that all these overriding interests must necessarily be “legal” interests, i.e., rights enforceable by an action at law. It may or may not be so. Counsel for Mrs. Cumberland gave an instance under s. 70 (1) (g), where the right might be a purely equitable right. But that, again, is not a matter that I need decide. Nor need I pursue the question whether, apart from the difficulty which I have already mentioned, it could be said that, in this case, there was a term granted “at a rent”, although for three years, *ex concessis*, nothing would have been payable by way of rent. I base my decision on the point which I have tried to explain, and, for the reasons which I have stated, I think that this appeal fails.

JENKINS, L.J.: I agree. The sole question is which of two innocent persons must bear a loss occasioned by the fraud of a third party, and it must be determined simply as a question of law.

Counsel for Mrs. Cumberland founded himself on the contention that the agreement between Miller and Mrs. Cumberland, evidenced by the memorandum of Oct. 16, 1950, created an "overriding interest" within s. 70 (1) (k) of the Land Registration Act, 1925. Section 70 (1) provides:

"All registered land shall, unless under the provisions of this Act the contrary is expressed on the register, be deemed to be subject to such of the following overriding interests as may be for the time being subsisting in reference thereto . . ."

Paragraph (k) of the sub-section is:

"Leases for any term or interest not exceeding twenty-one years, granted at a rent without taking a fine."

In support of this contention counsel for Mrs. Cumberland advanced two arguments. First, he submitted that the agreement evidenced by the memorandum signed by Miller was apt to create a legal term in Mrs. Cumberland, and would have done so but for the fact that, at the time when it was entered into, Miller himself had not got the requisite estate to support the term. But (the argument proceeds) when Miller completed his purchase and the property was transferred to him, then, although the transfer was immediately followed by the legal charge to the building society, and although the registration of his interest as proprietor and the building society's interest as chargee were effected contemporaneously, nevertheless there must have been a scintilla of time when Miller was the unencumbered owner of the property, and in that instant of time (so proceeds the argument) Mrs. Cumberland's interest as lessee was perfected by estoppel, and she thus became entitled to a lease which was an overriding interest within s. 70 (1) (k), being a lease for a "term . . . not exceeding twenty-one years, granted at a rent without taking a fine."

To that argument I cannot accede. I have no wish to traverse again unnecessarily the ground covered by my Lord's judgment, but, putting the point as shortly as I can, the fatal flaw in the argument appears to me to be this. By the combined effect of s. 52 (1) and (2) (d), s. 53 (1) (a), and s. 54 (2) of the Law of Property Act, 1925, this agreement, evidenced by the memorandum signed by Miller, was not apt to create a legal term in the premises, inasmuch as the agreement, being for a term of three years from Oct. 16, 1950, and thereafter on a weekly basis at a rental of 30s. per week, was an agreement for a term necessarily exceeding the three years by a period of at least one week, and, accordingly, related to a term which could only be created by deed. It follows, in my view, that the interest of Mrs. Cumberland under this agreement was, at highest, that of a person who had a contract for the grant of a lease and a right to obtain the specific performance of that contract.

Counsel for Mrs. Cumberland, however, contended that this did not conclude the matter, and he submitted, as his second argument, that, even if there is no actual lease here, nevertheless Mrs. Cumberland is entitled to succeed on the ground that the description of "overriding interest" mentioned in s. 70 (1) (k) of the Land Registration Act, 1925, extends to agreements for leases. Conceding all else in Mrs. Cumberland's favour, viz., that the agreement is a sufficiently complete and definite agreement to make it capable of specific performance, and that, for a moment of time during the completion of the transaction consisting of the transfer to Miller and the charge by Miller to the building society, Miller had a sufficient interest in the property to constitute this a specifically enforceable contract, nevertheless, in my judgment, this second argument must also fail. I take that view because, in my judgment, the description of "overriding interest" mentioned in s. 70 (1) (k) is not apt to include a mere agreement for a lease. Counsel relied on the definition of "lease" contained in s. 3 (x) of the Land Registration Act, 1925, which is in these terms:

"'Lease' includes an under-lease and any tenancy or agreement for a lease, under-lease or tenancy."

He argued that the word "leases" in s. 70 (1) (k) of the same Act must, accordingly, be construed as including agreements for leases, but, as my Lord has pointed out, the definitions in s. 3 are prefaced by the familiar form of words:

"In this Act unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say . . ."

In my view, the context afforded in s. 70 (1) (k) does "otherwise require". It refers to

"Leases for any term or interest not exceeding twenty-one years, granted at a rent without taking a fine."

In my judgment, the use there of the word "granted" clearly imports the actual creation of a term of years, whether it is done by deed or by an agreement under hand only in that class of case in which a legal term can be created by a document not under seal, or, indeed, by parol in any case in which an actual tenancy taking effect at law may be created without writing. But, in my judgment, the word "granted" necessarily imports the actual creation of a term, and this excludes, by force of the context, the case of a mere agreement for a lease having no more than a contractual effect. To include such a case, in my judgment, s. 70 (1) (k) should have read "granted or agreed to be granted".

There are two further points. Section 70 (1) (k) only extends to leases "granted at a rent without taking a fine". The learned judge held that the £228, the receipt of which was acknowledged in the document of Oct. 16, 1950, was a fine, and in so holding he did not refer to the fact that it was actually expressed in the document to be "three years' rent at 30s. per week in advance". I prefer to reserve for some future occasion the question whether such a payment as this, made in commutation of rent and described as rent in advance, amounts in law to a fine. If such a payment is not capable in some circumstances of amounting to a fine, it is obvious that in these days of housing shortage a ready way would be provided of evading the legislation which restrains the exaction of premiums. I, therefore, leave the question whether a sum paid and acknowledged in the particular form of words here used is in law a fine. It remains to consider whether, apart from the fact that this was a mere agreement to grant and not a grant, the lease here in question could have been said to have been granted "at a rent". In my judgment, in the circumstances of this case the document in question can hardly be described as an agreement for the grant of a lease at a rent in any ordinary sense of that expression. Surely, the expression "rent", in the context "granted at a rent", must connote a periodical payment issuing out of the land during the period of the grant, and I should hardly have thought that a grant of a term of three years in consideration of a lump sum, expressed to be the whole of the rent payable during that period, would appropriately be described as a "lease granted at a rent".

But the reason on which I prefer to found myself is simply that, in my judgment, in the context afforded by s. 70 (1) (k) of the Land Registration Act, 1925, the "overriding interest" there described does not extend to a mere agreement for the grant of a lease. As my Lord has pointed out, that conclusion seems, on the whole, to be supported by a comparison of the provisions of the Land Charges Act, 1925, with those of the Land Registration Act, 1925, and, if those provisions are looked at, it cannot be said that the conclusion which I have stated leaves wholly unprotected a person holding an agreement for the grant of a lease who has not entered into actual occupation so as to qualify for the protection afforded by s. 70 (1) (g) of the Land Registration Act, 1925, because the course contemplated in such cases appears to be that the person claiming an interest of that description, which would be an "estate contract", or, in other words, a land charge, Class (C), falling within the provisions of s. 10 of the Land Charges Act, 1925, should make application at the Land Registry under the Land Registration Act, 1925, for the registration of a caution in respect of such interest. That

appears to be provided for by s. 59 of the Land Registration Act, 1925. In the result, therefore, for the reasons given by my Lord and such reasons of my own as I have been able to add, I agree that it is not here shown that Mrs. Cumberland acquired any interest which took effect in priority to the legal charge taken by the building society, and, accordingly, this appeal fails and must be dismissed.

A HODSON, L.J., said that he agreed with SIR RAYMOND EVERSHED, M.R., and JENKINS, L.J., that the interest which Mrs. Cumberland had in the premises was not an "overriding interest" within the language of s. 70 (1) (k) of the Land Registration Act, 1925, and he continued: HARMAN, J., decided that, by reason of the definition of "lease" in s. 3 (x) of the Land Registration Act, 1925, "lease", within the meaning of s. 70 (1) (k) of the same Act, included an agreement for a lease or tenancy. Having considered the document of Oct. 16, 1950, B an agreement for a tenancy, he came to the conclusion that it was not "without taking a fine". I do not desire to dissent from the learned judge's conclusion on that matter, notwithstanding that, in referring to the document, he said:

"It does not say that £228 is rent; it merely describes it as equivalent to 30s. a week . . ."

C I do not think that those words really apply to the document, because the £228 is described therein as "rent". But, as UTHWATT, J., said ([1945] 2 All E.R. 522) in *Samuel v. Salmon & Gluckstein, Ltd.* (5), when considering the terms of a lease:

D "The parties may write the agreement in such terms as they please and, if so minded, may attach any label they wish to the payments agreed to be made by the lease. But, when all that is done, it is for the law to decide on the effect of the document what payments are rent reserved and what not."

E Therefore, the learned judge may be right in his conclusion that, on the true construction of the document, it is an agreement to grant a term of three years for a sum of £228 payable in advance, and that it is not a lease "granted . . . without taking a fine", within s. 70 (1) (k) of the Land Registration Act, 1925. The definition of "fine" in the Law of Property Act, 1925, s. 205 (1) (xxiii), includes the word "premium", and the definition of "premium" in the judgment of WARRINGTON, L.J., in *King v. Earl Cadogan* (4) is as follows ([1915] 3 K.B. 492):

F " . . . 'premium', as I understand it, used as it frequently is in legal documents, means a cash payment made to the lessor, and representing, or supposed to represent, the capital value of the difference between the actual rent and the best rent that might otherwise be obtained. It is a very familiar expression to everybody who knows the forms and powers of granting leases."

G In the present case, on the view of the transaction that commends itself to me, there was a payment made in advance and in respect of premises let at no rent, and, if that is so, it is not covered by the provisions of s. 70 (1) (k) of the Land Registration Act, 1925. If that were the position, Mrs. Cumberland could never have an "overriding interest" consisting of an equitable right to specific performance, because the exaction of a premium by Miller would itself be a criminal H offence, and she would be a party to the crime: see the Landlord and Tenant (Rent Control) Act, 1949, s. 2. In my judgment, the appeal fails.

Appeal dismissed.

Solicitors: *L. A. E. Stiles* (for the second defendant); *Beddington Hughes & Hobart* (for the plaintiff building society).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

FACTORS (SUNDRIES), LTD. v. MILLER AND ANOTHER.

[COURT OF APPEAL (Somervell, Birkett and Hodson, L.JJ.), June 25, 26, 1952.]

Landlord and Tenant—Lease—Forfeiture—Breach of covenant—Under-letting without consent—Relief of under-lessee—Period of lease granted to under-lessee—Property controlled under Rent Restrictions Acts—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 15 (3)—Law of Property Act, 1925 (c. 20), s. 146 (4)—Under-lessee an assisted person—Contribution assessed at nil—Order to pay sum equal to party and party costs as condition of relief under Law of Property Act, 1925 (c. 20), s. 146 (4)—Legal Aid and Advice Act, 1949 (c. 51), s. 2 (2) (e). A

By a lease, dated Jan. 20, 1950, the landlords let to a tenant a flat to which the Rent Restrictions Acts applied for a term of five years from Jan. 23, 1950, the lease containing a covenant not to under-let without the landlords' consent. In breach of the covenant, the tenant sub-let the premises on a monthly tenancy. The sub-tenant thought that the tenant had power to sub-let and paid rent regularly to the tenant. In an action by the landlords for possession against the sub-tenant, the county court judge held that the sub-tenant was not a sub-tenant to whom the premises had been lawfully sub-let within s. 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and, therefore, he was not entitled to protection under that sub-section, but he made an order under s. 146 (4) of the Law of Property Act, 1925, granting him a lease expiring on the date of expiry of the lease to the tenant, viz., Jan. 22, 1955. The sub-tenant was an assisted person whose contribution had been assessed at nil. The county court judge, as a condition of granting him relief, directed him to pay to the landlords a lump sum equal to the party and party costs of the proceedings. B C D

HELD: (i) there was no conflict between s. 146 (4) of the Act of 1925 and the Rent Acts, and, although the sub-tenant was not protected under s. 15 (3) of the Act of 1920, he was entitled to seek relief under s. 146 (4), the fact that, at the expiration of a lease granted to him under s. 146 (4) he could claim the protection of the Rent Acts being a relevant circumstance for the court to consider in deciding whether to grant relief. E

(ii) the concluding words of s. 146 (4) did not mean that, although the sub-tenant could not require it, the court could grant a longer term than the sub-tenant had under the original sub-lease, and the term granted should be reduced to a month. F

(iii) in deciding the terms on which relief should be given, it was open to the county court judge to make a condition that a sum equal to costs on a solicitor and client basis should be payable by the sub-tenant; s. 146 (4) gave the judge a wide discretion; and in the circumstances the condition which he made should not be interfered with.

(iv) the order for a lump sum payment was not an order to pay costs within s. 2 (2) of the Legal Aid and Advice Act, 1949, but was an order to pay a sum equal to the costs as a condition of relief under s. 146 (4), and so could properly be made. G

FOR THE LAW OF PROPERTY ACT, 1925, s. 146 (4), see HALSBURY'S STATUTES, Second Edn., Vol. 20, p. 745.

Cases referred to:

- (1) *Egerton v. Jones*, [1939] 3 All E.R. 889; [1939] 2 K.B. 702; 108 L.J.K.B. 857; 161 L.T. 205; 31 Digest, Replacement, 545, 6670.
- (2) *Ellerman v. Lillywhite*, (1923), unrep.
- (3) *Ewart v. Fryer*, [1901] 1 Ch. 499; 70 L.J.Ch. 138; 83 L.T. 551; *affd.* *H.L. sub nom. Fryer v. Ewart*, [1902] A.C. 187; 71 L.J.Ch. 433; *sub nom. Watney, Combe, Reid & Co. v. Ewart*, 86 L.T. 242; 31 Digest, Replacement, 552, 6724. H

(4) *Imray v. Oakshette*, [1897] 2 Q.B. 218; 66 L.J.Q.B. 544; 76 L.T. 632; 31 Digest, Replacement, 554, 6738.

(5) *Matthews v. Smallwood*, *Smallwood v. Matthews*, [1910] 1 Ch. 777; 79 L.J.Ch. 322; 102 L.T. 228; 31 Digest, Replacement, 554, 6739.

APPEAL by the landlords and CROSS-APPEAL by the sub-tenant from an order of His Honour JUDGE SIR HENRY BRAUND, made at Willesden County Court on Apr. 4, 1952, in an action for possession.

A The landlords were the owners of a flat which, on Jan. 20, 1950, they let to the tenant, Miller, for five years from Jan. 23, 1950. The lease contained a covenant not to assign, transfer, under-let, or part with possession of the flat without the consent of the owners, such consent not to be unreasonably withheld. In March, 1950, the tenant, without obtaining the landlords' consent, let the flat to the sub-tenant, Goldin, on a monthly tenancy. The tenant failed to pay

B any rent to the landlords, and in June, 1950, the landlords' representative called at the flat and found the sub-tenant in possession. The sub-tenant was unaware of the covenant against under-letting and thought that the tenant was an estate agent with power to under-let. He had paid rent regularly to the tenant. In July, 1951, the landlords, being unable to obtain any rent from the tenant,

C issued a writ in the High Court claiming possession against the tenant and sub-tenant. The tenant did not enter an appearance, and on Nov. 8, 1951, judgment was signed against him in default. The sub-tenant contended that, as the landlords had spent so long a period in trying to obtain rent from the tenant, they must be taken to have waived the breach of covenant by the tenant with the result that he (the sub-tenant) was a sub-tenant to whom the premises had been lawfully sub-let and so was entitled to the protection of s. 15 (3) of the

D Increase of Rent and Mortgage (Interest) Restrictions Act, 1920. Alternatively, he claimed relief against forfeiture under s. 146 (4) of the Law of Property Act, 1925. The county court judge held that there had been no waiver, but he made an order under s. 146 (4) of the Act of 1925, granting a lease expiring on Jan. 22, 1955, and making it a condition of relief that the sub-tenant, who was an assisted

E person whose contribution had been assessed at nil, should pay a lump sum equal to the party and party costs. The landlords appealed from the order granting relief and the sub-tenant cross-appealed from the finding against waiver and the condition as to relief.

G. B. M. Reed for the landlords.

D. C. Potter for the sub-tenant.

F **SOMERVELL, L.J.**, stated the facts, held that there had been no waiver by the landlords of the breach of covenant not to sub-let, and that the sub-tenant was not entitled to protection under s. 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and continued: In my opinion, counsel has failed to establish that, taking the facts as found, this was not a case in which the sub-tenant was not entitled to relief, leaving open his other

G argument connected with the legal effect of s. 146 (4) in relation to rent-restricted houses.

The learned judge made an order that the sub-tenant should have a lease expiring on Jan. 22, 1955—the date of expiry of the lease to the tenant. The concluding words of s. 146 (4) are

“in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease.”

H It was suggested that those words might mean that, though he could not require, he could be granted, a longer lease. Although I think the drafting might have been a little more apt if those words had, as it were, picked up the earlier words in the section as to the sub-lessee's application, my own view is that they clearly limit the jurisdiction of the judge to the granting of a lease for the term that the sub-lessee had or a shorter term. I think, therefore, that the order must be amended to that extent.

The next point taken was based on the existence of the Rent Restrictions Acts. It was said that there was a conflict between s. 146 (4) of the Law of Property Act, 1925, and the Rent Restrictions Acts in that, under s. 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, a sub-tenant other than a sub-tenant to whom the premises have been lawfully sub-let cannot get the protection of that Act, under s. 146 (4) the legislature contemplated that the protection should extend only to the length of the sub-lease, and, if the premises are rent restricted, the granting to the sub-lessee of a lease for a period, however short, will enable him to claim the protection of those Acts. Therefore, it is said that s. 146 (4) is, in effect, being used to give a lease of an indefinite duration. I do not think there is any conflict between the statutes. The position, as it seems to me, is that under s. 15 (3) sub-tenants lawfully in possession are to be in a much more favourable position than are under-lessees under s. 146 (4), but it would be impossible to suggest that s. 15 (3) should be regarded as taking away by implication the rights which those who do not come within it have under other statutes. At the time when the Act of 1920 was passed the rights in question existed under the Conveyancing and Law of Property Act, 1892, s. 4. They now exist under the Law of Property Act, 1925. A sub-tenant who cannot come within s. 15 (3) is plainly entitled, in my view, to seek relief under s. 146 (4). I think that the existence of the Rent Restrictions Acts and their effect on contractual tenancies when they come to an end by operation of time or by notice to quit is a relevant circumstance for the court to consider in deciding whether or not to grant relief under s. 146 (4), and in this case the learned judge did consider the effect of those Acts. I think, in substance, he proceeded on this basis—a basis which, in my view, affords ample justification for the conclusion to which he came. The landlords were interested in getting the rent from the tenant. They saw the sub-tenant and they took no objection to him. It is a reasonable inference that, if they had got their rent, they would not have bothered about the breach of covenant. The learned judge might well have supposed that, if the tenant had been a satisfactory tenant and paid his rent, there would have been no objection by the landlords, if asked, to the sub-lease. If they had purported to withhold their consent, it might well have been held to be unreasonable. The result is that in a case like this where what the landlords are really interested in as against the tenant is the non-payment of rent, the court, in granting relief is in substance, though not technically, putting the sub-lessee in much the same position as if he had been a lawful sub-tenant and consent to the sub-tenancy had been given, or, if it had been refused, it had been shown to have been unreasonably withheld. I do not think that is in any way an illogical position or indicates any conflict between the application of the two Acts.

When one comes to consider the terms on which relief is to be given counsel for the landlords relied on a statement ([1939] 3 All E.R. 892) by SIR WILFRID GREENE, M.R., in *Egerton v. Jones* (1) that, prima facie, in this class of case the landlords are entitled to be put back into the position that they would have been in if the forfeiture had not occurred. That is the prima facie position, and as between lessor and lessee obviously one can see very strong grounds for it, but, no doubt, in respect of some particular expense it could be displaced, and the position may be different when the court is considering the position of a sub-lessee who has not committed the breach on which the claim for forfeiture is based. The learned judge, undoubtedly, took the view—and I agree with him—that the landlords had not treated the sub-tenant reasonably. I do not mean to say that they were trying to do him some harm or anything like that, but they allowed him to remain in possession for all those months and there was evidence that he had spent money on the property. That was a circumstance which, I think, the learned judge was entitled to have in mind in considering what the terms should be. The main term complained of is that the imposing as a condition of relief that the sub-tenant should pay a sum equal to the party and party costs was wrong, because the landlords should have been given an

A indemnity on a solicitor and client basis. It was said that the solicitor and client basis would not apply to such part of the proceedings as took place in the county court. I do not think that that in itself is a good answer. I think it was plainly open to the learned judge to make a condition that a sum equal to the costs on a solicitor and client basis should be payable in respect of the whole proceedings. The exact form it is not necessary to consider, but it is what I call an indemnity in respect of reasonable expenses. Party and party costs do not provide such an indemnity. Section 146 (4) gives the learned judge a very wide discretion with regard to these conditions, and I do not think there would be any justification for our interfering.

B The second point in the cross-appeal is that the order for a lump sum payment equal to the party and party costs was an improper exercise of the learned judge's discretion owing to the fact that the sub-tenant was an assisted person whose contribution had been assessed at nil. The learned judge said that, while he was making this order, it had escaped his memory that the sub-tenant was an assisted person. He goes on:

C "It also became necessary for me to consider whether, in view of the circumstances that the [sub-tenant] is an assisted person, I ought to review my judgment as to the terms on which relief should be granted. Counsel has not been able to refer me to any case in which the situation has arisen. In all the circumstances I do not think it could be right or proper for me to do so."

On this point the argument is based on s. 2 (2) of the Legal Aid and Advice Act, 1949, which provides:

D "Where a person receives legal aid in connection with any proceedings . . . (e) his liability by virtue of an order for costs made against him with respect to the proceedings shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute."

E It is submitted on behalf of the sub-tenant that, having regard to the fact that his assessment in respect of his own costs was nil, there are no grounds on which, treating this as an award of costs, it would have been reasonable to order him to pay the costs in full. But, as the learned judge pointed out, this condition of relief is not an order to pay costs in the ordinary sense. It is a payment of a sum equal to the costs as a condition of relief, and that seems to me to put it into a wholly different category from the costs contemplated by s. 2 (2) (e). The learned judge puts it in this way:

F "I take the view that the [sub-tenant] has two capacities, the first as an assisted defendant, the other as a tenant petitioning for relief against forfeiture."

G I agree with that. It is said by counsel for the sub-tenant that this may prevent his being able to take advantage of the relief. The learned judge was not satisfied that it would, and having regard to the evidence he was clearly entitled to come to that conclusion. In any event, I think it would be impossible to hold that the Legal Aid and Advice Act, 1949, which is designed to assist persons to litigate, should impliedly have cut down the rights of landlords in respect of the granting of relief under s. 146 (4). Therefore, I think that that point on the cross-appeal fails and subject to the question of reducing the term to a month I think the appeal also fails.

H **BIRKETT, L.J.:** I am entirely of the same opinion.

HODSON, L.J.: I also agree. I think that the learned county court judge was wrong in extending the period of the sub-tenancy (which he granted in relief of the forfeiture which the sub-tenant had incurred) beyond the period of

the original sub-lease. His attention was not, as I understand it, drawn to the last three lines of s. 146 (4) of the Law of Property Act, 1925:

" . . . in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease."

The original sub-lease was granted in March, 1950, and was only a monthly tenancy. The county court judge, in proposing the form of the order, proposed that the term should be one expiring on Jan. 22, 1955, A

" at the same rent and subject to the same terms and conditions and subject to the like covenants on the part of the landlord and the tenant to be performed and observed as are contained in the agreement dated Jan. 20, 1950."

I think there was no jurisdiction to go so far. The passage in *FOA ON LANDLORD AND TENANT*, 7th ed., p. 655, which deals with s. 146 (4) says: B

" . . . the concluding words appear to confine it to the duration of the under-lease; and it has been held that the jurisdiction of the court is limited accordingly."

In support of that, reference was made to an unreported decision of *RUSSELL, J.*, in *Ellerman v. Lillywhite* (2) on similar words in s. 4 of the Conveyancing and Law of Property Act, 1892. Counsel for the sub-tenant was not prepared to accept the proposition in the text-book because all that the statute says is that the under-lessee shall not be entitled to require a lease, without limiting the power of the court to grant relief. I should scarcely have expected to find that the court was entitled to give something more than the sub-tenant was entitled to require, and I do not so read the sub-section. This point was mentioned, though obiter, by *ROMER, L.J.*, in *Ewart v. Fryer* (3). Dealing with s. 4 of the Conveyancing Act, 1892, where the words are the same as s. 146 (4) of the Act of 1925, he said ([1901] 1 Ch. 515): C

" [The court] is bound to have regard to the words at the end of the section, and not to give [the lessee] a longer term than the term of his underlease." D

It must be taken to be clear that that is the meaning of the last three lines of s. 146 (4). The real substance of the matter was, as counsel for the landlords put it, that while relief can only be granted to the extent of a monthly tenancy, his client is going to be saddled with a statutory tenant under the Rent Acts for an indefinite period. I desire to add nothing to what has fallen from my Lord on that topic. I think there is no conflict between the Rent Restrictions Acts and the Law of Property Act, 1925, which leads to an impossible position. I agree, therefore, that the cross-appeal fails, but that the appeal of the landlords ought to be allowed in part so that the order should be amended to limit the term of the sub-lease. E

Appeal allowed in part; cross-appeal dismissed. F

Solicitors: *Albert G. Berry & Co.* (for the landlords); *Goldingham, Wellington & Co.* (for the sub-tenant). G

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

Re WHARFEDALE BREWERY CO., LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), July 23, 1952.]

Company—Winding-up—Voluntary winding-up—Dividend arrears—Cumulative preferential dividends—Profits available for dividend insufficient to cover arrears—Fund out of which arrears payable.

A By a special resolution passed in 1896 the capital of a company was increased by the creation of preference shares which were “to confer on the holders thereof the right to a fixed cumulative preferential dividend at the rate of six per centum per annum on the capital paid up thereon respectively and such preference shares shall rank both as regards dividend and capital in priority to the other shares but shall not confer any further right to participate in profits or surplus assets”. In January, 1952, the company by special resolution resolved that it be voluntarily wound-up. The arrears of the fixed dividend on the preference shares up to Sept. 30, 1951, amounted to £112,800 gross. The amount available for distribution among the members was estimated by the liquidator to be £62,887, which was more than sufficient to repay the whole of the capital paid up on the preference shares. Profits available for distribution at the date of the winding-up amounted to £2,072. On the question how the £62,887 should be applied,

C HELD: on the true construction of the resolution of 1896, the preference shareholders were to receive the amount of capital paid up on their shares and also the arrears of dividends out of the fund comprising the surplus assets of the company in priority to other shareholders, and they were not limited as regards dividends to the amount of profits earned out of which a preference dividend could have been declared.

D *Re W. J. Hall & Co., Ltd.* ([1909] 1 Ch. 521), not followed.

E Dicta of NEVILLE, J., in *Re New Chinese Antimony Co., Ltd.* ([1916] 2 Ch. 118), and of P. O. LAWRENCE, J., in *Re Springbok Agricultural Estates, Ltd.* ([1920] 1 Ch. 565), applied.

AS TO DISTRIBUTION AMONGST CONTRIBUTORIES, see HALSBURY, 1949 Edn., Vol. 5, pp. 765-769, paras. 1247-1255; and FOR CASES, see DIGEST, Vol. 10, pp. 1002-1009, Nos. 6961-6995.

F Cases referred to:

- (1) *Re Hall (W. J.) & Co., Ltd.*, [1909] 1 Ch. 521; 78 L.J.Ch. 382; 100 L.T. 692; 10 Digest 959, 6570.
- (2) *Re New Chinese Antimony Co., Ltd.*, [1916] 2 Ch. 115; 85 L.J.Ch. 429; 114 L.T. 989; 10 Digest 1007, 6987.
- (3) *Re Springbok Agricultural Estates, Ltd.*, [1920] 1 Ch. 563; 89 L.J.Ch. 362; 123 L.T. 322; 10 Digest 1007, 6988.

G SUMMONS by which the liquidator in the voluntary winding-up of the Wharfedale Brewery Co., Ltd., applied for the determination of the question whether in the winding-up the holders of preference shares in the capital of the company (a) were entitled in priority to any repayment of capital to holders of the ordinary shares to the full amount of the arrears of the six per cent. cumulative preferential dividend on their preference shares, or (b) were entitled in priority as aforesaid only to arrears equivalent to the undistributed profits of the company earned prior to the commencement of the winding-up.

H The original capital of the company was £30,000 divided into three thousand ordinary shares of £10 each. Subsequently it was increased to £80,000, the additional £50,000 being divided into four thousand preference shares of £10 each and one thousand new ordinary shares of £10 as follows:—(a) By a special resolution of the company duly passed and confirmed at extraordinary general

meetings of the company held on July 14, 1896, and July 31, 1896, it was resolved:

"That the capital of the company be increased to £50,000 by the creation of two thousand new shares of £10 each, to be called preference shares and to confer on the holders thereof the right to a fixed cumulative preferential dividend at the rate of six per centum per annum on the capital paid up thereon respectively and such preference shares shall rank both as regards dividend and capital in priority to the other shares but shall not confer any further right to participate in profits or surplus assets."

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(b) By a special resolution of the company duly passed and confirmed at extraordinary general meetings of the company held on Sept. 15, 1897, and Sept. 30, 1897, it was resolved (inter alia):

"That . . . the capital of the company be increased from £50,000 to £80,000 by the creation of (i) one thousand new ordinary shares of £10 each to rank *pari passu* with the original ordinary shares, and (ii) two thousand new preference shares of £10 each, and that such preference shares shall confer on the holders thereof the right to a fixed cumulative preferential dividend at the rate of £6 per centum per annum on the capital paid up thereon respectively, and shall rank, both as regards dividend and capital, in priority to the ordinary shares in the capital for the time being of the company and *pari passu* in all respects with the two thousand preference shares of £10 each created in 1896, but shall not confer any further right to participate in profits or surplus assets."

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All the preference shares and two thousand five hundred ordinary shares were issued and were fully paid. By a special resolution of the company passed at an extraordinary general meeting held on Jan. 24, 1952, it was resolved that the company be wound-up voluntarily. The arrears of the fixed dividend on the preference shares amounted to £112,800 gross on Sept. 30, 1951. The liquidator estimated that the net sum available for distribution among the members would be £62,887. The balance outstanding to the credit of the profit and loss appropriation account as at Sept. 30, 1951, representing accrued profits was £1,722 11s. 9d. In addition, the company earned profits up to the commencement of the winding-up estimated at £350.

D

E

K. W. Mackinnon for the liquidator.

G. B. Parker for the ordinary shareholders.

Plowman for the preference shareholders.

WYNN-PARRY, J.: This summons raises a short question of construction in the voluntary liquidation of a company which went into liquidation in January, 1952. At the date of the resolution the company had an issued capital divided into preference and ordinary shares of £10 in each case, of which four thousand preference shares and two thousand five hundred ordinary shares had been issued, all fully paid up. At that date there were arrears of the preference dividend amounting in the aggregate to over £112,000. At the date of the winding-up there were available profits for distribution by way of dividend while the company was a going concern of approximately £2,070. In the liquidation the liquidator now has a surplus of £62,887, and the question is how that sum should be divided between the preference and ordinary shareholders. The answer depends on the construction of the relevant provision in the resolutions creating the preference shares and on certain authorities to which I will refer.

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The capital originally consisted of one class of shares, but on two occasions it was increased, and it was by the resolution relating to the first increase that part of the preference shares were created. By a subsequent resolution the capital was increased by the creation of further preference shares, the same rights being attached to these preference shares as to those created by the earlier resolutions. The resolutions provided that the preference shareholders should have the right to a fixed cumulative preferential dividend of six per cent. per annum and should

rank both as regards dividend and capital in priority to the other shares. It is agreed that, having regard to certain modern decisions, this provision should be read so that the preference shares should rank in a winding-up both as regards dividend and capital in priority to the other shares. There is a conflict of authority on the point which I am called on to decide, viz., whether under a provision in these terms the preference shares are entitled to arrears of dividend irrespective of whether or not profits were available to pay that dividend at the commencement of the liquidation.

In *Re W. J. Hall & Co., Ltd.* (1) the articles of association provided that

"In the event of the company being wound-up . . . the surplus divisible assets for the time being remaining after paying the liabilities of the company shall be applied, first, in repaying the capital paid up on the said five hundred preference shares or so many thereof as may be issued for the time being, and, secondly, in paying the arrears (if any) of the five per cent. preferential dividends thereon to the commencement of the winding-up . . ."

and that the balance should belong to the ordinary shareholders. The accumulated profits at the commencement of the liquidation were less than the arrears of the preference dividend at that date. Two points were decided by SWINFEN EADY, J. First, he held that the preference shareholders were not entitled to claim arrears of dividend beyond the amount of the accumulated profits. Secondly, he held that arrears of dividend were payable whether declared or not. At the end of his judgment his lordship says ([1909] 1 Ch. 527):

"Reading the memorandum and articles together, I hold that the preference shareholders are entitled to the arrears of their five per cent. dividends, whether declared or not, but so far only as profits are now available."

It is difficult, with all respect to the learned judge, to see by what process of reasoning he arrived at that decision, because he was dealing with an article which provided that in the event of the company being wound-up the surplus divisible assets should be applied inter alia in paying the arrears of the five per cent. preferential dividend thereon. The surplus divisible assets, no doubt, represent a mixed fund, but it is a fund which for all purposes in a winding-up must be treated as assets and not as partly assets and partly profits.

That decision was first unfavourably commented on by NEVILLE, J., in *Re New Chinese Antimony Co., Ltd.* (2), where the articles of association were in a form substantially similar to that in the earlier case. NEVILLE, J., in the course of his judgment, said that the rights of the preference shares were determined by the special resolution under which they were issued. He read the relevant clause, and said ([1916] 2 Ch. 118):

"The meaning of those words is to my mind perfectly clear. We have to deal with a fund which is not capital, or income, or profits, but surplus assets. That is what we have to distribute. There is nothing to make any distinction between capital and income. The only point is what is meant by 'arrears of the preferential dividend aforesaid'."

Having discussed further the meaning of the clauses in question and having referred for support, so far as concerned the suggested limitation of dividends to declared dividends, to one of the points made by SWINFEN EADY, J., in his judgment in *Re W. J. Hall & Co., Ltd.* (1), NEVILLE, J., said (ibid.):

"In that case SWINFEN EADY, J., went on to decide that there could be no arrears of dividends payable except so far as there had been profits. With all deference I fail to follow that part of the decision, but it does not apply to this case. I am dealing with the division of surplus assets, not with the declaration of a dividend. I cannot see that it makes any difference whether there are profits or not."

That observation, it is true, was obiter, but it is as clear an indication as a judge could give that he disagreed with the reasoning of SWINFEN EADY, J., in the earlier case.

Re W. J. Hall & Co., Ltd. (1) was further criticised in *Re Springbok Agricultural Estates, Ltd.* (3). In that case P. O. LAWRENCE, J., had to consider a provision in the articles of association of the company to the effect that, in the event of the winding-up of the company, the holders of the preference shares should be entitled to have the surplus assets applied, first, in paying off the capital paid up on the preference shares, and, secondly, in paying off the arrears, if any, of the preferential dividend up to the commencement of the winding-up, and thereafter to participate rateably with the holders of other shares in the residue, if any, of such surplus assets as should remain after paying off the capital paid up on such other shares. He says, in the course of his judgment, that the resolution is in substance similar to, though not in identically the same language as, the material resolution in *Re New Chinese Antimony Co., Ltd.* (2). Later, he says ([1920] 1 Ch. 565):

"It has been argued that the matter is governed by the decision of SWINFEN EADY, J., in *Re W. J. Hall & Co., Ltd.* (1). That case was decided on the construction of an article which though similar to cl. (d) of the fourth resolution was not in precisely the same words. I do not think that I am bound by that decision as the words are different, but in any case I do not agree with the reasons given by the learned judge for his decision. He seems to have held that the amount of the arrears of preference dividends was limited to the amount of such dividends as could have been properly declared but was not actually paid while the company was a going concern. The learned judge decided that there could be arrears of dividends although no dividends had been declared, and in this I agree with him; but he then proceeded to hold that it was essential that profits should have been earned out of which a preferential dividend could have been declared and paid before it could be said that the dividend was in arrear. In my view that is not the true construction of the special resolution in this case."

It is to be remembered, when reading that last sentence, that the learned judge had made it clear in two earlier passages that, in his view, the provision which he had to consider in that case was in substance similar to the material articles of association in *Re W. J. Hall & Co., Ltd.* (1). Later, P. O. LAWRENCE, J., made it clear that he agreed with and approved of the reasoning of NEVILLE, J., in *Re New Chinese Antimony Co., Ltd.* (2).

There is the conflict. In my judgment, I am in the same position as regards *Re W. J. Hall & Co., Ltd.* (1) as both NEVILLE, J., and P. O. LAWRENCE, J., found themselves, and I am not bound by it. Indeed, it appears to me that I am in a position to say that the weight of authority, notwithstanding that the observations of both these learned judges were, in each case, obiter, is against the view of SWINFEN EADY, J. Speaking with all respect to his judgment, I cannot agree with his conclusion, and I find myself unable to follow the reasoning by which he arrived at that conclusion on the second point. I, therefore, prefer to follow the two later decisions.

Turning back to the relevant resolution in the present case, I am unable to discover any ground of distinction between the language used in this resolution and the material provisions in each of the three cases to which I have referred. As I have said, the effect of the modern authorities is that I must read this resolution as if after the words "and such preference shares shall rank" there were inserted "in a winding-up", the resolution continuing "both as regards dividend and capital in priority to the other shares but shall not confer any further right to participate in profits or surplus assets". In my view, the word "profits" there refers back to the phrase "to confer on the holders thereof the right to a fixed cumulative preferential dividend at the rate of six per cent.

per annum on the capital paid up thereon respectively"—that is, it refers back to the right of the preference shareholders while the company is a going concern. Similarly, the phrase "surplus assets" refers to the provision which follows, which I have already read, beginning "and such preference shares shall rank".

A Thus, in my judgment, when one comes to consider the position in a winding-up, it is clear that, on the true construction of these resolutions, the only fund which is to be considered is the fund which constitutes the surplus assets, and it is that fund only the distribution of which falls to be considered. On that reasoning, it appears to me that this case is completely within the dicta of NEVILLE, J., in *Re New Chinese Antimony Co., Ltd.* (2), and P. O. LAWRENCE, J., in *Re Springbok Agricultural Estates, Ltd.* (3), and, further, speaking for myself, even without these two authorities and faced only by the earlier decision in B *Re W. J. Hall & Co., Ltd.* (1), I would have come to the conclusion to which I have come, viz., that the whole of the divisible fund (£62,887), subject to the outstanding costs of the liquidation, is in the circumstances distributable among the holders of the preference shares. *Order accordingly.*

C Solicitors: *Gibson & Weldon*, agents for *Wooler & Co.*, Leeds (for the liquidator and ordinary shareholders); *Wright & Bull*, agents for *Emsley & Son*, Leeds (for the preference shareholders).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

D EALING BOROUGH COUNCIL v. MINISTER OF HOUSING AND LOCAL GOVERNMENT AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), July 25, 28, 1952.]

E *Town and Country Planning—Purchase notice—Confirmation—Service of notice on borough council—Minister's notice of proposed action to confirm purchase notice without modification—No hearing before person appointed by Minister—Informal meeting between Minister, planning authority, and borough council—Substitution of planning authority for borough council as acquiring authority in purported confirmation of purchase notice—Town and Country Planning Act, 1947 (c. 51), s. 19 (3) (5).*

F An application for permission under the Town and Country Planning Act, 1947, to develop a piece of land having been refused by the local planning authority (the county council), on Nov. 30, 1950, the landowner served a purchase notice under s. 19 (1) of the Act on the council of the borough in which the land was situated, requiring them to purchase his interest in the land. On Dec. 11, 1950, the borough council sent a copy of the purchase notice to the Minister, as required by s. 19 (2), and on Mar. 13, 1951, under s. 19 (5), the Minister gave notice to the parties that he proposed to confirm the purchase notice without modification. On May 16, 1951, at the request of the planning authority, who wished to purchase the land, but had failed to come to an agreement with the borough council, an informal meeting was held at which representatives of the planning authority and of the borough council presented their views to one of the Minister's officers, but no notice of this meeting was sent to the landowner and there H was no hearing before a person appointed by the Minister within the meaning of s. 19 (5). On May 21, 1951, the Minister issued his decision to confirm the purchase notice with the modification that the planning authority should be substituted for the borough council as the acquiring authority.

HELD: on the true construction of s. 19 as a whole, confirmation of a purchase notice without qualification meant confirmation of the whole notice, and, if the Minister proposed to modify the purchase notice by substituting the planning authority for the local authority named in the purchase

notice, he had to state in his notice of proposed action under s. 19 (5) that he proposed to do so; by necessary implication the notice of proposed action of Mar. 13, 1951, stated the borough council as the acquiring authority, and, there having been no hearing under s. 19 (5), the Minister could not change his "proposed action" when he made his confirming order, and the purported confirmation of May 21, 1951, was ultra vires and void; as the period of six months from the date of the purchase notice expired on May 30, 1951, the purchase notice was to be deemed to be confirmed at the expiration of that period under s. 19 (3); and, therefore, the borough council was to be deemed to be authorised to acquire the interest in the land in accordance with the provisions of the sub-section.

FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 19, see HALSBURY'S STATUTES, Second Edn., Vol. 25, p. 517.

Case referred to:

- (1) *With v. O'Flanagan*, [1936] 1 All E.R. 727; [1936] Ch. 575; 105 L.J.Ch. 247; 154 L.T. 634; Digest Supp.

ACTION by the Ealing Borough Council for a declaration that the confirmation by the Minister of Housing and Local Government on May 21, 1951, of a purchase notice, dated Nov. 30, 1950, in purported exercise of the powers conferred on him by the Town and Country Planning Act, 1947, s. 19 (2), was ultra vires and void, and for consequential relief.

The purchase notice was served on the plaintiff council by the third defendant, Henry Boot and Sons, Ltd., under s. 19 (1) of the Act and required the plaintiff council to purchase the third defendant's interest in certain land. In his notice of proposed action, dated Mar. 13, 1951, the Minister stated that he proposed to confirm the purchase notice without modification, but his confirmation on May 21, 1951, contained the modification that the second defendants, Middlesex County Council (the planning authority), should be substituted for the plaintiff council as the acquiring authority. The plaintiff council contended, inter alia, that, as there was no hearing before a person appointed by the Minister for the purpose, within s. 19 (5) of the Act, the Minister had no power to alter his "proposed action".

Mitchison, Q.C., and *Squibb* for the plaintiff council.

Harold Christie, Q.C., and *Denys B. Buckley* for the first defendant, the Minister of Housing and Local Government.

Harold Williams, Q.C., and *W. B. Harris* for the second defendants, Middlesex County Council.

Kerrigan for the third defendant, Henry Boot and Sons, Ltd. (the landowner).

UPJOHN, J.: The third defendant in this action, Henry Boot and Sons, Ltd., to whom I shall refer as "the company", was at all material times the owner of a piece of land of about seven acres, situated in the district of the plaintiff council. This land was referred to in the action as the Princess Helena College site, and I shall refer to it as "the site". In the summer of 1950 the company applied for permission under the Act to develop the site by the erection of fifty flats thereon. On July 4, 1950, the permission was refused by the second defendants, Middlesex County Council, who are the local planning authority for the purposes of the Act. In those circumstances, if the company could satisfy certain conditions laid down in s. 19 (1) of the Act, it became entitled to give what is called in the section a "purchase notice", directed to the plaintiff council and requiring them to purchase the land.

Section 19 (1) of the Act provides:

"Where permission to develop any land is refused, whether by the local planning authority or by the Minister [now designated the Minister of Housing and Local Government], on an application in that behalf made under this Part of this Act, or is granted by that authority or by the

Minister subject to conditions, then if any owner of the land claims—(a) that the land has become incapable of reasonably beneficial use in its existing state; and (b) in a case where permission to develop the land was granted as aforesaid subject to conditions, that the land cannot be rendered capable of reasonably beneficial use by the carrying out of the permitted development in accordance with those conditions; (c) in any case, that the land cannot be rendered capable of reasonably beneficial use by the carrying out of any other development for which permission has been or is deemed to be granted under this Part of this Act, or for which the local planning authority or the Minister have undertaken to grant such permission, he may, within the time and in the manner prescribed by regulations made under this Act, serve on the council of the county borough or county district in which the land is situated a notice (hereinafter referred to as a ‘purchase notice’) requiring that council to purchase his interest in the land in accordance with the provisions of this section.”

It is not in dispute that the conditions set out in para. (a) and para. (b) of the sub-section have been fulfilled and that the company was entitled to serve a notice under the sub-section. It did so by a letter, dated Nov. 30, 1950, and addressed to the clerk to the plaintiff council. The notice is in these terms:

“ . . . we hereby give notice that we require the Ealing Borough Council to purchase our freehold interest in the said land, under s. 19 of the Town and Country Planning Act, 1947.”

On receipt of the notice, the provisions of s. 19 (2) come into play. The sub-section reads:

“Where a purchase notice is served on any council under this section, that council shall forthwith transmit a copy of the notice to the Minister, and subject to the following provisions of this section the Minister shall, if he is satisfied that the conditions specified in para. (a) to para. (c) of the foregoing sub-section are fulfilled, confirm the notice, and thereupon the council shall be deemed to be authorised to acquire the interest of the owner compulsorily in accordance with the provisions of Part IV of this Act, and to have served a notice to treat in respect thereof on such date as the Minister may direct: provided that . . . ”

Section 19 (2) (a) provides that the Minister may grant permission for the development, and s. 19 (2) (b) provides that the Minister may grant permission for some other development. Section 19 (2) (c) is in these terms:

“if it appears to the Minister, having regard to the probable ultimate use of the land, that it is expedient so to do, he may, if he confirms the notice, modify it, either in relation to the whole or in relation to any part of the land to which it relates, by substituting any other local authority for the council on whom the notice is served, and in any such case the foregoing provisions of this sub-section shall have effect accordingly.”

As required by s. 19 (2), the plaintiff council transmitted a copy of the purchase notice to the Minister, the first defendant, on Dec. 11, 1950, and also sent a copy to the county council.

Section 19 (3) is in these terms:

“If within the period of six months from the date on which a purchase notice is served under this section the Minister has neither confirmed the notice nor taken any such other action as is mentioned in para. (a) or para. (b) of the last foregoing sub-section, nor notified the owner by whom the notice was served that he does not propose to confirm the notice, the notice shall be deemed to be confirmed at the expiration of that period, and the council on whom the notice was served shall be deemed to be authorised to acquire the interest of the owner compulsorily in accordance with the provisions of Part

IV of this Act, and to have served notice to treat in respect thereof at the expiration of the said period."

Section 19 (5), which is the important sub-section, is in these terms:

"Before confirming a purchase notice, or taking any other action in lieu thereof, under this section, the Minister shall give notice of his proposed action—(a) to the person by whom the notice was served; (b) to the council on whom the notice was served; (c) to the local planning authority for the area in which the land is situated; and (d) to any other local authority whom the Minister proposes, under the foregoing provisions of this section, to substitute for the said council; and if within the period prescribed by the notice under this sub-section (not being less than twenty-eight days from the service thereof) any person or authority on whom that notice is served so requires, the Minister shall, before confirming the purchase notice or taking any such other action as aforesaid, afford to those persons and authorities an opportunity of appearing before and being heard by a person appointed by the Minister for the purpose."

As required by s. 19 (5), the Minister sent notice of his proposed action to the parties concerned. The notice to the plaintiff council, which is addressed to the clerk to the council and is dated Mar. 13, 1951, is in these terms:

"Sir, Town and Country Planning Act, 1947, Purchase Notice in respect of Princess Helena College Site, Ealing. I am directed by the Minister of Local Government and Planning to refer to your letter of Dec. 11, 1950, and to say that he has now given consideration to the grounds for the purchase notice served on your council under s. 19 of the Act in respect of the interest held by Henry Boot and Sons, Ltd., in land forming the site of Princess Helena College, Ealing. The Minister is satisfied that the land has become incapable of reasonably beneficial use in its existing state; and having regard to the proposed reservation of the land for either open space or educational purposes he does not consider that he would be justified in reversing the planning authority's decision that flats should not be erected on the site, or in directing that permission should be granted for any other development. He accordingly proposes, unless notified by Apr. 13, 1951, that your council, the Middlesex County Council, or the servers of the notice desire an opportunity of being heard by a person appointed by him for that purpose, to confirm the notice without modification. This letter, which is in similar terms to those sent at the same time to the Middlesex County Council and Henry Boot and Sons, Ltd., the servers of the notice, is issued by the Minister, in accordance with s. 19 (5) of the Act, as the formal notice of his proposed action."

The time when the notice could be given under s. 19 (5) of a desire for

" . . . an opportunity of appearing before and being heard by a person appointed by the Minister . . . "

expired on Apr. 13. On Apr. 12 the plaintiff council sent a letter to the Minister, saying that they had no observations to make on the Minister's proposal to confirm the purchase notice without modification. On the next day the county council caused the following letter to be delivered by hand to the Minister:

"With reference to your letter of Mar. 13, I would inform you that a conference will be held on Apr. 19 between representatives of the county council and the Ealing town council to determine the future use of the above land. The decision reached will also determine whether the land the subject of the purchase notice should be acquired by the county council or the town council. In these circumstances I am to inform you that the county council desires an opportunity of being heard by the Minister's representative before the purchase notice is confirmed."

For some months previously there had been discussions between the plaintiff council and the county council in regard to the future use of the site. The plaintiff council wanted to use it as a public open space, while the county council wished to erect a school on it. No agreement was reached by the councils at the meeting of Apr. 19, 1951, and on Apr. 20 a letter on behalf of the county council was sent to the Minister informing him of that fact. The letter went on to say:

A "I am, accordingly, to request that the views of the county council may be heard by a person appointed by the Minister for that purpose before the purchase notice is confirmed."

A copy of the letter was sent to the plaintiff council. On Apr. 26 the following letter was written on behalf of the county council to the Minister:

B "I have to refer to my letter to you of [Apr. 20] regarding the above matter. The county council, in refusing consent for development proposed by Henry Boot and Sons, Ltd., intimated that the development plan would reserve the land for either open space or educational purposes. The county council wishes to ensure that the purchase notice shall be confirmed but that the name of the authority which will develop the site shall be inserted in the notice as the acquiring authority. In order that the Minister shall be fully
C informed in the matter, the county council accordingly seeks an opportunity for its representatives to present their views to one of the Minister's officers, and for Ealing council to be similarly represented, before the Minister determines who shall be the acquiring authority for the purposes of the purchase notice. If the Minister is agreeable to convene such an informal conference I shall be glad if you will kindly regard the request contained in
D my letter of [Apr. 20] as withdrawn."

Although the last sentence referred to the letter of Apr. 20, which had been sent out of time, it was treated by all concerned, at the time, as referring to the letter of Apr. 13 and as constituting a withdrawal of the request, contained in that letter, for a hearing before a person appointed by the Minister pursuant to s. 19 (5), provided that the Minister was prepared to convene a meeting, as suggested in the letter of Apr. 26. This was agreed, and on May 9 the Ministry wrote a letter to the councils, confirming

E " . . . that an informal meeting has been arranged for . . . May 16 with Mr. H. R. Pollitzer in the chair, to discuss the above subject between representatives . . . "

F of the two councils and of the Ministry of Education. No notice to attend the meeting was served on the company. The meeting duly took place, and the chairman heard the views of the parties who were represented. In his evidence before me, he said that in opening and closing the meeting he stressed its informal character. I am quite satisfied (and, indeed, counsel for the Minister conceded at the close of the evidence) that no one who was at that informal meeting on
G May 16 thought it was a hearing under s. 19 (5). Indeed, the fact that the county council had already withdrawn their request for a hearing, coupled with the terms of the notice of May 9 convening the meeting, together with the terms of the letter of May 21, in which the Minister issued his decision, render any other conclusion impossible.

H The letter of May 21, which is addressed to the county council, is headed by a reference to the Town and Country Planning Act, 1947, and to the site. Paragraph 1 refers to the purchase notice, and para. 2 is in these terms:

"The Minister is satisfied that the conditions specified in s. 19 (1) (a) and (c) of the Act are fulfilled in the case of this land. He has given notice of his proposed action in accordance with s. 19 (5) and no request for a hearing has been received by him and not withdrawn within the period prescribed by the notice. The Minister has decided therefore to confirm the purchase notice."

That paragraph makes it plain that the Minister never thought that the informal meeting which was held on May 16 constituted a meeting under s. 19 (5). The letter continues:

"At your council's request an informal meeting was, however, agreed upon with the two councils concerned and was held at this office on May 16, 1951. On behalf of your council it was stated that it is their wish to acquire the site, which has an existing use right for educational purposes, and to erect upon it a primary school; they accordingly requested the Minister to modify the purchase notice by substitution of your council for Ealing Borough Council, on whom the notice was served."

After setting out the contentions of the town clerk of Ealing, which were to the effect that the plaintiff council desired the site to be acquired as an open space, the letter continues:

"The Minister has carefully considered all the facts and representations before him and the probable ultimate use of the land; having consulted with the Minister of Education, he is in no doubt that the site would be most appropriately used for school purposes, whereas the open space need of this area is not particularly urgent. He has decided, therefore, that he must accede to your council's request. I am to inform you accordingly that it appears to the Minister, that it is expedient to modify the purchase notice in relation to the whole of the land to which it relates by substituting your council for the Ealing Borough Council (on whom the notice was served); the Minister directs accordingly that your council shall be deemed to have served today a notice to treat in respect of the interest of Messrs. Henry Boot and Sons, Ltd. in the land in question. This letter is issued as the Minister's formal confirmation of the above mentioned purchase notice. Copies of it have been sent to the town clerk of Ealing and to Messrs. Henry Boot and Sons, Ltd., the servers of the notice."

It is that formal decision which is challenged by the plaintiff council.

In a nutshell, the position at this time stood thus. (i) On Mar. 13, 1951, the Minister gave notice of his proposed action under s. 19 (5), viz., that he proposed to confirm the purchase notice without modification. (ii) In response to the Minister's notice, neither party gave any effective notice asking for an opportunity of appearing before and being heard by a person appointed by the Minister. (iii) There never was, in fact, such a hearing. (iv) After an informal meeting, which did not amount to such a hearing, the Minister purported to confirm the purchase notice, but modified it by making the county council the purchasing authority in lieu of the plaintiff council. The bona fides of the Minister in making this decision are not in question. The only question which I have to determine is whether in those circumstances the Minister made a valid order. The plaintiff council contended that, in giving notice of the proposed action to confirm the order, the Minister thereby showed his intention to confirm the compulsory purchase by the plaintiff council. Counsel for the plaintiff council submitted that, since the purchase notice, in accordance with the provisions of s. 19 (1), required the plaintiff council to purchase the land, confirmation of the notice by the Minister would confirm the whole of the notice and would entitle, and, indeed, bind, the plaintiff council to become the purchaser. Therefore (the argument runs) as there was no hearing under s. 19 (5), the Minister could not alter his proposed action and was bound to do what he said he was proposing to do, viz., confirm the purchase notice in favour of the plaintiff council. If the Minister changed his intention after issuing the notice of his proposed action in his letter of Mar. 13, then (counsel submitted) he should have given a new notice of proposed action so that the parties affected could invoke the provisions of s. 19 (5), if they so desired. Counsel for the plaintiff council relied on s. 32 of the Interpretation Act, 1889, and also on certain observations of LORD WRIGHT, M.R. ([1936]

1 All E.R. 734) in *With v. O'Flanagan* (1) by way of illustration of what was said to be a fundamental principle in this matter. It followed (said counsel) that, as the Minister had not complied with the provisions of s. 19 (5), his decision of May 21 was ultra vires and a nullity, and, if that were the case, he had not confirmed the purchase notice, or taken any action under s. 19 (2) (a) or (b), before May 30, 1951 (i.e., within six months from the date of the purchase notice), and, therefore, the provisions of s. 19 (3) automatically came into play to confirm

A the notice in favour of the plaintiff council.

The contentions on behalf of the Minister (which were also adopted on behalf of the county council) were as follows. It was said, inter alia, that, under s. 19 (2) the Minister was under a duty either to confirm the purchase notice, with or without modification, or to take other action, under s. 19 (2) (a) or s. 19 (2) (b), and that, if he decided to confirm the purchase notice, his duty was directed

B essentially to the person giving the notice, and there was nothing in s. 19 which compelled the Minister to confirm in the sense of naming the local authority which was to acquire the site, that being a matter for subsequent administrative action by the Minister. It was then contended that, if the Minister decided to

C exercise his power by substituting the name of another local authority, under s. 19 (2) (c), it was not necessary to give any notice thereof to anyone or to give anyone an opportunity of being heard by a person appointed by him for that purpose. The local authorities (it was said) had no rights in the matter, and it was entirely a matter for the exercise of the discretion of the Minister. It was

further contended that, if the Minister gave notice of proposed action, it was notice of his intention at the time when he expressed his intention as to his proposed action, and there was nothing to prevent him subsequently altering

D that intention, at any rate to the extent of a modification under s. 19 (2) (c), without giving further notice to the local authorities or affording them an opportunity of being heard, should they desire to be heard. Therefore, it was contended, the Minister had strictly carried out the duties cast on him by s. 19.

These contentions depend solely on the true construction of s. 19, but, before going to a consideration thereof, one or two general observations are pertinent.

E This section constitutes a serious inroad into the liberty of the subject, including in that term bodies who, like local authorities, are not emanations of the Crown, since it enables a disappointed holder of land to force a local authority to apply its public funds in the purchase of the land. In this case there was some competition between local authorities to become the owner of the site, but in many instances the reverse would be the case. Local authorities may well be loath to

F have to pay large sums for a site for which they have no use. When, therefore, provision is made in the section for persons to appear before the Minister's representative to express their views one would expect to find some provision entitling a local authority to make representations to the Minister on the question whether or not they should be compelled to purchase such a site. It would require

G clear words in the section to empower the Minister to force a local authority to purchase a site without giving them an opportunity of making representations on so important a subject, yet that is precisely what the Minister argues that s. 19 does, as he says that, in confirming the purchase notice, he need not designate the name of the acquiring authority. Similarly, where the Minister confirms a

H purchase notice requiring a particular local authority to purchase land situate within their district, it would seem strange if he could, without any notice to that local authority, remove them from being in the position of purchaser and substitute the local planning authority in their place, yet that is precisely what the Minister says that he can do.

In my judgment, s. 19 confers no such arbitrary and autocratic powers on the Minister. On the true construction of the section, if he confirms, without qualification, the purchase notice, which requires a named authority to purchase, he is, in my opinion, confirming the purchase notice in whole and not in part. That seems to me only common sense, but my conclusion is supported by the

phraseology in s. 19 (3), which says that, in the circumstances set out in the sub-section, the notice is to be deemed to be confirmed. That, plainly, means in whole and not merely vis-à-vis the person giving the purchase notice. If the action proposed by the Minister involves the substitution of a local authority other than the authorities mentioned in s. 19 (5) (b) and (c), it is clear from s. 19 (5) (d) that the Minister must state in his notice of proposed action that he is proposing to exercise his powers under s. 19 (2) (c) by substituting another local authority. In my judgment, he must also do so if he is proposing to modify the purchase notice by substituting the planning authority for the local authority named in the purchase notice. The whole object of compelling the Minister to inform the parties mentioned in s. 19 (5) (a) to s. 19 (5) (d) of his proposed action is, in my opinion, to enable each of the parties there named to know exactly where they stand in relation to the whole matter, so that they may consider whether to ask for an opportunity to appear before a person appointed by the Minister. The argument that the Minister need not name the acquiring authority is, in my opinion, contrary to the whole object and tenor of the sub-section, as, in that case, the persons who have been served with notice of his proposed action would not know which one of them is to be the acquiring authority and would have no opportunity of making representations to him on the point. In my judgment, therefore, the Minister's notice of proposed action must state expressly or by necessary implication the name of the acquiring authority.

In the present case, for the reasons which I have given, the notice of proposed action by necessary implication stated the name of the plaintiff council as the acquiring authority. There having been no hearing under s. 19 (5), is it open to the Minister, as was contended on his behalf, to change his proposed action when he makes his confirming order? In my judgment, the Minister cannot change his mind and make an order which may vitally affect the local authorities concerned. To hold that he could do so would nullify the whole object of s. 19 (5). It may be that, within the six months provided by s. 19 (3), the Minister might change his mind and give a new notice of proposed action, and thereby revive the rights of the parties under s. 19 (5), but I am not deciding this point, as it is not necessary for me to do so. The Minister cannot arbitrarily change his mind and make an order without having given an opportunity to the parties to exercise their rights under s. 19 (5). I propose to make a declaration that the purported confirmation, dated May 21, 1951, by the Minister of the notice, dated Nov. 30, 1950, is ultra vires and void. It, therefore, follows that the provisions of s. 19 (3) come into play, since the period of six months from the date of the purchase notice expired on May 30, 1951. The first defendant, the Minister of Housing and Local Government, must pay the costs of the plaintiff council and the company. I shall make no order as to the costs of the county council.

Judgment for the plaintiff council.

Solicitors: *Field, Roscoe & Co.*, agents for *E. J. C. Brown*, town clerk, Ealing (for the plaintiff council); *Solicitor, Ministry of Health* (for the first defendant); *C. W. Radcliffe*, clerk to Middlesex County Council (for the second defendants); *T. F. Peacock, Fisher, Chavasse & O'Meara* (for the third defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Re B.'s SETTLEMENT.

[CHANCERY DIVISION (Roxburgh, J.), July 31, 1952.]

Settlement—Variation of trusts—Transaction not authorised by settlement or by law—No administrative problem—Jurisdiction of court to authorise transaction—Trustee Act, 1925 (c. 19), s. 57 (1).

A *Trust and Trustee—Variation of trusts by the court—No administrative problem—Jurisdiction—Trustee Act, 1925 (c. 19), s. 57 (1).*

To reduce the incidence of taxation on assets the subject of a personalty settlement a scheme was devised which could not be effected owing to the absence of any power in that behalf contained in the settlement or given by law. Application was, therefore, made to the court to sanction the scheme either under its general jurisdiction or under the Trustee Act, 1925, s. 57 (1). The court found that the transactions involved in the scheme amounted in substance to a re-writing of the trusts or a substantial part thereof, or to directions to administer the trust property on the footing that new trusts had been declared and the existing trusts had been struck out or varied, and it was admitted that the purpose of the scheme was not to solve any administrative problem, but to re-arrange the beneficial interests to greater advantage.

C HELD: the transactions could not be authorised under the general jurisdiction of the court; s. 57 (1) did not authorise a transaction not of an administrative character, and the court could not confer on the trustees the power to execute a re-settlement or to deal with the trust estate on the footing that a re-settlement had been executed; but, even if s. 57 (1) did authorise such a transaction, the language of the sub-section gave a clear indication that the court ought not to exercise its discretion in favour of a transaction which was not of an administrative character and involved substantial re-writing of the trusts in order to re-arrange beneficial interests to greater advantage.

E Observations in *Re D.'s Settled Estates* (ante p. 603), applied.

Quære: whether the extraordinary jurisdiction of the court to sanction transactions not authorised by the trust instrument has not been superseded by the Trustee Act, 1925, s. 57 (1), and the Settled Land Act, 1925, s. 64 (1).

FOR THE TRUSTEE ACT, 1925, s. 57 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 26, p. 138.

F Cases referred to:

(1) *Re D.'s Settled Estates*, ante p. 603.

(2) *Re Craven's Estate* (No. 2), [1937] Ch. 431; 106 L.J.Ch. 311; Digest Supp.

(3) *Re New, Re Leavers, Re Morley*, [1901] 2 Ch. 534; *sub nom. Re New's Settlement*, 70 L.J.Ch. 710; 85 L.T. 174; 43 Digest 840, 2866.

(4) *Re Mair*, [1935] Ch. 562; 104 L.J.Ch. 258; 153 L.T. 145; Digest Supp.

G (5) *Re Salting*, [1932] 2 Ch. 57; 101 L.J.Ch. 305; 147 L.T. 432; Digest Supp.

H ADJOURNED SUMMONS by which application was made for an order authorising transactions to effect a scheme to minimise taxation in respect of the assets subject to the trusts of a personalty settlement. The transactions were not authorised by the settlement or by law, and the order was sought under the general jurisdiction of the court, or, alternatively, under the Trustee Act, 1925, s. 57 (1). The matter was argued in chambers, but judgment was delivered in open court.

J. A. Brightman for the plaintiff.

P. V. Baker for the first defendant.

Rink and P. W. E. Taylor for other defendants.

ROXBURGH, J.: This is a personalty settlement, and B., the settlor, is tenant for life under protective trusts. In the event of forfeiture, discretionary

trusts during the remainder of his life are declared in favour of B. and any wife or issue of his. B. has a power of appointment in favour of his issue. In default of appointment, his children, who, being sons, attain twenty-one, or, being daughters, attain that age or marry, take the capital in certain shares. B. has power to appoint to any wife who may survive him, in one event, the whole, and, in another event, half, the income during the residue of her life. If no child attains a vested interest, the settlor has a general power of appointment by will. The settlor is married, and has one infant child. There is no administrative difficulty. The object of the scheme placed before me is to re-arrange the beneficial interests to greater advantage having regard to the incidence of taxation.

The transactions proposed by the scheme are, broadly stated, as follows. The trust funds are to be divided into two separate funds, (i) and (ii). As regards fund (i), the settlor is to surrender his protected life interest, but so that the discretionary trust does not arise. A new trust is declared in certain events. The settlor is to release this fund from his power of appointment in favour of a surviving wife and certain other powers. As regards fund (ii), the settlor is not to forfeit his protected interest (as apart from any order would happen) by reason of the transaction relating to fund (i). By way of compensation to the objects of the discretionary trust, a new and different discretionary trust is created. The power of appointment in favour of a surviving wife is re-written so as to extend in every event to the whole income of the second fund. The result, of course, would be that the two funds would be held in future on different trusts.

I am asked to sanction this scheme under the general jurisdiction of the court, or under the Trustee Act, 1925, s. 57 (1). What I have said with regard to the general jurisdiction in *Re D.'s Settled Estates* (1) is applicable to this case, and I need not repeat it, but what I said about s. 57 was obiter dictum in that case, and I must repeat it. I approach the sub-section bearing in mind that before 1926 the court, as a rule, had no jurisdiction to give its sanction to the performance by trustees of acts which were not authorised by the terms of the instrument, but that it had an extraordinary jurisdiction exercisable in a case of urgency, so long as its exercise did not result in the substitution of a new trust in place of the old. I must also remember that there is an analogous provision in the Settled Land Act, 1925, s. 64 (1), applicable to strict settlements of land. These sections must, I think, be considered together, and, if there are any authorities which assist the construction, I must give effect to them, but, surprisingly enough, their ambits have never been discussed in a reported judgment during the twenty-five years during which they have been in force, apart from a cursory reference in *Re Craven's Estate* (No. 2) (2).

Looking at s. 57 (1), I notice that it does not begin with a reference to a "settlement" or the "trusts of a settlement", but to a transaction "in the management or administration of any property vested in trustees". This suggests a practical step of an administrative character. Further, this step must be capable of being effected by the trustees. The section does not authorise the court to do anything beyond conferring such a power on the trustees (either generally or in any particular instance, and either conditionally or unconditionally) and directing how any expenditure so authorised is to be borne as between capital and income. Looking at s. 64 (1) of the Settled Land Act, 1925, I observe that it also does not begin with a reference to a "settlement" or the "trusts of a settlement", but to a "transaction". This suggests a practical step of some sort. A reference to the definition in s. 64 (2) suggests that the practical steps under consideration are of an administrative character, and a reference back to s. 64 (1) shows that they must be such as are capable of being effected by the tenant for life. The section does not empower the court to do anything beyond authorising the tenant for life to effect the transaction. The correspondence between the two sections is remarkably close.

A It was argued that the legislature cannot have intended by these elaborate sentences to leave the rule in *Re New* (3) unchanged. It certainly has not done that. The jurisdiction is no longer "extraordinary". It extends to transactions which are neither urgent nor of an emergency character, but does it extend to a re-writing of the trusts of the settlement, to a re-arrangement of the beneficial interests thereunder for the advantage of the beneficiaries generally where there is no administrative problem? As I look at these two sub-sections together, it seems to me that they have been carefully framed so as to imply a negative answer. If it be asked why, in that case, the Act does not in its express terms supply the negative answer, I would reply that it could not do so without defining the boundary between administrative action and re-writing the trusts, and that is a boundary which is incapable of precise definition. It seems to me that neither section authorises a transaction which is not of an administrative character, and that the court cannot confer on tenant for life or trustees the power to execute a re-settlement or deal with the trust estate on the footing that a re-settlement has been executed. No language could be less apt than this for conferring such a novel and extensive power on the court. If I am wrong in this view, I would hold in the alternative that the legislature has by its language given clear indication that the court ought not to exercise its discretion in favour of a transaction or series of transactions which, in its opinion, are not of an administrative character, but involve a substantial re-writing of the trusts in order to re-arrange beneficial interests to greater advantage.

D I must make special reference to the impact of transactions effected under s. 57 (1) or s. 64 (1) on forfeiture of protective life interests and discretionary trusts thereupon arising. It is settled that a transaction which is authorised by the court under either of these sections cannot operate as a forfeiture: see *Re Mair* (4); and I accept counsel's submission (a point much stressed by counsel for the plaintiff) that a transaction may be authorised although it may prejudice or pro tanto defeat the persons interested under a discretionary trust: see the order referred to in *Re Salting* (5) ([1932] 2 Ch. 57). But, in my judgment, these reflections do not justify the conclusion that express directions to administer one portion of the estate on the footing that there has been no forfeiture (though but for any order there would be) and to administer another portion on the footing that a protected life interest is an unprotected life interest may not of themselves be a re-writing of the settlement. In any case, such directions cannot be ignored for the purpose of such an inquiry, and the transactions to be effected must be judged as a whole to ascertain the substance of the matter.

F This scheme, in my judgment, proposes a much less drastic re-settlement than the scheme in *Re D.'s Settled Estates* (1), but my conclusions are the same, and I repeat them in substantially the same terms. I hold that the transactions involved in this scheme amount in substance to a re-writing of the trusts or a substantial part thereof, or to directions to administer the trust property on the footing that new trusts have been declared and old trusts have been struck out or varied, and the admitted purpose of the scheme is, not to solve any administrative problem, but to re-arrange beneficial interests to greater advantage. Such proposals fall, in my judgment, outside the scope of the court's "extraordinary" jurisdiction (if, indeed, it has not been superseded by s. 64 (1), and s. 57 (1)). They also fall outside the ambit of s. 57 (1), or, alternatively, are, for G H that section.

Order accordingly.

Solicitors: *Baileys, Shaw & Gillett* (for the third and fourth defendants);
Neish, Howell & Haldane (for the plaintiff and all other defendants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

BREWER v. WESTMINSTER BANK, LTD. AND ANOTHER.

[QUEEN'S BENCH DIVISION (McNair, J.), June 11, 12, 13, 30, July 1, 31, 1952.]

Bank—Joint account—Mandate to honour drawings signed by joint customers—Forgery by one customer of other customer's signature—Action by innocent customer for declaration of bank's liability—Guilty customer joined as defendant—Competency—No implied term that both customers act honestly—No duty to supervise joint customer—Bank not discharged by paying forged cheques. A

Two executors of a testator's estate, one being a beneficiary and the other the managing clerk of a firm of solicitors, opened a joint account with a bank, completing a standard form of mandate supplied by the bank for the purpose. The mandate authorised the bank to honour any drawings on the account signed by both executors, and under it the executors agreed that any liability to the bank incurred by the executors on the account should be joint and several. Following the practice which they usually adopted in relation to joint accounts where one executor was a solicitor, the bank sent the periodical bank statements to the managing clerk only, and, apart from cashing monthly cheques which had been duly signed by both executors and were presented by the beneficiary, they gave her no indication of the state of the account. The managing clerk forged the signature of the beneficiary to a series of cheques and over a period of years drew nearly £3,000 from the account and used it for his own purposes. The forgeries were so skilful that no negligence could be imputed to the bank officials in not detecting them. The beneficiary brought an action for a declaration that the bank had wrongfully debited the joint account with the amount of the forged cheques, joining the managing clerk as co-defendant with the bank. B

HELD: the executors' right to have cheques honoured by the bank only if signed by both of them was a right owed to them jointly, and it could only be relied on in an action brought either by both executors joining as plaintiffs or by one as plaintiff joining the other as defendant; the way in which the action was brought being a procedural matter, the bank's liability was the same in either case; since an essential step in the action was that the cheques were forged by one of them, the executors, suing jointly, could not have obtained the declaration sought; and, therefore, the beneficiary could not obtain the declaration in an action in which she joined the managing clerk as defendant. C

Hirschorn v. Evans ([1938] 3 All E.R. 491), applied. D

Semle: the beneficiary would not otherwise have been debarred from obtaining the declaration since (a) it was not an implied term of the mandate to the bank that each executor should act honestly in relation to the working of the account and should not deceive the bank by fraud; (b) acceptance of the bank statements by the managing clerk did not constitute them accounts stated binding on the beneficiary who had not received them, and she was not estopped from contending that they were not correct; (c) the beneficiary was under no duty to control or supervise her co-executor vis-à-vis the bank, and was not, therefore, negligent in failing to do so; and (d) the bank did not obtain a good discharge against both executors by paying the forged cheques. E

Cases referred to:

- (1) *Young v. Grote*, (1827), 4 Bing. 253; 5 L.J.O.S.C.P. 165; 130 E.R. 764; 3 Digest 232, 640. H
- (2) *Colonial Bank of Australasia, Ltd. v. Marshall*, [1906] A.C. 559; 75 L.J.P.C. 76; 95 L.T. 310; 3 Digest 233, 643.
- (3) *Cullen v. Knowles*, [1898] 2 Q.B. 380; 67 L.J.Q.B. 821; 12 Digest, Replacement, 39, 157.
- (4) *Hirschorn v. Evans*, [1938] 3 All E.R. 491; [1938] 2 K.B. 801; 107 L.J.K.B. 756; 159 L.T. 405; Digest Supp. G

- (5) *Brandon v. Scott*, (1857), 7 E. & B. 234; 26 L.J.Q.B. 163; 28 L.T.O.S. 264; 119 E.R. 1234; 3 Digest 117, 398.
- (6) *Jones v. Yates*, (1829), 9 B. & C. 532; 7 L.J.O.S.K.B. 217; 109 E.R. 198; 4 Digest 459, 4153.
- (7) *Samuel (P.) & Co. v. Dumas*, [1924] A.C. 431; 93 L.J.K.B. 415; 130 L.T. 771; 29 Digest 112, 666.
- A (8) *Hagedorn v. Bazett*, (1813), 2 M. & S. 100; 105 E.R. 319; 2 Digest 185, 487.
- (9) *Monaghan v. Agricultural Fire Insurance Co.*, (1884), 18 North Western Rep. 797; 53 Michigan Rep. 238.
- (10) *Joachimson v. Swiss Bank Corpn.*, [1921] 3 K.B. 110; 90 L.J.K.B. 973; 125 L.T. 338; 21 Digest 639, 2188.
- B (11) *Tournier v. National Provincial & Union Bank of England*, [1924] 1 K.B. 461; 93 L.J.K.B. 449; 130 L.T. 682; Digest Supp.
- (12) *Greenwood v. Martins Bank, Ltd.*, [1932] 1 K.B. 371; *affd.* H.L., [1933] A.C. 51; 101 L.J.K.B. 623; 147 L.T. 441; Digest Supp.
- (13) *Copland v. Laporte*, (1835), 3 Ad. & El. 517; 111 E.R. 510; 12 Digest, Replacement, 31, 72.
- C (14) *The Moorcock*, (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 12 Digest, Replacement, 686, 5274.
- (15) *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] 1 All E.R. 33; [1941] A.C. 108; 110 L.J.K.B. 131; 164 L.T. 313; 2nd Digest Supp.
- (16) *Reigate v. Union Manufacturing Co. (Ramsbottom)*, [1918] 1 K.B. 592; 87 L.J.K.B. 724; 118 L.T. 479; 12 Digest, Replacement, 686, 5278.
- D (17) *Keptigalla Rubber Estates, Ltd. v. National Bank of India, Ltd.*, [1909] 2 K.B. 1010; 78 L.J.K.B. 964; 100 L.T. 516; 3 Digest 232, 636.
- (18) *Bishun Chand Firm v. Seth Girdhari Lal*, (1934), 50 T.L.R. 465; Digest Supp.
- (19) *Stone v. Marsh*, (1826), Ry. & M. 364 (171 E.R. 1050); (1827), 6 B. & C. 551 (108 E.R. 554); 5 L.J.O.S.K.B. 201; 3 Digest 124, 18.
- E (20) *Innes (Assignee of R. & C. Hingeston, Bankrupts) v. Stephenson*, (1831), 1 Mood. & R. 145; 174 E.R. 50; 3 Digest 187, 370.
- (21) *Husband v. Davis*, (1851), 10 C.B. 645; 2 L.M. & P. 50; 20 L.J.C.P. 118; 138 E.R. 256; 3 Digest 187, 371.

ACTION for a declaration.

F The plaintiff's father, Mr. Joseph Brewer, owned Fir Trees Farm, Steventon, where he lived with the plaintiff, Miss Mary Brewer, and two other daughters. He was a customer of the Abingdon branch of the defendant bank. Whenever he required legal assistance he consulted Messrs. D'Almaine & Cockeram, solicitors, of Abingdon, and his affairs were almost invariably attended to by the second defendant, Frank Stevens, the managing clerk. In 1933, by a codicil to his will, Mr. Joseph Brewer appointed the plaintiff, who was a beneficiary, and the second defendant executors of his will. On his death on Aug. 25, 1943, the plaintiff, who had no experience of business or legal matters, with an unmarried sister who lived with her discussed the arrangements for their future with the second defendant, and it was arranged, on the second defendant's suggestion, that an executors' account should be opened at the Abingdon branch of the defendant bank in the joint names of the plaintiff and of the second defendant, and that, pending the final distribution of the estate, the plaintiff should draw from the account £10 per month for the housekeeping expenses of herself and her sister. In pursuance of this arrangement, on Sept. 13, 1943, the plaintiff and the second defendant applied to the defendant bank for a joint account, using the defendant bank's standard form known as "Mandate for joint account" which, so far as material, provided as follows:

H " ' Application for joint account ' . (1) We hereby request and authorise you to open and/or continue a current/deposit account/s in our joint names

and to honour any drawings thereon signed by both of us and to carry out any instructions so signed relating to any drawings thereon and to debit to such account/s any bill of exchange or promissory note so accepted or so made, notwithstanding that any such honouring, carrying out or debiting may cause such account/s to be overdrawn or any overdraft thereon to be increased but without prejudice to your right to refuse to allow any overdraft or increase of overdraft; and we agree that any liability to you incurred by us on such account/s shall be joint and several. (2) We also without in any way limiting the foregoing general request and authority authorise you at the request of both of us to make any advance to us by way of loan or overdraft or discount or in any manner howsoever with or without security; and we agree that any liability to you incurred by us in respect of any such advance shall be joint and several."

At the same time the plaintiff and the second defendant signed the usual executors' undertaking and applied for an advance of £400 for payment of estate duty and expenses. These two applications were accepted by the defendant bank, and a cheque book for operating the joint account was issued to the second defendant. Each month thereafter the plaintiff called at the office of Messrs. D'Almaine & Cockeram to sign the monthly cheque which had already been signed by the second defendant and which she then took to the defendant bank where she cashed it. Commencing early in December, 1943, the second defendant began a series of frauds which finally depleted the account by nearly £3,000. Nearly every week he prepared a cheque for £10, to which he appended his own signature and the forged signature of the plaintiff. He then presented the cheque to the defendant bank and obtained cash which he used for his own purposes. When the effect of these drawings was to place the account in debt he obtained the plaintiff's co-operation in the sale of securities forming part of the estate on the pretext that money was required for estate duty or to satisfy the claim of the plaintiff's married sister to her third share of the estate, the proceeds being paid into the account. On July 23, 1945, the grant of probate was issued, the delay being explained by the second defendant as due to difficulties over the valuation of the farm. The balances to the credit of Mr. Brëwor's accounts (£502 16s. on the deposit account and £641 10s. 5d. on the current account) were then credited to the joint account. The weekly drawings by forged cheques by the second defendant continuing, the last of the securities was sold in the summer of 1949, and when the account again became overdrawn in September of that year the defendant bank sent the plaintiff a copy of the bank statement together with a number of cleared cheques bearing her forged signatures and the fraud was discovered. In due course the second defendant was convicted and sentenced. Following the practice which they usually adopted in relation to joint executor accounts where one executor was a solicitor, between September, 1943, and September, 1949, the defendant bank had sent the periodical bank statements to the second defendant alone. During that time they had had no direct communication with the plaintiff in relation to the account except for cashing her monthly cheques when no indication was given to her of the state of the account.

The plaintiff, suing as executrix of her father's estate, claimed a declaration that the defendant bank had wrongfully debited the executors' joint account with the amounts of 279 cheques which totalled nearly £3,000, since by the terms of the mandate given to the bank the cheques required the signatures of both the plaintiff and the second defendant and, in fact, they had had only the signature of the second defendant, the signature of the plaintiff being forged. By their defence the bank contended: (i) that they paid cash on each of the cheques to the second defendant and obtained from him a discharge sufficient to entitle them to debit the account; (ii) that the plaintiff failed in her duty to supervise her co-executor and to examine the bank statements and thereby negligently caused or contributed to the forgeries or caused the defendant bank to be misled

by her co-executor; (iii) that the bank statements delivered from time to time amounted to accounts stated; (iv) that, by failing to make any complaint as to the bank statements, the plaintiff impliedly represented that they were correct and was estopped from contending that they were not correct; (v) that, by opening the joint executorship account, the plaintiff and the second defendant impliedly agreed jointly and severally that each of them would act honestly in the conduct of the account; (vi) that the contract under which the joint account was opened being a joint contract, no action could be maintained on it unless each of the joint contractors was in a position to sue on it, and that, inasmuch as the second defendant could not, by reason of his forgeries, sue on the contract for the declaration claimed, the plaintiff was equally debarred.

Baker, Q.C., and J. K. Wood for the plaintiff.

MacKenna, Q.C., and J. H. Barrington for the defendant bank.

The second defendant did not appear.

Cur. adv. vult.

July 31. McNAIR, J., read a judgment in which he stated the facts, found as a fact that the forgeries were so skilful that no negligence could be imputed to the officials of the defendant bank in failing to detect them, and continued: It is plain that the debits made by the bank on these cheques and the payments to the second defendant were, in fact, unauthorised and the bank were in breach of the express terms of their mandate in that the mandate stipulated that the bank should only honour drawings signed by both the plaintiff and the second defendant, whereas, in fact, they honoured drawings signed by the second defendant alone: see the judgment of BEST, C.J., in *Young v. Grote* (1) (4 Bing. 258):

"Undoubtedly, a banker who pays a forged cheque, is in general bound to pay the amount again to his customer, because, in the first instance, he pays without authority . . . it is the duty of the banker to be acquainted with his customer's hand-writing, and the banker, not the customer, must suffer if a payment be made without authority."

See also the Bills of Exchange Act, 1882, s. 24; HALSBURY'S LAWS OF ENGLAND, 2nd ed., vol. 1, p. 836, para. 1359. Accordingly, the whole onus of resisting the declaration claimed rests on the bank. Indeed, the contrary was not argued by counsel on their behalf.

Although in the course of the hearing before me the legal argument ranged over a wide field, counsel were unable to refer me to any case, and I myself have been unable to find any case, in which the courts have had to consider the effect of a forgery by one of two parties to a joint account, though the point might have been raised on the facts stated in *Colonial Bank of Australasia, Ltd. v. Marshall* (2). It, therefore, becomes necessary for me to consider the matter as one of principle. The material plea is raised in para. 5D of the re-amended defence, which is in the following terms:

"5D. (i) The contract for the opening of the joint account referred to in para. 3 of the amended statement of claim was made by the plaintiff and the second defendant jointly. (ii) The plaintiff has no right under the said joint contract except rights held by her jointly with the second defendant. (iii) The second defendant is a necessary party to any action to enforce any rights belonging to the account holders under the said joint contract, as a plaintiff, if he consents to be joined as such, and as a defendant, if he does not consent, in accordance with the practice established in *Cullen v. Knowles* (3). (iv) The rights of the plaintiff and the second defendant under the said joint contract are the same whether they are asserted in any action brought by the plaintiff and the second defendant jointly as co-plaintiffs, or whether they are asserted, as here, in an action brought by the plaintiff alone to which she has joined the second defendant as a defendant on the

ground that he had refused to be joined as a plaintiff. (v) No action can be maintained by the joint contractors on a joint contract unless each of them is in a position to sue thereon. (vi) No action could successfully be maintained by the plaintiff and the second defendant as co-plaintiffs against the [defendant bank] in which they alleged, as the plaintiff alleges here, that the second defendant has forged the plaintiff's signature as the drawer of cheques on the said joint account, and in which rights were asserted and relief claimed against the [defendant bank] solely on the basis of such allegation. The second defendant would not be in a position to maintain such an action, for he could not be heard to say that he had forged the plaintiff's signature as aforesaid and he could not be permitted to assert rights and claim relief on the basis of such allegation. (vii) In the premises this action is not maintainable by the plaintiff."

In the first place, it seems to me to be quite clear that the obligation entered into by the bank when accepting the application for a joint account made by the plaintiff and the second defendant was a single obligation owed to them jointly, or, in other words, that the right possessed by the plaintiff and the second defendant against the bank—namely, a right to have drawings honoured by the bank if signed by them both—was a right held by them jointly notwithstanding that their liability towards the bank was joint and several. This conclusion seems to me to follow from the express terms of the mandate, and it is supported by the decision of the Court of Appeal in *Hirschorn v. Evans* (4): see the judgment of MACKINNON, L.J. ([1938] 3 All E.R. 496). If, then, the bank's obligation was a single obligation owed to both jointly, and, accordingly, the customers' right was a single joint right, any action by the customer to enforce that right or to obtain a declaration as to the right must be brought either by joint contractors joining as plaintiffs, or, if one of the contractors is unwilling to sue as plaintiff, by the one consenting plaintiff, the other contractor being joined (as here) as defendant. But, this being merely a procedural matter, the issue against the bank must be determined in the same way whether both contractors join as plaintiffs or one is plaintiff and the other joined as defendant.

The material question on this issue can, therefore, be stated as follows:—If the plaintiff and the second defendant had both joined as plaintiffs, could they have obtained against the bank the declaration claimed when an essential step in their proof was that the cheques were forged by the second defendant? In my judgment, they could not. Support for this conclusion can, I think, be found in *Brandon v. Scott* (5), where securities had been deposited on terms that they were to be released only on the joint order of the three depositors and were, in fact, released on the wrongful order of one depositor only, and CROMPTON, J., held on demurrer that the three depositors could not successfully sue and stated (7 E. & B. 237) that:

"The principle is, that several [persons] cannot sue at law jointly, unless each one is in a position to sue."

To the like effect is the decision of LORD TENTERDEN, C.J. (9 B. & C. 539), in *Jones v. Yates* (6) (cited in *Brandon's* case (5)) that:

"The party to a fraud, he who profits by it, shall not be allowed to create an obligation in another by his own misconduct, and make that misconduct the foundation of an action at law."

Further, in my opinion, a useful analogy is to be found in cases of insurance law. In *P. Samuel & Co. v. Dumas* (7) VISCOUNT CAVE refers ([1924] A.C. 445) with apparent approval to a passage from DUER ON MARINE INSURANCE (Lecture III, s. 15) to the following effect:

"Where the interests of several persons are covered by the same policy, and the question arises whether by the act of one the rights of all are to be affected, we must necessarily consider whether the contract is entire in

respect of all or may be construed as a separate insurance for each. An insurance in one policy for the owners of a ship, we have already seen, is not divisible but the illegal act of one without the knowledge or privity of the others has the same effect in avoiding the entire contract as if all had concurred; and the same rule doubtless prevails in all cases where the persons for whose benefit the insurance is made have a joint or common interest in the subject-matter insured."

A Similarly, in *Hagedorn v. Bazett* (8), LORD ELLENBOROUGH, C.J., accepted the proposition that, if the policy covering the interest of two assured had been one entire contract, the fact that the insurance was illegal as regards the interest of one assured would have voided the policy against the other. I was also referred to the decision of the Supreme Court of Michigan in *Monaghan v. Agricultural Fire Insurance Co.* (9), which seems to be in line with the reasoning which I have adopted. Accordingly, the plea of the bank raised by para. 5D of the re-amended defence succeeds.

C The conclusion which I have reached renders it unnecessary for me to express any definite view on the remaining defences raised by the defendant bank, but, as they were fully argued before me, it is probably desirable that I should deal with them shortly. The bank put in the forefront of their argument by way of alternative the plea raised in para. 5C of the defence, the argument in support of which may be summarised as follows: (i) When a single customer opens an account with a bank, contractual relations are established between the customer and the bank imposing duties on both parties, some express and some implied: see *Joachimson v. Swiss Bank Corpn.* (10), and, particularly, the judgment of D ATKIN, L.J. ([1921] 3 K.B. 127); *Tournier v. National Provincial & Union Bank of England* (11) ([1924] 1 K.B. 483, 484); *Greenwood v. Martins Bank, Ltd.* (12). (ii) One of the implied terms is that the customer will act honestly towards the bank: see the judgment of SCRUTTON, L.J., in *Greenwood's case* (12) ([1932] 1 K.B. 381), as to the duty of the customer

E "if he became aware that forged cheques were being presented to his banker, to inform his banker in order that the banker might avoid loss in the future."

F (iii) Where two customers open a joint account there is a joint contract and it is an implied term of this joint contract that each customer will act honestly in relation to the working of the account, and, in particular, will not deceive the bank by fraud. No direct authority was cited in support of this proposition, but reliance was placed on decisions such as *Copland v. Laporte* (13) to the effect that, where several persons join in making an express promise, each is liable for the performance of the whole promise, whether performance is to be by one or all, or by a third party. In my judgment, these decisions lend no support for the main proposition as they turn wholly on the proper construction of the express promise.

G Considering the matter as one of principle, it seems to me that the question whether this particular term is to be implied must be decided by the familiar test first laid down in *The Moorcock* (14), and later re-stated by LORD WRIGHT in *Luxor (Eastbourne), Ltd. v. Cooper* (15), where he cites with approval ([1941] 1 All E.R. 57) the following passage from the judgment of SCRUTTON, L.J., in *Reigate v. Union Manufacturing Co. (Ramsbottom)* (16) ([1918] 1 K.B. 605):

H "'The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract: that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties 'What will happen in such a case?' They would both have replied, 'Of course, so and so will happen; we did not trouble to say that;

it is too clear." Unless the court comes to such conclusion as that, it ought not to imply a term which the parties have not expressed'."

Bearing in mind that the joint account was opened by the use of the bank's own form and the statement of BRAY, J., in *Kepitigalla Rubber Estates, Ltd. v. National Bank of India, Ltd.* (17) ([1909] 2 K.B. 1025) that the number of cases where bankers sustain losses by forgery is infinitesimal in comparison with the large business they do, and having regard to the plaintiff's position, I am unable to reach the conclusion that there is any necessity to imply such a term to give business efficacy to the contract. If the point had been raised at the time by the "officious bystander" I can well imagine a person placed in the position of the plaintiff saying without hesitation: "Though I cannot imagine for a moment that my trusted co-executor will commit forgery, I am not in a position to guarantee that he will not."

Next, as to the plea based on an account stated, though in *Bishun Chand Firm v. Seth Girdhari Lal* (18) LORD WRIGHT, in delivering the judgment of the Board, seems to suggest that the retention by a customer without comment of a bank statement showing debits and credits may amount to a stated and settled account, I know of no decision, and was referred to no decision, to that effect, and with respect I would adopt the observations of BRAY, J., on this point in *Kepitigalla's* case (17) ([1909] 2 K.B. 1027). But for the purpose of the present case it is, I think, sufficient to say that there was no evidence of any acceptance by the plaintiff of any bank statement since she never received it, and that, in my judgment, if I am wrong on the first point as to the effect of the joint account, the acceptance by the second defendant of the bank statement would not bind the plaintiff. Further, I consider that the fact that the bank statements were not sent to the plaintiff personally is fatal to the contention as to estoppel raised in para. 5B of the re-amended defence, apart from any other defects in this plea.

As regards the allegation that the plaintiff was in breach of her duty towards the defendant bank in that she failed to examine the bank statements from time to time, and, in effect, failed to control or supervise her co-executor, no direct authority was cited in support of this allegation though reliance was placed on the decision in *Greenwood's* case (12), in support of the argument that the decision of BRAY, J., in *Kepitigalla's* case (17) that the directors of a company opening an account with a bank did not impliedly agree to take precautions to prevent forgeries on the part of their servants could no longer be supported. In my judgment, there is no inconsistency between the two decisions and the reasons which have led me to reject the implied term relied on also lead me to reject the present contention. I see no reason at all why vis-à-vis the bank one executor should act as watch dog over the other whatever may be the position as between the two executors and their *cestuis que trust*.

The final point with which I need deal is that raised in para. 3A of the defence, namely, that by paying the amount of the forged cheques to the second defendant, the bank obtained a good discharge against both executors. It was frankly and necessarily admitted by counsel on behalf of the bank that the logical consequence of this submission was that the bank could have obtained a good discharge against the plaintiff if they had—contrary to the express terms of the mandate—paid the second defendant against cheques bearing his signature alone. It is sufficient for me to say that as at present advised the defendant bank's contention on this plea seems to me to be inconsistent with the decisions in *Stone v. Marsh* (19), *Innes (Assignee of R. & C. Hingeston, Bankrupts) v. Stephenson* (20), and *Husband v. Davis* (21).

Judgment for the defendants.

Solicitors: *J. E. Lickfold & Sons*, agents for *D'Almaine & Cockeram*, Abingdon (for the plaintiff); *Alfred Bright & Sons* (for the defendant bank).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

R. v. STRAFFEN.

[COURT OF CRIMINAL APPEAL (Slade, Devlin and Gorman, JJ.), August 20, 1952.]
Criminal Law—Evidence—Evidence tending to show commission of other crimes—Murder—Evidence of previous murders in similar circumstances.

Criminal Law—Evidence—Prisoner's answers to questions by police—Need of caution—"Person in custody"—Broadmoor patient—"Judges' Rules", r. (3).

A The appellant, who was a patient at Broadmoor Institution, was charged with the murder by strangulation of a girl of five years of age which was committed during a period when he was at large, having escaped from the institution. After his recapture the appellant was interviewed at the institution by police officers who, without administering a caution, questioned him as to his movements while he was at large. At the trial
 B evidence was admitted of these questions and the appellant's answers thereto, and also of the previous murders by strangulation of two other young girls to which the appellant had confessed, the circumstances of those murders being similar to those of the murder charged. The appellant having been convicted, on appeal,

C HELD: the prosecution were entitled to adduce evidence of the previous murders as tending to identify the person who had committed the murder charged as being the same person as he who had confessed to having murdered the other two girls in precisely the same way, namely, the appellant, and, therefore, the evidence was rightly admitted.

Makin v. A.-G. for New South Wales ([1894] A.C. 57) and *Thompson v. R.* ([1918] A.C. 221), applied.

D AS TO EVIDENCE OF SIMILAR OFFENCES, see HALSBURY, Hailsham Edn., Vol. 9, p. 186, para. 270; and FOR CASES, see DIGEST, Vol. 14, pp. 368-390, Nos. 3892-4124.

Cases referred to:

- E (1) *Makin v. A.-G. for New South Wales*, [1894] A.C. 57; 63 L.J.P.C. 41; 69 L.T. 778; 58 J.P. 148; 14 Digest 371, 3924.
 (2) *Harris v. Director of Public Prosecutions*, [1952] 1 All E.R. 1044; 116 J.P. 248.
 (3) *Thompson v. R.*, [1918] A.C. 221; 87 L.J.K.B. 478; 118 L.T. 418; 82 J.P. 145; 14 Digest 360, 3810.
 (4) *Perkins v. Jeffery*, [1915] 2 K.B. 702; 84 L.J.K.B. 1554; 113 L.T. 456; 79 J.P. 425; 14 Digest 373, 3941.

F APPEAL against conviction.

The appellant, John Thomas Straffen, was convicted at Winchester Assizes of the murder of a young girl and was sentenced to death. The grounds of appeal were that at the trial CASSELS, J., had wrongly admitted evidence of two other murders alleged to have been committed by the appellant, and also evidence of
 G statements made by the appellant to two police officers while he was in custody and without the usual caution being first administered.

Elam and H. E. Park for the appellant.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.), G. D. Roberts, Q.C., and J. N. Hutchinson for the Crown.

H SLADE, J., delivered the following judgment of the court. This is an appeal from the conviction of John Thomas Straffen before CASSELS, J., and a jury at the Winchester Assizes of the murder of Linda Bowyer, a girl of five and three-quarters years of age, on Apr. 29, 1952. Two grounds are raised in support of the appeal. The first ground is:

"That the learned judge was wrong in law in admitting evidence at the trial of murders alleged to have been committed by the accused at Bath on July 15 and Aug. 8, 1951, respectively."

That refers to the murders of two other young girls, namely, Brenda Goddard and Cicely Batstone. The second ground is:

"That the learned judge was wrong in law in admitting evidence at the trial of the oral statements made by the accused to Detective-inspector Francis and Detective-sergeant Lawson on Apr. 30, 1952, while he (the accused) was in custody and without the usual caution being first administered."

The second ground of appeal is based on what are known as the Judges' Rules. These rules are designed to secure that no advantage be taken of a prisoner who is in custody by requiring that in such a case the police shall administer the usual caution to him before questioning him. Those rules have no force in law in the sense that answers given by an accused person to any inquiries made in breach of them are inadmissible. It is a matter for the discretion of the learned judge in each case whether, when inquiries are made in contravention of the rules, the answers should be admitted or not. In the present case CASSELS, J., took the view that the words "in custody" in the rules meant "in custody of the police" and did not apply to a patient at Broadmoor, and he added that, if they did, it would never be possible to make any inquiries of a patient at Broadmoor without first administering the caution. In the opinion of the court the learned judge was right in exercising the discretion that he did in admitting the evidence of Detective-inspector Francis and Detective-sergeant Lawson, and there is no substance in that ground of appeal.

The other ground of appeal raises a far more serious point, but one on which the members of this court have reached a clear conclusion. On Apr. 29, 1952, the appellant escaped from Broadmoor and was at large from 2.40 to 6.40 p.m. on that day. At about 6 a.m. on Apr. 30 the dead body of Linda Bowyer was found in the village of Little Farley and her bicycle was found some two hundred yards away from the body. She had died from manual strangulation, and the medical evidence showed that her death had taken place some twelve to fifteen hours previously, which would come within the period during which the appellant was at large. Miss Saxby, who was called as a witness for the prosecution, was the last person to see Linda Bowyer alive. She said that she had seen her shortly after 5.30 p.m. The appellant's movements were more or less accounted for except for a period between 5.30 and 6 p.m., and having regard to the distances involved there is no doubt that that time provided him with ample opportunity to commit the crime had he been so minded.

About two and a half hours after the discovery of the dead body of Linda Bowyer Detective-inspector Francis and Detective-sergeant Lawson went to the Broadmoor institution, to which the appellant had been taken on his recapture the previous evening. Accompanied by some male nurses they went into the appellant's room, told him that they were police officers, and said that they would like to talk to him about his escape the previous day. Inspector Francis said:

"Are you prepared to tell us what you did and where you went?"

The appellant gave an account of some of his movements, and then Inspector Francis said:

"Yes, we know all that, but we should like to know what else you did, and if you got into any mischief?"

The appellant then said: "I did not kill her." Evidence was called by the prosecution to prove that at no time between 6.40 p.m. on Apr. 29 and the time of this interview—about 8.30 a.m. on Apr. 30—was there any opportunity of the appellant having access to newspapers or any other source of information relating to a little girl having been killed.

When the appellant said: "I did not kill her", Inspector Francis said: "What do you mean by you did not kill her? There has been no suggestion that

anyone has been killed, injured, or in any way attacked". The appellant: "I know what you policemen are. I know I killed two little children, but I did not kill the little girl". Inspector Francis: "What do you know of the little girl being killed?" The appellant: "I did not kill her". Detective-sergeant Lawson: "A little girl was in fact killed quite close to where you were arrested". The appellant: "I did not kill the little girl with the bicycle". At the time not only had nothing been said about a little girl having been killed, except when it had been mentioned by Sergeant Lawson a moment or two before, but nothing had been said about a little girl with a bicycle.

After that conversation the appellant made a voluntary statement as to his movements during the time that he was at large. It was taken down, read over to him in the usual way, and signed by him. That written statement confirmed the evidence which was given by witnesses for the prosecution including, in particular, that of the step-father of Linda Bowyer, a Mr. Sims. In that statement there appeared this passage:

"I saw about four little girls talking in the road not far from the pub.

One of the little girls ran into her house crying, the other two went towards the pub. The other one went back to her house and when I looked back she had a bike and was riding up behind me. I heard a man, I think he was from the shop, ask her if her mother was home. I think she said: 'Yes'. The man then got into a van which was parked outside the shop. I then walked straight along the road. I turned round again. The girl was not there at all."

The man referred to is clearly Mr. Sims, the step-father, who said in evidence that he had had such a conversation with his step-daughter at that place. At the end of the statement the appellant said:

"I have been shown a photograph by the police officer of a little girl and that is a photo of the little girl who I saw with the bike near the pub and who followed me up the road."

The photograph so shown to the appellant and identified by him as the fourth of the four little girls to whom I have just referred was a photograph of the deceased girl, Linda Bowyer.

The defence of the appellant was that he did not kill Linda Bowyer. He pleaded Not Guilty, and it was for the prosecution to prove their case. To do that the prosecution were entitled to call any evidence which was admissible in law. At an early stage, in the absence of the jury, they sought the judge's permission to admit evidence of the deaths of Brenda Goddard and Cicely Batstone, and they came prepared with evidence which amounted to a confession by the appellant that he murdered those two little girls. Indeed, one of the answers made by the appellant to the police officers in the case of Linda Bowyer was: "I know I killed two little children, but I did not kill the little girl". Unquestionably the two little children to whom he was there referring were Brenda Goddard and Cicely Batstone. The learned judge, after hearing legal argument, admitted the evidence. The question here is whether that evidence was properly admitted. The ground on which it was admitted was that it was material to establish the identity of the murderer of Linda Bowyer.

The general rule is that evidence should be excluded which tends to show that the accused has been guilty of criminal acts other than those covered by the indictment, and it is an irrefragable rule that evidence of the commission of criminal offences not covered by the indictment shall not be admitted for the purpose of proving that the accused is a person of criminal disposition, or even that he has a propensity for committing the particular type of crime with which he is charged. But, apart from statute, there are certain recognised exceptions to the general rule under which evidence is admissible of other crimes committed by the accused, the reason for its admission being that it tends to prove, not that he is a man who has criminal propensities, but that he was the man who committed the particular offence charged.

I take the law on the point from *Makin v. A.-G. for New South Wales* (1). In that case LORD HERSCHELL, L.C., delivering the judgment of the Privy Council, said ([1894] A.C. 65):

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

Here the evidence was admitted by the learned judge on the latter ground, namely, that it tended to rebut a defence which was otherwise open to the accused, that is, that he was not the person who committed the murder.

In dealing with *Makin's* case (1) recently in the House of Lords in *Harris v. Director of Public Prosecutions* (2), VISCOUNT SIMON said ([1952] 1 All E.R. 1046):

"In my opinion, the principle laid down by LORD HERSCHELL, L.C., in *Makin's* case (1) remains the proper principle to apply, and I see no reason for modifying it . . . It is, I think, an error to attempt to draw up a closed list of the sort of cases in which the principle operates. Such a list only provides instances of its general application, whereas what really matters is the principle itself and its proper application to the particular circumstances of the charge that is being tried. It is the application that may sometimes be difficult, and the particular case now before the House illustrates that difficulty."

Further on VISCOUNT SIMON said (*ibid.*, 1047):

"The substance of the matter appears to me to be that the prosecution may adduce all proper evidence which tends to prove the charge."

After dealing with *Thompson v. R.* (3), he said (*ibid.*, 1048):

"It is the fact that [the accused] was involved in the other occurrences which may negative the inference of accident or establish his mens rea by showing 'system', or, again, the other occurrences may sometimes assist to prove his identity, as, for instance, in *Perkins v. Jeffery* (4). But evidence of other occurrences which merely tend to deepen suspicion does not go to prove guilt."

That being the law, the question is whether the evidence in the present case falls within the category of admissibility as being relevant to prove the crime charged by showing that it was the appellant who committed it. The grounds on which the admissibility of the evidence was urged by the Solicitor-General in the court below was the similarity of the deaths and of the circumstances surrounding them in the case of the two murders at Bath, on the one hand, with the circumstances of the murder at Little Farley, on the other. He stated the similarities to be, first, that each of the victims was a young girl; secondly, that each of the young girls was killed by manual strangulation; thirdly, that in each case there was no attempt at sexual interference or any apparent motive for the crime; fourthly, that in none of the three cases was there any evidence of a struggle; and, fifthly, that in none of the three cases was any attempt made to conceal the body although the body could have been easily concealed. Those similarities were fortified by the medical evidence given by Dr. Gibson, dealing with the murders of Brenda Goddard and Cicely Batstone, and the pathologist, Dr. Teare, dealing with the murder of Linda Bowyer. Referring to the two earlier murders, Dr. Gibson said:

"The cause of death was asphyxia due to manual strangulation.

Q.—Was there any sexual interference with this little girl [Brenda Goddard] ?

A.—None at all. Q.—Apart from the abrasions to her throat, and the laceration on the back of her head, had she sustained any other injuries ?

A.—Not apart from one or two minor scratches, which might have been caused earlier; there were no other injuries. Q.—On Aug. 9 did you go to the field known as The Tumps in Bloomfield Road, Bath ? A.—I did.

Q.—Did you go along the hedge in that field which is shown in photograph No. 2 of Exhibit 15 ? A.—Yes. Q.—Did you see a body lying underneath the hedge, as shown in photograph No. 3 ? A.—Yes. Q.—Did you carry out an examination of the body of that child ? A.—I did. Q.—What was the cause of death ? A.—Asphyxia, due to manual strangulation.

Q.—Had there been any sexual interference with that child ? A.—None at all. Q.—I think you were present when a post mortem examination was made of her body ? A.—I was. Q.—Were there any injuries to her body, apart from the region of the throat ? A.—No. Q.—Comparing the two cases of Brenda Goddard and Cicely Batstone, so far as you could see from an examination of their bodies, had their death been caused in exactly the same fashion, by manual strangulation ? A.—Yes. Q.—The only difference between them being that one had a laceration on the back of the head and the other had not ? A.—That is so. Q.—Which, in your view, did not contribute to her death ? A.—It did not."

That laceration, according to the appellant, was caused by his banging her head against a stone because the child, apparently, uttered no cry when he was strangling her.

"Q.—In neither case was there any sexual interference ? A.—No.

Q.—In the case of Brenda Goddard, she was lying along by a wall in a wood ?

A.—Yes. Q.—So far as you could see, had any attempt been made to conceal her body ? A.—None at all. Q.—In the case of Cicely Batstone, her body was lying by a high hedge, was it not ? A.—Yes, close to a high

hedge. Q.—So far as you could see, had any attempt been made to conceal her body ? A.—I did not think so."

Dealing with the evidence as regards Linda Bowyer Dr. Teare said :

"I saw the body of Linda Bowyer. Q.—Have you studied the depositions, the photographs, and the post mortem reports in the cases of Brenda Goddard and Cicely Batstone ? A.—I have. Q.—And did you hear the evidence of Dr. Gibson ? A.—I did. Q.—In the case of Linda Bowyer did you find many similarities with regard to her death when compared with the deaths of Cicely Batstone and Brenda Goddard ? A.—I did. Q.—First of all, of course they were all little girls ? A.—Yes. Q.—They all died of manual strangulation ? A.—Yes. Q.—In the case of Linda Bowyer also there was no attempt at sexual interference ? A.—That is so. Q.—In the case of Linda Bowyer also there was no apparent motive, was there ? A.—No. Q.—So far as Linda Bowyer was concerned, you went to the spot where her body was found ? A.—I did. Q.—Was there any evidence of any struggle in that case ? A.—I could see none. Q.—And no attempt in that case to conceal the body ? A.—None at all. Q.—Would concealment have been fairly easy in that case ? A.—It would. Q.—With regard to the case of Linda Bowyer, the case where you did see the body, was there any feature about her death which impressed itself upon your mind ? A.—Yes, at the time I was struck by the precision with which this child's death appeared to have been caused. It struck me that the pressure on her neck was determined and applied at exactly the right points, as if by a person with some experience of this method of killing. Q.—The injuries which she sustained were very local in character, were they not ? A.—They were. Q.—Do you attach any significance to that ? A.—They

[the injuries] were in contrast to the exaggerated amount of bruising and external injury which one commonly sees in cases of strangulation, even in young children. Q.—From the knowledge you now possess of the death of Cicely Batstone, was the same feature apparent there? A.—Yes, but less marked than in the case of Linda Bowyer.”

The evidence with regard to the deaths of Brenda Goddard and Cicely Batstone was admitted to show that the person who manually strangled those two little girls also manually strangled Linda Bowyer in similar circumstances. In the opinion of the court, that evidence was rightly admitted, not to show, to use the words of counsel for the appellant, that the appellant was a professional strangler, but to show that he strangled Linda Bowyer—in other words, to identify the murderer of Linda Bowyer as being the same person as the person who had murdered the other two little girls in precisely the same way. I see no distinction in principle between this case and *Thompson v. R.* (3) and, indeed, I think one cannot distinguish abnormal propensities from identification. Abnormal propensity is a means of identification. In *Thompson's* case (3) the offence charged was committed on Mar. 16, 1917, and the evidence was that on that day an appointment was made by the man who committed the offences with the boys to meet those boys again on Mar. 19. It was common ground that it was the accused who went to the appointed place on Mar. 19, and he found the police waiting for him. When he was arrested there were found on him powder puffs, and at his lodgings there were found indecent photographs of boys. Evidence was admitted of the powder puffs and of the photographs that were found on the 19th to prove that the accused committed the offence on the 16th, the boys having identified him as being the person who committed that offence and he having set up an alibi. It was admitted to prove his identity by showing that he was one of those persons who suffer from the abnormal propensity of homosexuality. In the present case it is an abnormal propensity to strangle young girls without any apparent motive, without any attempt at sexual interference, and to leave their dead bodies where they can be seen and where presumably their deaths would be rapidly detected. In the judgment of the court, this evidence was admissible because it tended to identify the person who had murdered Linda Bowyer with the person who had confessed in his statements to having murdered in similar circumstances a year before Brenda Goddard and Cicely Batstone.

Counsel for the appellant asked: How far, then, does the admissibility of such evidence go? Does it apply in the case of a burglar, housebreaker, thief, and so on? LORD SUMNER, in *Thompson's* case (3), pointed out ([1918] A.C. 235) that such persons were merely examples of those who fell within the genus of dishonest persons, but, speaking for myself, if the question of identity arose in a case of housebreaking and it were possible to adduce evidence that there was some peculiarity in relation to earlier housebreakings which was apparent also in the case of the housebreaking charged so as to stamp the accused man not only with the housebreaking charged but with the earlier housebreakings, and there was a confession or other evidence that he had committed the earlier housebreakings, that evidence would fall within the same principle of admissibility, not to prove his propensity for housebreaking, but to prove that he was the person who committed the housebreaking charged. Counsel for the appellant has conceded that, if the evidence was admissible, the discretion of the learned judge to admit it at the trial and not to reject it on the ground that its prejudicial effect was disproportionate to its probative value was judicially exercised, and, therefore, this appeal is dismissed.

Appeal dismissed.

Registrar, Court of Criminal Appeal (for the appellant); *Director of Public Prosecutions* (for the Crown).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

MULREADY v. J. H. W. BELL, LTD. AND ANOTHER.

[MANCHESTER TRINITY ASSIZES (Pearson, J.), July 8, 9, 1952.]

Negligence—Liability of contractor to servant of sub-contractor—Retention by contractor of control over manner of performance of work—Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), reg. 4, reg. 31.

A The plaintiff, a sheeteer's labourer, was employed by K. who was engaged under a contract with the first defendants to fix steel sheeting and ventilators to a building, the first defendants supplying the materials and equipment required, and K. with his employees performing the work under the supervision and control of the first defendants. PEARSON, J., found that the first defendants were not entitled to instruct the plaintiff as to the work he was to do or how he was to do it. While working on the roof of the building, under conditions which did not comply with the requirements of reg. 31 of the Building (Safety, Health and Welfare) Regulations, 1948, the plaintiff fell to the ground some seventy feet below and was injured.

B HELD: (i) the first defendants had not divested themselves of the direction of the work or the control over the manner of its performance, and, therefore, were undertaking, within the meaning of reg. 4 of the regulations, the operation in the course of which the plaintiff was injured, and were liable to the plaintiff under reg. 31.

C (ii) as the first defendants were not the employers of the plaintiff, they were not liable to him for breach of their common law obligation to ensure his safety.

D FOR THE BUILDING (SAFETY, HEALTH AND WELFARE) REGULATIONS, 1948, regs. 4 and 31, see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 8, pp. 212 and 224.

Cases referred to:

(1) *Penny v. Wimbledon Urban Council*, [1898] 2 Q.B. 212; *affd.* C.A., [1899] 2 Q.B. 72; 68 L.J.Q.B. 704; 80 L.T. 615; 63 J.P. 406; 26 Digest 410, 1308.

E (2) *Pratt v. Richards*, [1951] 1 All E.R. 90 n.; [1951] 2 K.B. 208; 2nd Digest Supp.

(3) *London Graving Dock Co., Ltd. v. Horton*, [1951] 2 All E.R. 1; [1951] A.C. 737; 2nd Digest Supp.

F (4) *Barrington v. Kent Rivers Catchment Board*, [1947] 2 All E.R. 782; 112 J.P. 85; 2nd Digest Supp.

(5) *Cox v. Cutler & Sons, Ltd. & Hampton Court Gas Co.*, [1948] 2 All E.R. 665; [1949] L.J.R. 294; 2nd Digest Supp.

(6) *Street v. British Electricity Authority*, [1952] 1 All E.R. 679.

ACTION for damages for breach of statutory duty and negligence.

G The plaintiff, Thomas Mulready, was a sheeteer's labourer. The first defendants, J. H. W. Bell, Ltd., contracted with the second defendants, Orr's Zinc White, Ltd., to supply and install corrugated steel sheets forming the sides and roof of a producer gas plant house in the course of erection on the second defendants' premises and to fix three ventilators on the building. By an oral agreement between the first defendants and one Keating it was arranged that Keating should undertake the sheeting work and the fixing of the ventilators for the first defendants and would select and pay his own labour. Following the agreement H Keating engaged the plaintiff who worked under his direction. The first defendants supplied Keating with materials and equipment and directed him as to the work to be done and the way in which it was to be carried out, but had no control over the plaintiff. On Aug. 26, 1950, while the plaintiff was on the roof of the building fixing a ventilator, he slipped, fell to the ground, and was injured. No precautions had been taken by the first defendants to prevent workmen falling from the roof when working there,

The plaintiff contended that the first defendants were employers of workmen undertaking an operation within reg. 4 of the Building (Safety, Health and Welfare) Regulations, 1948, and had failed to comply with reg. 31 of those regulations, and, further, that they were his employers and had failed to take reasonable care to ensure his safety. As against the second defendants, the plaintiff contended that they were the occupiers of a factory and had failed to comply with the requirements of s. 26 (2) of the Factories Act, 1937. It was further contended that the second defendants were liable at common law for negligence. Both defendants denied any breach of statutory duty and contended that the accident was caused by the negligence of the plaintiff. A

PEARSON, J., held that, although the second defendants' premises were a factory within the meaning of the Factories Acts and they were the occupiers, the site of the producer gas plant house was solely used "for some purpose other than the processes carried on in the factory" within s. 151 (6) of the Act of 1937, and, therefore, that s. 26 (2) did not apply, and, further, that the second defendants were not liable to the plaintiff for negligence. This report deals with the liability of the first defendants to the plaintiff. B

Burton, Q.C., and *C. N. Glidewell* for the plaintiff.

Nelson, Q.C., and *R. H. Forrest* for the first defendants. C

Gerrard, Q.C., and *Wingate-Saul* for the second defendants.

PEARSON, J.: The plaintiff's case against the first defendants (the Bell Co.) rests on two grounds. First, it is contended that within the meaning of reg. 4 of the Building (Safety, Health and Welfare) Regulations, 1948, the Bell Co. were contractors and/or employers of workmen undertaking a building operation, which included the fixing of a ventilator on the roof of the building, they were performing the work of fixing the ventilator, and they failed to comply with the requirements of reg. 31 of the regulations, that non-compliance being a cause of the accident. Regulation 31 (1) provides: D

"Where work is done on the sloping surface of a roof and, taking into account the pitch, the nature of the surface, and the state of the weather, a person employed is likely to slip down or off the roof, then unless he has adequate handhold or foothold or is not liable to fall a distance of more than six feet six inches from the edge of the roof, suitable precautions shall be taken to prevent his so falling." E

It was, in my view, obvious that the requirements of that regulation, if applicable, were not complied with, and that the non-compliance was a cause of the accident. On this aspect of the case the point to be decided is whether under reg. 4 the Bell Co. had an obligation to comply with the requirements of reg. 31. Secondly, it is contended that, for the purposes of the liability of an employer to take reasonable care to ensure the safety of his workmen, the Bell Co. were the employers of the plaintiff, they failed to take reasonable care to ensure his safety, and failure on their part was a cause of the accident. The plaintiff said that Mr. Patrick Keating employed him, paid his wages, told him what to do, and could have dismissed him. F

In view of that evidence, the right conclusion as to the terms and effect of the contract between Keating and the Bell Co. is, I think, that it was a sub-contract of a very partial and minor character. The Bell Co. supplied the materials and the equipment required. Keating, with his employees, was to carry out the work, but I think he was to do so under the supervision and control of, and in accordance with any instructions which might be given by, the Bell Co. with regard to the work to be done and the manner in which it was to be done. The plaintiff was an employee of Keating and not an employee of the Bell Co. I do not think the Bell Co. were entitled to instruct the plaintiff as to the work he was to do or how he was to do it. The procedure would be for the company G H

to give instructions to Keating and he, to comply with the company's directions, would have to give his own orders to the plaintiff as his employee.

In my opinion, the plaintiff could not be blamed for what he did. He was inexperienced, he had not been told how the operation should be performed, and he had not been given any warning of the dangers involved in such an operation or any instructions as to the safety precautions which should be taken. I find there was no negligence on his part.

A I have now to consider the position of the Bell Co. under reg. 2, reg. 4 and reg. 31 of the Building (Safety, Health and Welfare) Regulations, 1948. Regulation 2 shows that the regulations apply to the construction of a building. Regulation 4, so far as material, provides:

B "It shall be the duty of every contractor and employer of workmen who is undertaking any of the operations to which these regulations apply . . . (ii) to comply with such of the requirements of regs. 31 to 33 . . . as relate to any work, act or operation performed or about to be performed by such contractor or employer of workmen."

It was argued on behalf of the Bell Co. that, as they had placed a sub-contract for the sheeting and ventilator-fixing operations to be carried out by Keating and his men, the company were, therefore, mere "paper contractors", and were not undertaking the operations or performing the work of fixing the ventilator, and were, therefore, not liable under reg. 4 and reg. 31.

C On appropriate facts, where a main contractor had fully sub-contracted the work so as to leave the sub-contractor in full charge and control, and the main contractor had no right to intervene and direct the work to be done and the manner of doing it, that argument would raise an interesting question as to the meaning of the word "undertaking" and the word "performed" in reg. 4. But on the facts which I have found in this case, I do not think that question causes any difficulty. The Bell Co. were not mere "paper contractors". They had contracted to do the work for the Orr's Co., and had not divested themselves of the direction of the work and their control over the manner of its performance.

D They were still in effective charge and control. I hold that they were undertaking an operation within the meaning of reg. 4, and were performing the act of fixing the ventilators. *Penny v. Wimbledon Urban Council* (1), and *Pratt v. Richards* (2) ([1951] 2 K.B. 214), were referred to and have been taken into account in coming to this conclusion. I, therefore, hold that the Bell Co. are liable to the plaintiff for the breach of reg. 31 and on that ground he is entitled to recover damages

E against them.

F As regards the claim against the Bell Co. for breach of the employer's duty at common law, I hold that this ground of claim fails because the Bell Co. were not in any relevant sense employers of the plaintiff. If they had been his employers I would have held that there was a breach of the common law obligation to take reasonable care to ensure his safety, as he had been given no sufficient instructions

G and there was a failure to provide a safe system of work. Having regard to all the facts in this case, I think a proper sum to award to him by way of damages, including special damages, is £8,500. Therefore, there will be judgment for the plaintiff against the Bell Co. for that sum.

Judgment for the plaintiff against the first defendants.

Solicitors: *David Blank, Alexander & Co.*, Manchester (for the plaintiff); *Laces & Co.*, Liverpool (for the first defendants); *William Charles Crocker* (for the second defendants).

[Reported by MISS M. D. CHORLTON, Barrister-at-Law.]

DALY v. GENERAL MEDICAL COUNCIL.

[PRIVY COUNCIL (Lord Porter, Lord Tucker and Lord Asquith of Bishopstone), July 24, 1952.]

Medical Practitioner—General Medical Council—Disciplinary committee—Erasure of name from register—Discretion of committee to consider evidence of previous offences—Powers of legal assessor.

In considering what action they should take against a medical practitioner and whether his conduct amounts to infamous conduct the Medical Disciplinary Committee of the General Medical Council, set up under s. 14 (1) of the Medical Act, 1950, are entitled to receive not only the evidence in the particular case, but also evidence in regard to the practitioner's previous conduct as a medical practitioner (e.g., evidence of previous complaints and findings in regard to him), and it is not necessary that such evidence should be of similar offences, provided that they relate to his professional conduct. The extent to which the additional evidence should affect the decision of the committee is a matter for their discretion. A

Semble: as the legal assessor to the committee, appointed under s. 17 (1) of the Act of 1950, possessed wide powers under the Medical Disciplinary Committee (Legal Assessor) Rules, 1951, he had not exceeded his powers by questioning witnesses at the hearing by the committee provided that he had received the leave of the chairman of the committee to put the questions which he did. B

APPEAL, under the Medical Act, 1950, s. 20 (3), from a determination of the Medical Disciplinary Committee of the General Medical Council, made on Nov. 29, 1951, that the appellant had been guilty of infamous conduct in a professional respect so that the registrar of the General Medical Council should be directed to erase his name from the register. C

At all material times the appellant was a medical practitioner registered under the Medical Acts. The determination of the committee was in respect of the charge that the appellant, being a registered medical practitioner, had committed adultery with a married woman towards whom he stood in a professional capacity and with whom he had been found guilty of adultery by a decree of the court dated Dec. 11, 1950. After the committee had found the facts proved and before they had decided on their determination they were reminded that the appellant had appeared before the General Medical Council on two previous occasions, viz., (i) on May 29, 1940, following a conviction at Nottingham Assizes of endeavouring to conceal the birth of a child; and (ii) on July 18, 1945, following a conviction of making a false statement in connection with the registration of the birth of an illegitimate child. On his appeal from the determination of the committee, the appellant contended, inter alia, that the duty of the legal assessor under s. 17 (1) of the Medical Act, 1950, was to decide on the admissibility of evidence and to give his opinion on points of law, and that the assessor had acted contrary to his duty in that he had forced the appellant to give evidence which was prejudicial to his case, had allowed witnesses to produce and read letters without proof that they were written by the appellant, and had acted with bias during the hearing, intervening to make points which prosecuting counsel had not considered it necessary to make. The appellant further contended that, as the General Medical Council had already heard and decided the two earlier complaints against him, those cases should not have been brought forward again. D

The appellant appeared in person. E

S. G. Howard, Q.C., and J. R. Macgregor for the General Medical Council. F

July 24. LORD PORTER: In this case two problems have been raised. The first is in regard to the action of the legal assessor, and the second is in regard to the discretion of the Medical Disciplinary Committee. G

H

So far as the assessor is concerned, their Lordships have had their attention called to the Medical Disciplinary Committee (Legal Assessor) Rules, 1951 (S.I., 1951, No. 1918), which give him wide powers, and they must assume that in this particular case, considering the evidence as presented, the legal assessor had received the leave of the chairman of the Medical Disciplinary Committee to put the questions which he did, in which case they were entirely in order. If questions were put against the wish of the chairman, they would be out of order, but that was not the case. Therefore, there is no irregularity which could make a difference to the decision of the case for this reason. It is for the Medical Disciplinary Committee, when they are considering what action they should take and whether the conduct amounts to infamous conduct, to receive, not only the evidence in the particular case, but evidence as to the previous position of the doctor concerned. They are entitled to, and must, take into consideration this additional evidence when they are making up their minds, in the first place, whether they should find the doctor guilty of infamous conduct, and, in the second place, what action they should take on that conduct. Therefore, in the particular case, they were entitled to hear, not only evidence of the surrounding circumstances, but also evidence of the previous complaints and findings with regard to the doctor in question. In their Lordships' view, it is not true to say that in a medical case one must look only at evidence of similar offences. How much those other matters, provided that they are matters relevant to an appellant's behaviour as a doctor, may affect the mind of the Medical Disciplinary Committee is a matter for them and for their discretion. That being so, in this case their Lordships cannot say that the committee have in any way acted improperly or without evidence, or have not had ample ground on which to exercise their discretion. In these circumstances, their Lordships must humbly advise Her Majesty that the appeal be dismissed. There will be no order as to costs. The order will take effect from the time when Her Majesty approves the advice tendered to her.

Appeal dismissed.

Solicitors: *Waterhouse & Co.* (for the General Medical Council).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

R. v. MILLER AND OTHERS.

[WINCHESTER SUMMER ASSIZES (Devlin, J.), July 11, 14, 15, 16, 1952.]

F *Criminal Law—Evidence—Evidence tending to show commission of other crimes—Question on behalf of one prisoner involving character of another.*

Criminal Law—Separate trials—Question asked on behalf of one prisoner involving character of another—Charge of conspiracy.

During the course of the trial of A., B. and C. on a charge of conspiracy to evade duties of Customs payable on the importation of stockings, the defence of B. was that he was not concerned in the illegal acts, but that C. masqueraded as him (B.) and used his (B.'s) office for their commission. In furtherance of that defence B.'s counsel asked a witness for the prosecution whether C. was not in prison during a period when no illegal importations had taken place. Counsel for C. objected to the question and applied for a new trial.

H **HELD:** in the circumstances the question was relevant; there was prima facie evidence that B. and C. were fellow conspirators; and the application would be refused.

Per **DEVLIN, J. :** The principle that a question as to the character of an accused person is only admissible if it is relevant applies equally to questions put by counsel for a co-defendant as to those put by the prosecution. If in any case such a question is relevant and is put by counsel for a co-defendant that counsel ought to show, so far as is possible, the same restraint

as would the prosecution and should confine his questions strictly to those required for the purpose of his case. Moreover, counsel should first inform counsel for the other accused person that he proposes to put the question.

AS TO EVIDENCE OF CHARACTER, see HALSBURY, Hailsham Edn., Vol. 9, pp. 188-191, paras. 271-274; and FOR CASES, see DIGEST, Vol. 14, pp. 361-366, Nos. 3818-3874.

Cases referred to:

- (1) *R. v. Grondkowski, R. v. Malinowski*, [1946] 1 All E.R. 559; [1946] K.B. 369; 115 L.J.K.B. 289; 175 L.T. 32; 110 J.P. 193; 2nd Digest Supp.
- (2) *R. v. Peckham*, (1935), 154 L.T. 275; 100 J.P. 59; Digest Supp.
- (3) *R. v. Firth*, [1938] 3 All E.R. 783; Digest Supp.
- (4) *R. v. Palmer*, (1935), 25 Cr. App. Rep. 97; Digest Supp.
- (5) *R. v. Wright*, (1934); 25 Cr. App. Rep. 35; Digest Supp.
- (6) *R. v. Featherstone*, [1942] 2 All E.R. 672; 168 L.T. 64; 107 J.P. 28; 2nd Digest Supp.
- (7) *R. v. Fripp, R. v. Jones*, (1942), 29 Cr. App. Rep. 6; 2nd Digest Supp.
- (8) *R. v. Smith*, (1915), 84 L.J.K.B. 2153; 114 L.T. 239; 80 J.P. 31; 14 Digest 524, 5884.

TRIAL on indictment.

At Winchester Assizes, before DEVLIN, J., and a jury, Alfred Miller, Nathan Mercado and Leonard Harris were charged on an indictment that between Jan. 1, 1949, and Oct. 6, 1951, they conspired together and with others fraudulently to evade duties of Customs payable on the importation of nylon stockings. At the trial evidence was tendered for the prosecution in respect of twenty-one importations, the first in February, 1949, and the last in September, 1951. The prosecution alleged that Miller started the illegal importations, conspiring with members of the crews of ships docking at Southampton, and that later he was joined in the conspiracy by Harris and Mercado. Between Nov. 28, 1949, and Sept. 16, 1950, Harris was serving a sentence of imprisonment for an offence unconnected with the present charges, and during that period there were no illegal importations. The defence of Mercado, as appeared from the cross-examination by his counsel of a witness for the prosecution, was that he was not concerned in the illegal importations, but that Harris, masquerading as Mercado, by whom he was employed, used Mercado's office for that purpose. In support of this defence and to show that Harris was primarily responsible for the importations, counsel asked the witness whether he was aware that Harris was in prison during a period when the importations were suspended. Counsel for Harris then applied for an order that the jury be discharged from giving a verdict in respect of Harris and that there should be a new trial with regard to him on the ground that his trial must be so prejudiced by the question asked by Mercado's counsel that that would be the proper course for the judge to take in the exercise of his discretion. The case is only reported on this point.

G. D. Roberts, Q.C., and *S. A. Morton* for the Crown.

Maude, Q.C., and *J. N. Hutchinson* for Miller.

Wooll, Q.C., *H. H. Edmunds* and *Hobbs* for Mercado.

Gillis and *R. I. Gray* for Harris.

DEVLIN, J. : The fundamental principle, equally applicable to any question that is asked by the defence as to any question that is asked by the prosecution, is that it is not normally relevant to inquire into a man's previous character, and, particularly, to ask questions which tend to show that he has previously committed some criminal offence. (It is not relevant because the fact that he has committed an offence on one occasion does not in any way show that he is likely to commit an offence on any subsequent occasion.) Accordingly, such questions are, in general, inadmissible, not primarily for the reason that they are prejudicial, but because they are irrelevant. There is, however, this difference

in the application of the principle. In the case of the prosecution, a question of this sort may be relevant and at the same time be prejudicial, and, if the court is of the opinion that the prejudicial effect outweighs its relevance, then it has the power, and, indeed, the duty, to exclude the question. Therefore, counsel for the prosecution rarely asks such a question. No such limitation applies to a question asked by counsel for the defence. His duty is to adduce any evidence which is relevant to his own case and assists his client, whether or not it prejudices anyone else.

A Accordingly, the question which I have to ask myself in the first instance is whether it was relevant to inquire where Harris was at a certain period of time. The answer is, I think, that it was relevant, and, indeed, no real objection has been taken on that ground. It was plainly relevant to the case which was being developed on behalf of the accused Mercado—that the time when the conspiracy was, as he says, quiescent was a time when Harris was unable to take part in it. So far no real evidence has been adduced, but the question indicates what I presume will be the case, that counsel for Mercado will seek to tender proof of where Harris was at the relevant period, and what I am doing, in effect, is determining whether evidence of that character is admissible or not. For the reasons that I have given I think it is relevant, and, therefore, admissible.

B C Although there was no irregularity in the form of the question under consideration, I have dealt with it in this way to make clear how far my ruling goes. First, it does not open the field to any question of this kind by counsel for an accused person against the character of another accused. It is admissible in the present case because it happens to be relevant. In the ordinary way the character of the accused is no more relevant at the hands of the defence than it is at the hands of the prosecution. Secondly, while counsel for the defence is not bound by the same considerations of restraint that would affect counsel for the prosecution in such a matter, care ought to be taken not to go any further than is strictly necessary for the proof of the relevant point on which the defence desires to rely. In such a matter the court is very much in the hands of counsel. I have indicated that at this stage proof of where Harris was at a given period during the conspiracy appears to me to have relevance, but I think that counsel for the defence ought to follow, so far as possible in the very different circumstances of appearing for the defence, the same restraint as counsel for the prosecution would, and ought not to introduce material of this sort further than is necessary or unless it is strictly required for the purpose of his case. Thirdly, I think that any question of this sort that is being asked by counsel for one accused F that will affect the other accused ought to be communicated to counsel for the other accused in advance, so that he may consider whether he desires to take any objection to it.

The cases on which counsel for Harris relied do not, in my judgment, assist him. They were cases in which there was an irregularity in the conduct of the case by the prosecution. The evidence of previous character was irrelevant and inadmissible, but it had slipped out in some way, sometimes through the fault of the witness, sometimes through the fault of counsel, and, therefore, it made the conduct of the prosecution's case irregular. Where such an irregularity exists a new trial will generally be granted and the jury will be discharged. Here there is no irregularity, and if I were simply to discharge the jury and start the trial all over again the same results would necessarily follow, since the question that has been put could be put again. Therefore, the essence of the application is not the discharging of the jury on the ground of irregularity, but an application for a separate trial. The considerations which I apply to that are just the same as if counsel for Harris, having been forewarned of the nature of the defence which was to be advanced on behalf of Mercado, had made the application at the beginning of the case.

H On such an application one of the matters taken into consideration is the possibility that one co-defendant may raise a defence which reflects on another

co-defendant and involves an attack on his character, and for this purpose I will treat the question that is being asked as having the same effect as if it were an attack on Harris's character, though it is primarily made, not for that purpose, but to prove where he was at a given moment. I do not draw any distinction on that ground. The recent cases in which this matter has been considered—I have in mind in particular *R. v. Grondkowski*, *R. v. Malinowski* (1)—show that that possibility is only one of the elements that has to be taken into consideration in determining whether there should or should not be a new trial. In each case one has to consider what the interests of justice require, and, as LORD GODDARD, C.J., pointed out in *R. v. Grondkowski*, *R. v. Malinowski* (1) ([1946] 1 All E.R. 561), the interests of justice are not necessarily the same as the interests of the accused. A

The fundamental thing, to my mind, about the present case is that it concerns a charge of conspiracy, that it alleges—and there is *prima facie* evidence to support the allegation—that Mercado and Harris were engaged in a common enterprise and were fellow conspirators. The cases must be rare in which fellow conspirators can properly in the interests of justice be granted a separate trial. The fact that, as is plain, one accused person desires to throw blame on the other, that Mercado desires to suggest that Harris was, in effect, using the facilities which were provided by his office, unbeknown to him (Mercado), to conduct an illegal enterprise and that Mercado was innocent, suggests the difficulty which could arise if separate trials were granted. Take the case of two prisoners, A. and B., who are said to have been engaged in a common illegal enterprise, and one desires to say that he was made use of by the other, that he was innocent and was misled. If a separate trial be granted, the result would be that in the first case the prisoner A. might go into the witness-box and give evidence of all sorts of things said by B. and of the conduct of B. which would pass necessarily without any denial, and might represent B. as being a man of obvious criminality, and the result would be that the jury, hearing only A.'s side and not B.'s, might think it proper to acquit A. Then the trial of B. takes place before another jury and the same procedure happens in reverse, and the jury in that case might think it proper to acquit B. The result of granting a separate trial might, therefore, be that there was a miscarriage of justice. And the same result would, I think, apply if one assumes, contrary to the assumption that I have made, that one of the accused is innocent. The result might be that the jury in such a case, hearing only the innocent accused and not having had the advantage of seeing the other accused, not being able to form any opinion about his character, not hearing him cross-examined, might come to the conclusion that there was not enough in the story that they had heard, in the absence of hearing the other side and of it being tested, to justify an acquittal. C D E F

The principle is that in cases of this sort justice ordinarily requires that the whole matter should be tried as one case, and that it will need a very strong and exceptional case before it is split up into two separate trials. If separate trials were to be ordered as a matter of course simply because one accused proposed to attack the character of another, then a separate trial, and the possible advantages in the case of a guilty accused, could always be obtained simply by the threat that one accused proposed to attack the character of his fellow accused. I have, therefore, given the main weight to that consideration, though I have had regard also to the desirability, where it is possible, of excluding these matters from mention in front of the jury. On balance I think that I should not have granted a separate trial if an application had been made at the beginning of the case. I think the same principles apply now, and I do not grant a separate trial, which would be the result of the application that was made to me if it was successful. Accordingly, the application fails and the trial will proceed with the accused as at present arraigned. *Application refused.* G H

Solicitors: *M. G. Whittome*, Solicitor for the Customs and Excise (for the Crown); *Canter, Hellyar & Co.* (for Miller and Harris); *Bieber (A.) & Bieber* (for Mercado).

[Reported by CONRAD OLDHAM, Esq., Barrister-at-Law.]

LOWE v. LOWE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), July 29, 30, 1952.]

Divorce—Delay—Discretionary bar—Principles to be applied—Matrimonial Causes Act, 1950 (c. 25), s. 4 (2) (i).

A The principles laid down by VISCOUNT SIMON, L.C., in *Blunt v. Blunt* ([1943] 2 All E.R. 78) relating to the exercise by the Divorce Court of the discretion conferred on it to grant a decree in a case where the petitioner has committed adultery are of general application wherever the burden is put on the court of exercising its discretion whether or not to grant a decree and are applicable where the petitioner has been guilty of unreasonable delay in bringing the petition.

B The parties were married on Jan. 14, 1926. In or about 1934 they parted, and shortly afterwards the wife went to live with another man, and this fact came to the knowledge of the husband in or about the summer of 1935. In 1940 the husband also began to live in adultery, and this association ceased in 1945. On Oct. 5, 1950, the man with whom the wife had been living in adultery died. On Aug. 9, 1951, the husband filed a petition for divorce on the ground of the wife's adultery.

C HELD: the husband had been guilty of unreasonable delay within the meaning of s. 4 (2) (i) of the Matrimonial Causes Act, 1950, there having been something in the nature of acquiescence showing that he had been quite insensible to the position and to the loss of his wife; accordingly, the court had a discretion whether or not to grant a decree, but in the circumstances the discretion would not be exercised in the husband's favour, and the petition would be dismissed.

D Observations of BUCKNILL, J., in *Binney v. Binney & Hill* ([1936] 2 All E.R. 410) and principles laid down by VISCOUNT SIMON, L.C., in *Blunt v. Blunt* ([1943] 2 All E.R. 78), applied.

E FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 4, see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 394.

Cases referred to:

- (1) *Mortimer v. Mortimer*, (1820), 2 Hag. Con. 310; 161 E.R. 753; 27 Digest 300, 2768.
- (2) *Short v. Short & Bolwell*, (1874), L.R. 3 P. & D. 193; 27 Digest 353, 3376.
- F (3) *Beauclerk v. Beauclerk*, [1891] P. 189; 60 L.J.P. 20; 64 L.T. 35; 27 Digest 349, 3326.
- (4) *Rickard v. Rickard & Bond*, (1921), 37 T.L.R. 511; 27 Digest 349, 3317.
- (5) *Johnson v. Johnson*, [1901] P. 193; 70 L.J.P. 44; 84 L.T. 725; 27 Digest 355, 3395.
- G (6) *Binney v. Binney & Hill*, [1936] 2 All E.R. 409; [1936] P. 178; 105 L.J.P. 81; 155 L.T. 144; Digest Supp.
- (7) *Greenwood v. Greenwood*, [1937] 3 All E.R. 63; [1937] P. 157; 106 L.J.P. 74; 157 L.T. 168; Digest Supp.
- (8) *Pellew v. Pellew & Berkeley*, (1859), 1 Sw. & Tr. 553; 29 L.J.P. & M. 44; 2 L.T. 89; 164 E.R. 856; 27 Digest 354, 3384.
- (9) *Newman v. Newman*, (1870), L.R. 2 P. & D. 57; 39 L.J.P. & M. 36; 22 L.T. 552; 27 Digest 354, 3389.
- H (10) *Stevenson v. Stevenson & Lane*, [1947] W.N. 83; 2nd Digest Supp.
- (11) *Crewe v. Crewe*, (1800), 3 Hag. Ecc. 123; 162 E.R. 1102; 27 Digest 333, 3133.
- (12) *Blunt v. Blunt*, [1943] 2 All E.R. 76; [1943] A.C. 517; 112 L.J.P. 58; 169 L.T. 33; 2nd Digest Supp.

UNDEFENDED PETITION by the husband for dissolution of marriage on the ground of his wife's adultery.

The wife's adultery was alleged to have begun in or about 1934 and to have terminated on Oct. 5, 1950, on the death of the man with whom she had been living. At the hearing of the petition on Nov. 13, 1951, it appeared that the husband had had knowledge of the wife's adultery since the summer of 1935, but had taken no steps in the matter. He filed a discretion statement. The case was adjourned for argument by the Queen's Proctor on the question of delay in presenting the petition. The husband stated that he now wished to marry a woman who was not the woman mentioned in his discretion statement. A

W. J. K. Millar (Crispin with him) for the husband.

Colin Duncan and J. Campbell for the Queen's Proctor.

KARMINSKI, J.: On Aug. 9, 1951, the husband presented a petition to this court wherein he prayed for the dissolution of his marriage on the ground of his wife's adultery with Frank Mann. The adultery complained of is alleged to have commenced in or about 1934 and to have continued until the death of Frank Mann, which occurred on Oct. 5, 1950. It is alleged that the wife and Mann lived together and committed adultery between those dates at an address in Brentwood in Essex. On the ground of that adultery the husband prays for the dissolution of his marriage, at the same time asking the court to exercise its discretion in his favour on the ground of his own adultery. The case came before me as an undefended case on Nov. 13, 1951, and it then became apparent that there were grave questions of delay and that the matter would have to be investigated. I, therefore, asked for the Queen's Proctor to assist with argument. B C

The husband and wife were married on Jan. 14, 1926. They were both then young people, and they lived together, though latterly somewhat intermittently, until about the end of 1934. There is one child of the marriage, who is now over the age of twenty-one. According to the husband, the marriage was never happy. There were many quarrels and disputes. The husband attributes the unhappiness to the wife's drinking habits. She has not entered an appearance or taken any part in the proceedings. In 1933 the husband left the wife. He left her six times in all, returning to her on every occasion except the last. As a result, the wife twice took proceedings under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, before justices, and in October, and again in November, 1933, she obtained orders from the justices on the ground of the husband's desertion. There was a reconciliation at some time in 1934 which endured for a month, and resulted, on Dec. 6, 1934, in an order which had been made on the ground of desertion being discharged on the ground that the parties had resumed cohabitation. At the end of 1934 or beginning of 1935 the parties separated—I use the neutral term advisedly—for good, and by a date which has not been precisely ascertained, but which I think to be somewhere in the spring or early summer of 1935, the wife went to live with Frank Mann. The fact that the wife was living with Mann soon became known to the husband and he tells me, and I accept it, that thereafter he saw his wife frequently and at those meetings they were on perfectly friendly terms. The husband's knowledge of the wife's adultery with Mann, therefore, dates at the latest from the summer or early autumn of 1935. The husband did nothing, either to bring proceedings on the ground of his wife's adultery or to get the wife to break off her adulterous association with Mann and to return to him. The reasons he has given for his apathetic lack of action are of importance. He said he had considerable respect for Mann's father, who was a highly respected citizen of that part of Essex. He says also that at that time he did not want to re-marry, and he has told me that he really never worried to find out about divorce until 1950. The husband, in my view, is not a stupid man nor an illiterate one. He is by occupation a railway clerk, and I take him to be a man of normal education and intelligence. He says now that after some discussion with the D E F G H

wife a year or so before the petition was filed he decided that he wanted to re-marry, and, therefore, decided to bring the present proceedings.

A From that short summary it is apparent that the husband took no action in respect of his wife's adultery for sixteen years. The difficulties of the matter, however, do not end there. In 1940 the husband commenced to live with a woman who is named in his discretion statement. That association terminated in 1945, and so—and the fact is one of considerable importance in forming a view of this case—the husband was himself living in adultery for five years. In 1950 Frank Mann died, and on Aug. 9, 1951, the present petition was filed. I have to consider whether, in my opinion, the husband has been guilty of unreasonable delay in presenting his petition, and, if my answer to that question is "Yes", whether it is a case where, in the proper exercise of my discretion, I can grant him a decree.

B The wife's adultery with Mann was proved to my satisfaction, and I say at once that, serious and prolonged though the husband's adultery was, it would not by itself in the circumstances of this case have prevented me from exercising my discretion in his favour if it had been the only obstacle. The real question is that of delay, and I must recall to myself the statutory duty which is imposed on the court by the Matrimonial Causes Act, 1950, re-enacting a series of statutes in similar terms beginning with the year 1857. Section 4 of the Act of 1950 provides:

C " (1) On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged and whether there has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties, and also to inquire into any counter-charge which is made against the petitioner. (2) If the court is satisfied on the evidence that—(a) the case for the petition has been proved . . . the court shall pronounce a decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition: Provided that the court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery or if, in the opinion of the court, the petitioner has been guilty—(i) of unreasonable delay in presenting or prosecuting the petition . . . "

D The duty of the court to inquire into delay was made statutory by the first Act relating to divorce, the Matrimonial Causes Act, 1857, but it is clear from a number of authorities that delay was regarded as a discretionary bar by the ecclesiastical courts in their consideration of divorce cases. I do not think it is necessary to make a prolonged historical inquiry into the origins of the statutory position. One authority will suffice to show the view which was taken by the ecclesiastical courts. In *Mortimer v. Mortimer* (1) the question of delay was discussed, and the principle applied by the ecclesiastical courts was summarised in two sentences in the judgment of SIR WILLIAM SCOTT (2 Hag. Con. 313):

E "The first thing which the court looks to, when a charge of adultery is preferred, is the date of the charge, relatively to the date of the criminal fact charged, and known by the party; because, if the interval be very long between the date and knowledge of the fact, and the exhibition of them to this court, it will be indisposed to relieve a party who appears to have slumbered in sufficient comfort over them; and it will be inclined to infer either an insincerity in the complaint, or an acquiescence in the injury, whether real or supposed, or a condonation of it. It therefore demands a full and satisfactory explanation of this delay, in order to take it out of the reach of such interpretations."

H That summarises the view of the matter which was taken by the ecclesiastical predecessors of the Divorce Court. After the Act of 1857 the question of delay

was considered in a long line of authorities which were brought to my notice by counsel for the Queen's Proctor. To some of them only I desire to refer, because I am concerned to try to ascertain on what principle the court has acted in the past and ought to act now. In *Short v. Short & Bolwell* (2) the court had to consider the petition of a husband who discovered his wife in adultery in September, 1859, and left her, but did not present a petition on the ground of that adultery until July, 1873, that is, a delay of nearly fourteen years. As an excuse for, or explanation of, this delay he pleaded his poverty, but it became apparent that his poverty was relative, and that, although not a rich man, he was in a substantial way of business as a coal merchant. SIR JAMES HANNEN said this (L.R. 3 P. & D. 195):

"I have often expressed my surprise at finding cases brought into this court after years of delay, but, making every allowance for the position in life of the petitioner, and the other matters which have been suggested on his behalf, I cannot accept it as a sufficient reason for a delay of fourteen years, that he has not had the means of taking proceedings earlier."

Then the learned judge ordinary deals with the petitioner's financial position and sums it up in this way (*ibid.*, 196):

"He therefore presents to the court the picture of a man who has been thoroughly prosperous in life. For twelve or fourteen years he has been living in the same town with his wife and her paramour, content to push his business, and the last thing he has thought of is to obtain a divorce. He has only taken proceedings for that purpose after the woman with whom he is alleged to have been living in adultery has died. A change then comes over him in his domestic relations, and he wakes up to the expediency of obtaining a divorce. I come to the conclusion that the petitioner, all the facts being known to him, has been content to see his wife living in adultery with the co-respondent for all these years, and has now, for some other purpose than that of obtaining relief from the tie of matrimony on account of that adultery, instituted these proceedings."

Therefore, he dismissed the petition. It will be noted in that case that the learned judge ordinary was emphasising what has been sometimes called the collateral purpose, by which I mean a purpose other than that for obtaining relief from the ties of matrimony and seeking redress for his injuries.

I now turn to *Beauclerk v. Beauclerk* (3). There a wife had been guilty of many years' delay, and the explanation which she gave was that she did not wish to bring proceedings for a divorce until her son had come of full age and was able to make clear his wishes to his mother on the subject. The case came before the Court of Appeal and appears to have been very fully argued by some of the most distinguished counsel of the day, and the decision of the Court of Appeal was that the excuse offered by the wife was not such as to make the delay excusable. LINDLEY, L.J., said ([1891] P. 201), after discussing the reasons offered by the wife:

"Can that be said to be a satisfactory reason for not taking these steps sooner? Having regard to the fact that there was only one child of the marriage, and that a boy, I cannot accept it as such. It appears to me, that if we were to allow such a reason as that as an excuse for delay, then there is no case in which delay would not be excusable. The court might just as well strike the sections out of the statute."

The other learned lords justices came to the same conclusion. LOPES, L.J., dealt with the wife's explanation in this way (*ibid.*, 202):

"But the explanation which she has given simply amounts to this—that she hoped her husband would repent, that she was influenced by the fact that her son, a boy, was growing up, and would attain his majority

A in 1887, and that she wished to wait until her son had grown up. It is difficult to see how that could have influenced her in any way. If her child had been a girl, there might have been more to have been said for it; but I cannot see why the growing up of a boy should have been any ground for waiting the whole of that period and delaying a remedy to which she was entitled in 1870. At any rate, the explanation appears to me to be inadequate. It is in the discretion of the court to grant relief where there has been unreasonable delay. I think in this case the court properly exercised its discretion by refusing to grant it. Having regard to the lapse of time, it is difficult to come to any other conclusion than this: that the wife brings her suit now, either for some collateral reason, which we do not know, or because she was insensible to the wrongs she had sustained at the hands of her husband. I think, therefore, the appeal must be dismissed."

B
C *Rickard v. Rickard & Bond* (4) came before the Court of Appeal on appeal from HORRIDGE, J., and the Court of Appeal, composed of LORD STERNDALÉ, M.R., SCRUTTON, L.J., and YOUNGER, L.J., dealt with the principle. The facts of that case need not be discussed at any length because they are quite different from those of the present case, in that the husband delayed with a view to preserving the title to a child of some property in which there was a possible interest. With that object in view there had been very substantial delay. The Master of the Rolls in the course of his judgment said (37 T.L.R. 511):

D "The reason why that doctrine was established was stated by SIR FRANCIS JEUNE, P., in *Johnson v. Johnson* (5) ([1901] P. 193, at p. 195): 'I may add that the reasons why this court insists on steps being taken promptly, if they are taken at all, and why it should be very strenuous on the subject of delay, are that it is a terrible thing that people should be going about the world, neither married nor unmarried, possibly liable to contract fresh and illegal matrimony, and certainly exposed to temptation to commit adultery. That is a state of things which ought not to be prolonged for a moment longer than can be properly avoided'."

E Applying those principles, the Master of the Rolls came to the conclusion that the finding of unreasonable delay was justified, and that on that finding the case was not one in which the Court of Appeal could interfere with the discretion exercised by the trial judge. YOUNGER, L.J., agreeing with the Master of the Rolls and SCRUTTON, L.J., said (*ibid.*, 512):

F "From the point of view of the Act, however, the petitioner's delay was not meritorious at all, because by not taking proceeding for a divorce, he was bringing about a continuance of the adulterous life of the respondent and co-respondent."

G I come now to two cases, decided in 1936 and 1937 respectively, which, in my view, are of great importance. The first is *Binney v. Binney & Hill* (6). The facts of that case are worth reviewing because they bear at any rate some similarity to the facts in the case with which I am at present concerned. In *Binney v. Binney & Hill* (6) the marriage had taken place in 1896, and in 1914 the parties separated and the wife went to live with the co-respondent, living happily with him until after the filing of the petition. According to the facts as stated in the report, the husband was willing to take proceedings, but the wife and the co-respondent desired the matter to be kept quiet and no step taken. In 1914 the husband himself began an adulterous connection with a woman with whom he regularly cohabited till, in 1923, he terminated the relationship, because, as he stated in evidence, the woman in question became addicted to intemperance. From 1923 onwards till the filing of the petition in 1935 the husband took no step to obtain a dissolution of his marriage or to enable himself to contract a second marriage. In 1934 he met another woman,

with whom he did not commit adultery, but whom he wished to marry, and he, therefore, brought proceedings. The case appears to have been undefended, but the question of delay was actively canvassed, and BUCKNILL, J., having had the advantage of a full argument from counsel for the husband, said ([1936] P. 180):

"I cannot accept the excuse given by the petitioner [that it was his belief that since he himself had committed adultery, he therefore could not obtain any relief] for his delay up to 1934. The petitioner was an educated man and ought to have known the law. He could easily have found it out, at all events. But there is no reason to believe that up to 1934 the petitioner wanted a divorce. He then met a woman whom he now wants to marry. There is no suggestion of immorality in that. But as he now wishes to marry her he has taken the advice of his solicitor and has been told that he may get a divorce. The respondent and co-respondent also think that they may as well get married. The question that I have now to decide is whether in the exercise of my discretion a decree should be granted. The matter is governed by the Judicature (Consolidation) Act, 1925, s. 178 (3) (a), which enacts that the court shall not be bound to pronounce a decree if it finds that the petitioner has been guilty during the marriage of unreasonable delay in presenting a petition. Has there been unreasonable delay? I understand the statute to mean culpable delay, something in the nature of acquiescence such as shows the petitioner to have been insensible to the loss of his wife. I assume that the purpose of the law in laying down discretionary bars to divorce like delay is to encourage lawful wedlock and to set its face against adultery. The statute accordingly makes it more difficult to obtain a divorce if the petitioner has been guilty of adultery or of culpable delay in suing for divorce. In my view the delay in this case amounts to culpable delay. In effect the petitioner has acquiesced in the adultery of his wife. He took no steps originally to free himself and to let the respondent and co-respondent contract a lawful union. Whatever my personal sympathies may be, they are not a proper ground for exercising a judicial discretion, and as I am satisfied that there has been culpable delay and real acquiescence by the petitioner in the adultery of his wife the petition must be dismissed."

As I have said, there is considerable similarity between the facts of that case and the present one. The only difference of importance, if it is of real importance, is that in *Binney v. Binney & Hill* (6) the co-respondent and the wife were both alive at the time of the hearing of the petition, whereas in the present case the man with whom the wife committed adultery is dead, and, therefore, there can be no question of their marrying.

I desire to follow implicitly the law as stated by BUCKNILL, J., in the passage which I have read. The question which the learned judge put to himself was the statutory question: "Has there been unreasonable delay?" I follow him in understanding that "unreasonable delay" means culpable delay, something in the nature of acquiescence, something which shows the husband in this case to have been insensible to the loss of his wife and the injury done to him by his wife and by the man with whom the wife was living. Having answered that question in the affirmative, BUCKNILL, J., then proceeded to consider the principles on which discretion could be exercised, and I will deal with that later in my judgment. I pass now for a moment to a case in the following year, *Greenwood v. Greenwood* (7). That was a decision of LANGTON, J., based on a finding of connivance, but LANGTON, J., also considered the question of undue delay though this question was not necessary to his decision. He said ([1937] 3 All E.R. 66):

"The other matter, the question of undue delay, is, to my mind, clearer still. I can well imagine that there might be two opinions about the

A question of the lady's connivance, especially as she was placed in a situation of very great difficulty; but as to the delay, I find it difficult to imagine that there can be two opinions at all. Once in 1920, and once again in 1933, with the fullest knowledge of all the circumstances, with every expectation that her husband would continue to live in adultery with this woman, Mrs. Greenwood, quite calmly, quite deliberately, came to the conclusion that she would prefer that things should remain as they were, so long as she was properly provided for. With every sympathy for her position, I cannot imagine, in those circumstances, that she could be allowed now to change her mind, in the face of the provision that she would take £1,000 in full discharge of all her husband's liabilities towards her. It would be odd indeed if she were allowed then to turn round and say: 'Well, my speculation or my investment having gone against me, my judgment having been proved to be wrong, I will now change my position; I will shake my husband from the position which I have allowed him to occupy, a position in which I have acquiesced so long, and I will now come and ask the court to grant me a divorce in respect of adultery which has continued for thirty years to my knowledge without any action on my part save the petition which I compromised in the year 1921'. To my thinking, in those circumstances, it is possible to exercise judicial discretion in only one way, and that is against her."

The basis of the decision was a finding of connivance, which is an absolute bar, but the observations of LANGTON, J., on the question of delay are of great interest, and, indeed, of great help, in approaching the present problem.

D The reasons why delay is a discretionary bar are set out in *Johnson v. Johnson* (5). That was a somewhat unusual case in that the wife, who had committed adultery, was admitted to what was then called an asylum, and the husband, in the belief that she might not live very long, forbore to take proceedings against her, but when he learned that, though her mental health was incurable, she was likely to live for a long time, he brought a petition for divorce on the ground of adultery. In the circumstances of that case, SIR FRANCIS JEUNE, P., was able to find that the husband's delay was justified and not unreasonable or culpable.

F The first question I have to ask myself in this case is whether the delay was unreasonable or culpable, on the one hand, or excusable, on the other. Very many cases exist, and a good number of them has been cited in argument where a delay, even of a considerable period, has been held to be excusable, or, if a double negative may be permitted, not unreasonable. In the course of argument I suggested that, no doubt, as the result of the recent world war, there were many cases where a husband or a wife, with knowledge of a matrimonial offence, had been unable to bring proceedings through force of circumstances. I suggested as an example a man who had learned of his wife's adultery and was very shortly afterwards taken prisoner and was, therefore, unable to take proceedings. In such a case a delay of five years or more might be wholly excusable. It would be difficult to suggest that a delay of that kind could be in any sense culpable. An example of that is to be found, though at a much earlier date than the recent war, in the case of *Pellew v. Pellew & Berkeley* (8). The short facts of that case were these. The parties married in 1851, and in 1853 the husband, who was a flag officer in the Royal Navy, was appointed in command of the China station, the wife remaining with her mother in Brussels. The husband returned in 1854 and rejoined his wife, but shortly afterwards she ran away with another man, and in December, 1854, the husband obtained a sentence of divorce a mensa et thoro. That was before the passing of the Matrimonial Causes Act, 1857, which first permitted the granting of divorces a vinculo. Subsequently the husband proceeded to try to obtain a divorce by a divorce bill; there were considerable difficulties and

he was unable to proceed with the bill. A full court, presided over by WIGHTMAN, J., said this (1 Sw. & Tr. 555):

"We think that the 'delay' intended by the [Matrimonial Causes Act, 1857, s. 31] must be that sort of delay which would show the petitioner to have been insensible to the loss of his wife, and might almost be said to be equivalent to condonation. Whatever delay there has been in this case is accounted for, and we therefore dissolve the marriage."

I mention that case as a classic example of a delay which is not unreasonable, because in the particular circumstances in which the husband found himself it is very difficult to imagine what else he could have done. Now, I have to consider here whether the delay in the present case is reasonable or unreasonable, and apply the principles as I understand them. I have no doubt whatsoever that the delay was unreasonable, and I follow the reasoning of BUCKNILL, J., in *Binney v. Binney & Hill* (6). I think there has been culpable delay here, something in the nature of acquiescence, showing that the husband had been quite insensible to the position and to the loss of his wife.

That leaves me with the second question. Having found the husband to have been guilty of unreasonable delay, ought I, in exercising the discretion given to me, to overlook it and grant a decree in his favour notwithstanding? The number of reported cases in which discretion has been exercised in the face of a finding of unreasonable delay are remarkably few. The industry of counsel on both sides has brought to light three reported cases only, to two of which I propose to refer briefly. The paucity of reported cases is, I think, not any real indication of the true position. It may well be that since 1857 vastly more than three cases have been dealt with in which, although there has been a finding of unreasonable delay, a decree has been granted at the discretion of the court. I proceed on the basis that the paucity of reported authorities bears no relation to the number of cases in which the court has pronounced a decree notwithstanding an unreasonable delay.

I refer first to *Newman v. Newman* (9) where the parties were married in 1844 and five years later the husband committed incestuous adultery with the wife's sister. That distressing fact became known to the wife in 1850 and she then separated from her husband, but she brought no proceedings against him until 1868. The reason she gave for her delay was that her mother was very reluctant to have a public exposure of the scandal in the family, and she had yielded to her mother's urgent entreaties to take no step in the matter during her (the mother's) life. As soon as the mother died, she presented the petition. It also appears that the wife kept a school, which may possibly have had some effect on her desire not to incur any undue publicity. On consideration of those facts, LORD PENZANCE said (L.R. 2 P. & D. 58):

"I adhere to the opinion that there was unreasonable delay in presenting the petition. But the statute [Matrimonial Causes Act, 1857, s. 31] does not say that in all cases where unreasonable delay has occurred a decree must be refused. It merely says that in such cases the court shall not be bound to pronounce a decree. The question is whether, assuming that there has been unreasonable delay, the case is one in which, under all the circumstances, the court should withhold a decree? No doubt the cases which the legislature had principally in view, when the provision as to unreasonable delay was inserted, were those in which a husband's honour had been wounded, and he had put up with his own disgrace for a length of time. The rule *vigilantibus non dormientibus jura subveniunt* obtained in the ecclesiastical courts, and was adopted by the House of Lords. That is one class of cases, and no doubt there are many others to which this discretionary bar is applicable. But, looking at all the circumstances of this case, I think I should not be justified in refusing a decree."

A The learned judge ordinary laid some stress on the husband's position, and it must be borne in mind that in 1870 the financial position of a husband and wife was widely different from what it is today, since at that time the Married Women's Property Act, 1882, had not been passed. In 1952, while giving all possible weight to this element, I should not be prepared to distinguish to a great extent between a petition by a husband and a petition by a wife, but in *Newman v. Newman* (9) there were circumstances, in particular, the circumstances of the nature of the incestuous adultery, which are, happily, missing in the present case. One also has to consider that in 1870 a petition of that kind might attract more attention than it would now. I think that, in considering these matters, due force must be given to the changes in social manners and social values, and, indeed, moral values, over the past century. I am not suggesting that the discretion might not be exercised in 1952 on the same facts as those in *Newman v. Newman* (9).

B I pass to the much more recent case of *Stevenson v. Stevenson & Lane* (10). That was a decision of HODSON, J., in relation to the petition of a husband, a merchant seaman who appeared to have had a somewhat chequered matrimonial career. He was married to his wife in 1914 and there was a deed of separation in 1927. He brought a petition in 1928, and cross-charges were made by the wife, but the suit was never tried and was dismissed in 1939. He brought another petition in December, 1938, alleging his wife's adultery from 1932 onwards. The wife admitted her adultery and pleaded connivance. C It appears that by 1932 the husband had become on amicable terms with the wife, as the result of which, although the wife was living with the co-respondent, the husband was able to stay with her when he came home from sea so that he could see the children, and the court found as a fact that by 1933 he knew of the wife's adultery and thereafter continued on friendly terms with her and the co-respondent, who, by 1935, were living openly together. No doubt because of the circumstances of the war the case did not come to trial until 1946. The matter was argued, and HODSON, J., exercised his discretion. He rejected the allegation of connivance, but he had to consider whether or not the husband had been guilty of unreasonable delay. After considering an observation of LORD STOWELL in *Crewe v. Crewe* (11), he said ([1947] W.N. 83) that the Matrimonial Causes Act of 1857 did not put unreasonable delay in the same category as connivance, which remained an absolute bar. Unreasonable delay was a discretionary bar, and even were the delay found to be unreasonable, having regard to the measure of toleration accepted in the present case, the matter was still one of discretion. Bearing in mind the petitioner's profession, his need to save money to meet the costs of the present action, and his desire to see his children, his Lordship found an explanation, if not altogether an excuse, for the petitioner's tolerance. Though there had been unreasonable delay, he would exercise his discretion in the petitioner's favour and pronounce a decree of divorce . . . Then he referred to the wife's financial support. That was an important example of a case where the judge found that the delay was unreasonable, but nevertheless thought it a proper case for the exercise of the court's discretion. HODSON, J., found that the husband's position as a merchant seaman was not altogether an excuse, but at least was an explanation for his tolerance. E F G

H It is, perhaps, unnecessary to emphasise the somewhat obvious fact that the position of the husband in *Stevenson v. Stevenson & Lane* (10) was wholly different from the position of the husband in the present case. Counsel for the husband today laid much stress on the decision of the House of Lords in *Blunt v. Blunt* (12). That was an appeal concerning the exercise of the discretion of the court to grant a decree of divorce notwithstanding that the petitioner had been guilty of adultery, and in his speech VISCOUNT SIMON, L.C., made it clear ([1943] 2 All E.R. 77) that he was dealing with that issue.

No question of delay arose in *Blunt v. Blunt* (12), but counsel argued, and, in my view, rightly, that the principles of the exercise of discretion which were set out and enumerated by the Lord Chancellor in his speech are of general application wherever the burden is put on the court of exercising discretion. It is useful that I should remind myself of what were the Lord Chancellor's categories of grounds for the exercise of the discretion. He put the position and interest of any children of the marriage as the first. So far as this case is concerned that does not arise because the one child of the marriage is of full age and is not affected by the outcome of this case. The second point was the interest of the party with whom the petitioner had been guilty of misconduct, with special regard to the prospect of their future marriage. That also does not arise because the woman with whom misconduct took place has long since been married. Thirdly, the question whether, if the marriage be not dissolved, there is a prospect of reconciliation between husband and wife. So far as I can judge in this case, there is no reasonable prospect of reconciliation. Fourthly, the interest of the petitioner, and, in particular, the interest that the petitioner should be able to re-marry and live respectably. The petitioner in this case, who is in the early fifties, says that he does want to re-marry, but at the moment is tied to a wife with whom there is no real prospect of his resuming cohabitation. Fifthly, LORD SIMON advanced a consideration of a more general character which he regarded as of primary importance, namely, the interest of the community at large (*ibid.*, 78):

" . . . to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down."

Applying that principle to a case of delay, I have to try to maintain a balance between respect for the sanctity of marriage and the social considerations which make it undesirable in the public interest to keep alive this long defunct marriage. As was pointed out in *Johnson v. Johnson* (5), there are strong reasons of public policy why, if adultery is known, proceedings should be taken as soon as possible. As the learned President said ([1901] P. 195):

" . . . it is a terrible thing that people should be going about the world, neither married nor unmarried, possibly liable to contract fresh and illegal matrimony, and certainly exposed to temptation to commit adultery."

In this case I do not know whether the wife wanted to marry. I do not even know whether Frank Mann was free to marry, but if the husband desired to free himself of this legal tie, in my view he should have done so many years since. Having considered the facts of this case and the principles on which the discretion vested in me should be exercised, I do not think that I should be exercising that discretion properly or judicially if I exercised it in the husband's favour. I must, therefore, dismiss this petition.

Petition dismissed.

Solicitors: 'E. Edwards, Son & Noice (for the husband); Treasury Solicitor.
[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

WIMBOURNE v. FINE AND ANOTHER.

[CHANCERY DIVISION (Harman, J.), July 22, 23, 31, 1952.]

Solicitor—Charging order—Fund “recovered or preserved” through solicitor’s instrumentality—Fund lodged to await trial of action before solicitor retained—Charge limited to client’s share of fund—Priority of charge to mortgage of fund arranged by solicitor, but subject to partnership debts—Effect of compromise of action—Solicitors Act, 1932 (c. 37), s. 69.

The plaintiff started a business in 1939, but closed it and left for America on the outbreak of war. In 1941 her husband and her two sisters re-opened the business, and were carrying it on when the plaintiff returned to England in 1945. In 1947 the plaintiff issued a writ against her sisters claiming that the business belonged to her, or, alternatively, that there had been a partnership between her and them since 1945. The defendants admitted that the plaintiff was a partner, but, nevertheless, they disposed of the business assets, and the plaintiff moved the court for the appointment of a receiver and claimed a sum of money. No order was made on the motion on the defendants’ undertaking to lodge £3,900 in the joint names of A. and B., respectively the plaintiff’s and the defendants’ then solicitors, to await the trial of the action. In 1949 the plaintiff instructed C. to act as her solicitor. At the hearing of the action it was held that there was a partnership between the plaintiff and the defendants until the issue of the writ in 1947, the usual partnership account was ordered, and in addition an order was made against the defendants for an account of moneys which they had received or which, but for their wilful default, ought to have been received on the disposal of the business assets. In February, 1951, the plaintiff mortgaged to a bank her share and interest in the fund lodged with A. and B. In 1952, after the plaintiff and the defendants had entered into a compromise agreement as a result of which the whole of the fund would be applied, apart from small sums to be paid thereout to the plaintiff and the defendants, in payment of a debt for income tax and of sums to a number of persons, C. applied for a charging order on the fund in respect of his costs.

HELD: the fund had been “recovered or preserved” through C.’s instrumentality within the Solicitors Act, 1932, s. 69, notwithstanding that the fund had been lodged prior to his being retained, and, therefore, he was entitled to a charge; it was proper (in exercise of the court’s discretionary power in that regard under s. 69) to limit the charge to the plaintiff’s share of the fund; although C. had arranged the mortgage to the bank he would be preferred to the bank, for the bank must be taken to have had notice of C.’s statutory right to apply for a charging order, but the partnership debts would take priority to C.’s charge; and C.’s right was unaffected by the compromise agreement.

Hyde v. White. White v. Hyde ([1933] P. 105) and *Pilcher v. Arden* (1877) (7 Ch.D. 318), applied.

Dictum of GROVE, J., in *Clover v. Adams* (1881) (6 Q.B.D. 624), not applied.

Twynam v. Porter (1870) (L.R. 11 Eq. 181), followed.

AS TO CHARGING ORDERS, see HALSBURY, Hailsham Edn., Vol. 31, pp. 252-261, paras. 275-282; and FOR CASES, see DIGEST, Vol. 42, pp. 290-304, Nos. 3250-3382.

Cases referred to:

- (1) *Hyde v. White. White v. Hyde*, [1933] P. 105; 149 L.T. 96; *sub nom. Re White*, 102 L.J.P. 71; Digest Supp.
- (2) *Re Turner*, [1907] 2 Ch. 126, 539; 76 L.J.Ch. 492; 96 L.T. 798; 42 Digest 297, 3307.

- (3) *Baile v. Baile*, (1872), L.R. 13 Eq. 497; 41 L.J.Ch. 300; 26 L.T. 283; 42 Digest 294, 3286.
- (4) *Clover v. Adams*, (1881), 6 Q.B.D. 622; 42 Digest 295, 3292.
- (5) *Jackson v. Smith. Ex p. Digby*, (1884), 53 L.J.Ch. 972; 51 L.T. 72; 42 Digest 301, 3361.
- (6) *Greer v. Young*, (1883), 24 Ch.D. 545; 52 L.J.Ch. 915; 49 L.T. 224; 42 Digest 291, 3267.
- (7) *Re Wadsworth*, (1885), 29 Ch.D. 517; 54 L.J.Ch. 638; 52 L.T. 613; Digest, Practice, 916, 4609.
- (8) *Kay v. Lovell*, [1940] 3 All E.R. 89; [1940] Ch. 650; 109 L.J.Ch. 288; 163 L.T. 121; 2nd Digest Supp.
- (9) *Re Clayton*, [1940] 2 All E.R. 233; [1940] Ch. 539; 109 L.J.Ch. 197; 163 L.T. 326; 2nd Digest Supp.
- (10) *Pilcher v. Arden*, (1877), 7 Ch.D. 318; 47 L.J.Ch. 479; 38 L.T. 111; 42 Digest 300, 3338.
- (11) *Twynam v. Porter*, (1870), L.R. 11 Eq. 181; 40 L.J.Ch. 30; 23 L.T. 551; 42 Digest 294, 3285.
- (12) *Moxon v. Sheppard*, (1890), 24 Q.B.D. 627; 59 L.J.Q.B. 286; 62 L.T. 726; 42 Digest 295, 3295.

PROCEDURE SUMMONS for a declaration that the applicant, Mr. Charles Caplin, as the solicitor employed by the plaintiff in the prosecution of the action, was entitled to a charge on £3,314 3s. 11d. or such other sum standing to the credit of the account of E. C. Randall and L. E. Long (the defendants' solicitor and the plaintiff's former solicitor respectively) at Barclays Bank, Ltd., for the taxed costs, charges and expenses of the applicant of and in reference to the action as such solicitor as aforesaid.

Lester for the applicant.

F. Donald McIntyre for the plaintiff.

Edwards, Q.C., and *Winterbotham* for the defendants in the action.

Hunter-Brown for L. E. Long, formerly acting as solicitor to the plaintiff in the action.

Richmount for Barclays Bank, Ltd.

Arthur Bagnall for the Inland Revenue Commissioners, creditors of the partnership.

Cur. adv. vult.

July 31. **HARMAN, J.:** This is an application by a solicitor under the Solicitors Act, 1932, s. 69. The applicant was one of the solicitors employed by the plaintiff in the course of an action in which I gave judgment on July 11, 1950, after a seven days' hearing. The action was of a somewhat peculiar nature. A business was started by the plaintiff in March, 1939, but, having carried it on for a time, she went to the United States in August, 1940. The business became dormant, but was re-started on Dec. 4, 1941, by her sisters, the two defendants, Anita Fine and Phyllis Rubin, in conjunction with the plaintiff's husband. The plaintiff returned to this country in July, 1945, and she found a business going on and her sisters running it. She seems to have claimed from the start that they were only conducting the business as agents for her, and that it was her business. There were family quarrels culminating in the issue of the writ in August, 1947. By the writ it was claimed that the business was the plaintiff's, and, alternatively, that there had been a partnership since the plaintiff's return in 1945.

The sisters were served with that writ. Thereupon, although they admitted to their sister that there was a partnership, they thought fit to make away with the assets, and that they did by handing them to a company controlled by their brother, presumably with a view to frustrating the plaintiff's claim, even if she succeeded. Knowing that the business had been disposed of, the

A plaintiff launched a motion for a receiver, claiming a certain sum of money. Assurances had been given to her that this sum of money would be safe, and on the hearing of the motion in November, 1947, no order was made, on an undertaking by the defendants to lodge a sum of about £3,900 in the joint names of the plaintiff's and the defendants' solicitors to await the trial of the action. The costs were made the plaintiff's costs in the cause. A charging order is now asked for by the solicitor formerly acting for the plaintiff on what remains of the sum so directed to be lodged. In 1947 the plaintiff was instructing a solicitor named Long. For about two years the action seems to have languished in the hands of Mr. Long, but in May, 1949, the plaintiff instructed the applicant, who practises under the name of Charles Caplin & Co. The action then came on for trial and went on for some seven days, at the end of which I came to the conclusion that the plaintiff's claim to be the sole owner of the business could not stand because her husband either had, or must be assumed to have had, authority to make the agreement that he did with her sisters, and there must be supposed to be a partnership business started in December, 1941, between her and her sisters, and dissolved by the issue of the writ in August, 1947. The usual partnership account was ordered on that basis. In addition, the plaintiff obtained, by reason of the wrongful acts of her sisters, an order for an account of moneys received, or which, but for their wilful default, ought to have been received, by her sisters on the disposal of the business, it being alleged that they disposed of it to their brother's company at a gross undervalue. That order having been made and the costs having been ordered to be taxed and paid out of the assets, the plaintiff's costs were taxed eventually at £767 odd.

D The plaintiff was in impecunious circumstances, and, from time to time, certain advances were made to her out of the fund on account of what was supposed to be her share in it. She had advanced to her about £600, but she was still in debt and, in February, 1951, she mortgaged her share and interest in the fund to Barclays Bank. The inquiry was taken before the master, and the master finished the hearing, but intimated that he would consider his decision. When the parties asked him, in order to facilitate possibly some kind of settlement between them, to say informally what the result of the inquiry was likely to be, he intimated that, as he was then advised, he thought the defendants would have to pay in another £1,200 as the purchase price of this business. That was the position in January, 1952, whereupon the three sisters, without any legal advice, concocted what I can only describe as a fraudulent agreement.

F The money in the hands of the two solicitors by this time had been reduced by the advances to the plaintiff and amounted to £3,314 3s. 11d. The business had made considerable profits in the last three years of its existence, and none of the sisters had paid any taxes. There was, consequently, a considerable sum due to the Crown. By January, 1952, it was agreed that that sum was £1,660, taking into account, as against each sister, the amount of her personal allowances. G The plaintiff's share of that liability was considerably less, as I understand, than that of either of her sisters. That was one debt which the partnership owed, and it seems very doubtful whether there were any others, but the three sisters, with the idea, as I understand it, of withdrawing this fund, first, from the charge to Barclays Bank which the plaintiff had made and, secondly, from unwelcome applications by their solicitors or any of them, caused it to disappear. The next H that the applicant, who by this time had been discharged from being the plaintiff's solicitor, knew about it was an intimation from Mr. E. C. Randall, solicitor to the defendants, that an agreement had been made, which I must now particularise. The agreement was made on Apr. 1, 1952, and provided:

"The plaintiff withdraws all claims and allegations against the defendants. The defendants withdraw all claims and allegations against the plaintiff. . . . Each of the parties agrees to pay their own costs. The plaintiff shall be entitled to the whole of the partnership fixtures and fittings and plant

now stored at 27, Daventry Street, London. The parties agree that all the proper liabilities of the partnership shall be paid forthwith and instructions issued to Messrs. E. C. Randall and L. E. Long to deal with the moneys deposited in their joint names in the following manner: To pay the income tax liability on the profits of the partnership to the Inland Revenue at the full standard rate, each partner to make a personal reclaim for any allowances which may be due to her. To pay the sum of £200 to Gerald Julius Fine. To pay the proper accountancy charges and fees due to Messrs. H. S. Rubin & Co. To pay any other liabilities of the partnership. Any balance remaining after payment of the above items to be paid to the three partners in equal proportions."

On May 1, 1952, Mr. Randall wrote to the applicant and said:

"Our respective clients have met and agreed terms of settlement in writing, a copy of which I enclose. I also enclose copy authority to Mr. Long and myself for payments to be made out of the joint account. I have sent a copy of the authority to Mr. Long, together with cheques for his signature as follows: Inland Revenue, £2,663 2s. G. J. Fine, £200, H. S. Rubin & Co., £131 5s., Mrs. A. Deyong [formerly, Miss Fine, the first defendant] £106 12s. 3d., Mrs. P. Weil [the second defendant] £106 12s. 4d."

There was £106 for the plaintiff too. That caused the whole fund to be dissipated. There never was a sum of £2,663 due to the Inland Revenue. That sum had been agreed at £1,660 three months before, as everybody except Mr. Caplin knew, and the object of swelling the amount alleged to be due to the Inland Revenue was to make the fund disappear. The sisters would then be able to recover something individually from the Inland Revenue, but it would not be a part of the fund.

On May 8, 1952, the applicant issued this summons. He swears, and I think he is justified in swearing it, that when he came on the scene he naturally relied on the fact that there was nearly £4,000 in the joint names of two solicitors, of which his client was entitled to at least a third, subject to costs and to the debts of the partnership, whatever they should be. I suppose he knew there must be a debt to the Inland Revenue. The business had been wound-up and the fund represented the proceeds of sale. Therefore, it seemed unlikely that there would be other creditors. The charging order is opposed by the plaintiff and the defendants, and also by Barclays Bank, the plaintiff's mortgagee, and the Inland Revenue representing creditors of the partnership. The other parties before me are Mr. Long, who submits to act as the court directs, and Mr. Randall who applies for a charging order in his own favour.

In those circumstances, is the applicant entitled to a charging order, and, if so, over what, and in priority to the debts or to the mortgagees or to anyone else? Section 69 of the Act of 1932 gives a right to ask for a charging order in these terms:

"Any court in which a solicitor has been employed to prosecute or defend any suit, matter or proceeding may at any time declare the solicitor entitled to a charge on the property recovered or preserved through his instrumentality for his taxed costs in reference to that suit . . . all conveyances and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against the solicitor."

The first point taken against the applicant is that this money was not recovered or preserved in the action. It is said that the point of the action was to recover the whole of the business as being the plaintiff's. By the time the statement of claim was delivered, the business was represented by the entirety of this fund. The plaintiff, however, asked, in the alternative, for accounts on the footing that there was a partnership. The money in the hands of the

two solicitors must be treated, I think, in the same way as if it had been paid into court to the credit of the suit to abide its result; there could be no other reason for the undertaking to pay it into joint names. The object of the suit, it is true, was to obtain the whole of this money for the plaintiff, but in the upshot she became entitled only to a part of it. Nevertheless, the fund in question was put into safe custody in this way to abide the result of the suit, and, it seems to me, in the wide meaning which has been given to these words, to have been

A “recovered or preserved”. The fact that the plaintiff got an answer which was not welcome to her does not seem to me to be relevant, because it is clear, for instance, from *Hyde v. White*. *White v. Hyde* (1), that money can be recovered or preserved, notwithstanding such a result. That was a striking case and the headnote is:

B “A party to a probate action propounded several wills of the deceased, being also interested as next of kin in the event of the intestacy of the deceased. The court pronounced for an intestacy and against the wills. On the application of solicitors who had conducted the litigation for the party propounding the wills, and had since been discharged, the court made an order declaring them entitled to a charge for their costs upon the interest

C of their client in the intestacy as upon ‘property recovered or preserved through their instrumentality’.”

LORD MERRIVALE, P., said that it did not matter that they had been discharged, and I do not think anybody would question that. He added ([1933] P. 107):

D “The real question is whether the section gives a charge on the interest of the plaintiff which has now been ascertained, and whether there is such a charge by reason that that interest is property which has been recovered or preserved through the instrumentality of her solicitors. If one takes a superficial view it can be said that the plaintiff has been unsuccessful in the claim she made under any of the wills. It may be said, therefore, that since she has failed all along the line there has been no property preserved or recovered. On the whole I do not think that this is the true view. The statute

E must be construed with reference to various classes of litigation.”

Then he said that in the Probate Court the result, although unwelcome to the plaintiff, was one which gave her something, and that was, therefore, “recovered or preserved”. That was a stronger case than this one, because the present plaintiff did make an alternative claim to a partnership.

This point is also dealt with in *Re Turner* (2), in which the result of the

F intervention of the plaintiff was disastrous for the estate. By reason of the action a profitable business which had been carried on had to be shut down owing to lack of capital and, as a result, the assets were insufficient to pay the costs of all parties. KEKEWICH, J., nevertheless, said that what assets there were had been recovered or preserved. He said ([1907] 2 Ch. 131):

G “It is extremely difficult to say what is meant by ‘preserved,’ but there is one case which gives me a few words which seem to me to be applicable. I do not quote them as a whole, and I see that there is some difficulty in applying the passage in its entirety to this or any other case, but WICKENS, V.-C., in *Baile v. Baile* (3) speaks of a property being preserved when it ‘is managed and retained for the rightful owner,’ and adds, ‘instead of being left to the first comer,’ which addition seems to imply the danger which

H he indicated in the other examples he had previously given, namely, of an estate preserved against an adverse claimant, and of an estate preserved by keeping a sea-wall in repair . . . Still I think I may take those words as giving me a guide as to what comes within the word ‘preserved.’ This property has been managed and retained.”

The fund in this case has been retained and, I suppose, managed, by the solicitors in whose hands it is, and, therefore, I think the answer to the question whether anything had been recovered or preserved is in the affirmative.

Secondly, it is said that, if anything was recovered or preserved, it was not through the instrumentality of the applicant because the money was paid in on a motion launched in 1947, and he was not retained until 1949. If he had been retained before the motion was launched, it seems to me that the law is settled because the common form of order in a partnership suit (see SETON'S JUDGMENTS AND ORDERS, 7th ed., p. 1044) would clearly, I think, give him a charge on the footing that it is a fund in court. Declaration no. 6 on p. 1044 of SETON is (so far as relevant):

"Declare that the applicant, as the solicitor lately employed by the plaintiff in the prosecution of this action, is entitled to a charge upon . . . [the sum] in court . . . for the taxed costs."

That seems to me to show that he would be entitled to a charge if he had been there when the money was lodged in the joint names, although he ceased to be solicitor when the action was brought to fruition. It is said that the converse does not apply because nothing more was got in. In my judgment, that does not do. The plaintiff's solicitors had no right to oblige her to complete the inquiry and to recover the extra £1,200 which the master indicated might be due. The solicitor who has prosecuted the action to the conclusion of the judgment, which declares what the rights of the plaintiff were and that she had some rights in this fund, seems to me to be entitled to say that such interest as she takes has been recovered through his instrumentality.

In *Clover v. Adams* (4) a solicitor was applying for a charging order, and GROVE, J., said (6 Q.B.D. 624):

"The solicitor must be one who is 'employed to prosecute or defend any suit,' etc. Those words do not import that the solicitor must be the solicitor at the time when he makes the application. The words 'shall be employed' are not used in the future tense; the use is conditional; they do not tie one down to any particular time. If indeed at the time the money was paid into court he was not the solicitor, there might be a strong and perhaps a conclusive argument against him, but here the applicant was the solicitor at the time the money was paid into court."

The words quoted by GROVE, J., appear in the Solicitors Act, 1860, s. 28, but are similar to those which I have to consider. The last sentence of that passage is mere obiter dictum. It seems to me, now that I have considered the matter carefully, that it cannot matter that the solicitor who applies is not the solicitor who happened to be employed at the moment when a particular stage was reached and some money was paid into court or some receiver was appointed.

It is clear from *Jackson v. Smith. Ex p. Digby* (5), on which the form of order in SETON is founded, that there can be a charge in a partnership action over the whole fund and not only over the plaintiff's or defendants' interest in it. The basis of decision of KAY, J., in that case seems to have been that this was a kind of salvage right, that the fund has come into harbour, so to speak, through the activity of the solicitor, and, therefore, he is entitled to a charge against the whole of it. He said (53 L.J.Ch. 975):

"It has been decided again and again, and in the case of *Greer v. Young* (6) the decisions were completely adopted by the Court of Appeal, that the solicitor whose exertions did really recover the fund has a right to have a charge on the fund itself, and not merely on the interest of the person who employed him. COTTON, L.J., says, 'Undoubtedly the quantum of the interest of the person who employed the solicitor is an important element of consideration. It is, generally speaking, the interest of the plaintiff or the defendant which is recovered in the action, and, to determine whether a fund has been recovered in the action, it is material to consider what is the interest of the plaintiff or defendant. But to say that the court has only power to charge the interest of the plaintiff or the defendant would be to

repeal the Act.' That means that the court has power to charge the fund as against everybody interested, provided, of course, it has got those persons before it—and when you look at the reason of the thing I think it is plain that it must be so. The principle adopted, taking the language used in one of the judgments, as the ground of making the charge, is that the property has been recovered or preserved, and therefore the charge is in the nature of salvage, and accordingly the solicitor who applies for such a charge is in this position: he says, 'But for my exertions the property might never have been realised at all'."

Of course, that only applies, as it were, by a side-wind to the applicant, because he was not employed by the plaintiff when the money was paid into court. Nevertheless, it was through him and his prosecution of the action that the money was retained in the joint names of the solicitors as it remains today. *Re Wadsworth* (7) shows that a solicitor may be entitled to a charging order though he has been discharged before trial of the action. Consequently, I do not think the doubts of GROVE, J., ought to prevail over my own views in that matter.

Thirdly, and the passage I have just cited leads to this: On what is it that the applicant is to have a charge? In a simple partnership suit the principle is that of salvage and the charge is on the entire fund: *Greer v. Young* (6). Nevertheless, there is a discretion, as s. 69 shows. It is merely a discretionary power.

Fourthly, is the applicant to be preferred to the creditors of the partnership? Undoubtedly, in a partnership suit they may be so, and the form of order followed by BENNETT, J., recently in *Kay v. Lovell* (8), shows that the common form of order puts the solicitor who obtains the charge ahead of the creditors of the persons having an interest in the fund. That is not always so. MORTON, J., for instance, in an administration suit, *Re Clayton* (9), took a different view, but, of course, an administration action is much more concerned with the creditors of the deceased than a partnership action is concerned with the creditors of the partnership, and that may be the difference between them.

Fifthly, does the charging order cause the applicant to be preferred to the mortgagees of the plaintiff's interest? The answer to that, I think, is: Yes, except in special circumstances. Section 69 clearly covers the point, because it provides that all conveyances operating to defeat that charge shall, except in the case of a conveyance to a bona fide purchaser for value without notice, be void. It is said that, though that may be so, there are special circumstances why here it should not be so. The reason given is that Mr. Caplin himself arranged this charge with Barclays Bank and did not suggest to the bank at the time that he was looking to this fund and expected to have a charge on it for his costs. It seems to me that that will not do. Every mortgagee of a fund, either in court or in joint names like this, with an action pending, as the bank knew it was pending, must be taken to have notice that the solicitors to any of the parties may have a statutory right to apply to the court for a charging order. They cannot say the purchase is for value without notice, nor does it seem to me that the mere arranging of a charge on the plaintiff's interest by Mr. Caplin was tantamount to a representation by him that he did not look to the usual rights of a solicitor for his charge.

A similar point was taken in *Pilcher v. Arden* (10) which was an administration suit. It was held that B. (the solicitor) was entitled to a charging order on the interest of his client in the funds in court, notwithstanding a certain prior order for payment out, and the fact that the plaintiff had in the meantime assigned his interest with the knowledge of B. made no difference. SIR JAMES BACON, V.-C., said (7 Ch.D. 320):

"But the statute has given to the solicitor a right to call for a charge whenever he thinks fit for the taxed costs, charges, and expenses of or in reference to the suit, matter, or proceeding. Nothing can be said against such

an enactment as this, but by a purchaser for valuable consideration without notice. In this instance the Reversionary Society [the purchaser of the client's interest] had full notice. Therefore the circumstance of this purchase having been made does not impeach the right of the solicitor to have his charge. Although I am not bound, it is true, by the decision in *Twynnam v. Porter* (11), which has been cited to me, I am very willing to be guided by it. This is not a question of propriety, it is a question of whether the inherent right of the solicitor to have a charge for his costs is to prevail over that of a purchaser."

The Reversionary Society there had not taken a charge, but had purchased the interest. Nevertheless, the solicitor was to be preferred, and SIR JAMES BACON, V.-C., made an order in the form of that in *Twynnam v. Porter* (11).

A further point is raised that the compromise cannot defeat Mr. Caplin's rights. That is clear enough on s. 69 itself, but there are two cases which show it very clearly. In *Twynnam v. Porter* (11) the headnote is:

"In a suit by a cestui que trust against a trustee of landed estate, praying for an account and re-conveyance, a receiver was ordered to be, and afterwards was, appointed, adversely to the defendant. Notice of motion for decree was served, but before the time for closing evidence had arrived, the plaintiff, without consulting her solicitor, and without his knowledge, entered into an agreement with the defendant for a compromise of the suit on the terms, first, that a sum of cash should be paid to the plaintiff, then that the mortgages on the property should be paid off, and then that the costs of all parties estimated at a fixed sum should be paid. Upon hearing of the compromise, the plaintiff's solicitor applied to the plaintiff and to the defendant's solicitors for the terms of it, but was refused all information. Upon petition under the Solicitors Act:—Held, that the solicitor was entitled to a first charge for the amount of his taxed costs, as between solicitor and client, upon the property of the plaintiff, as having been recovered and preserved through his instrumentality."

The argument of counsel was:

"The intention of the parties was to exhaust the estate, to postpone payment of the petitioners, and to fix an amount for payment of the costs."

SIR JAMES BACON, V.-C., accepted that view, and said that a certain sum was effectively preserved, and he continued (L.R. 11 Eq. 187):

"If that be so, it cannot signify in the slightest degree what the terms of the compromise were. Whether they were binding on the parties is wholly unimportant, because the right of the petitioners to have, out of the property protected and preserved, payment of the costs which have been incurred for the benefit of the plaintiff is a claim paramount to any title which can be asserted under the compromise, whatever it may be."

Similarly, in *Moxon v. Sheppard* (12) there was a collusive compromise and that was not allowed to defeat the solicitor.

This being, as I think, the legal position, and a discretion residing in me, what ought I to do in justice in a case of this kind? I think I must have regard to the fact, so far as the plaintiff is concerned, that what she eventually got was something that she might possibly have had before the action started: she was offered in the defence to be treated as a partner. The defendants largely belied that offer by devasting in selling the business without her consent or knowledge at what appears on the face of it to have been an undervalue. Nevertheless, her claim largely failed. I do not think in the circumstances it would be right to give her solicitors a charge over the defendants' interests in the fund, for those interests were not preserved to her by the action. All that was preserved was her interest, and it seems to me that, as in *Hyde v. White* (1), the charge ought to be limited to her interest. If that be so, it seems to me that

the charge must also be subject to the interest of the partnership creditors. If I put the charge in front of them, the result may be to make the other partners pay her debts.

The question remains: What are the proper debts of the partnership? There is the Crown I know, and that debt is ascertained. There are said to be two others, and these, though admitted by the plaintiff and her sisters, are debts to members of the family and obviously suspect. If they are not withdrawn or admitted,

That brings me to the position of the bank. In my judgment, the bank have no right to be preferred to the applicant, and the applicant's charge must rank in priority to the bank as mortgagee. The application, therefore, to some extent fails, so far as it was an attempt to get ahead of the partnership creditors, and I shall order the applicant to pay the costs of the Crown who represent those creditors. As to the other parties, I do not propose to give them any costs. The mortgagees, because they have failed in making the point which they tried to make, and the defendants (the sisters), in order to mark my disapprobation of the scurvy trick by which they tried to defeat the rights of their creditors, whether solicitors or not. Consequently, I shall declare that the solicitor is entitled to a charge on the interest of the plaintiff in the fund in priority to any chargees or mortgagees of that interest, but subject to the payment of the creditors of the partnership, and I direct an inquiry as to who such creditors are, if necessary.

Solicitors: *Charles Caplin & Co.* (the applicants); *Philip Conway, Thomas & Co.* (for the plaintiff); *E. C. Randall* (for the defendants); *Ernest W. Long & Co.* (for L. E. Long); *Durrant Cooper & Hambling* (for Barclays Bank, Ltd.); *Solicitor of Inland Revenue.*

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

BARON v. BARON AND OTHERS.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.JJ.), October 6, 1952.]

Practice—Trial—Early trial—Order for early trial—Date of trial in discretion of judge in charge of list—R.S.C., Ord. 36, r. 1A (1) (c).

The purpose of an order made under R.S.C., Ord. 36, r. 1A (1) (c), for the early trial of an action is to ensure that all reasonable efforts are made to expedite the hearing. The order does not fetter the discretion of the judge in charge of the list to consider all the circumstances put before him when the application to fix a day is made to him. If, considering all those circumstances, he decides that the proper date is one later than that on which the case would have come on for hearing in the ordinary course, it is his duty to fix that later date.

FOR R.S.C., ORD. 36, r. 1A (1) (c), see ANNUAL PRACTICE, 1952, p. 587.

MOTION by defendants for extension of time to appeal.

The plaintiff having appealed to DONOVAN, J., from the refusal of the master to grant a certificate for an early trial, DONOVAN, J., allowed the appeal and granted a certificate. On an application by the plaintiff to HILBERY, J., who was the judge in charge of the list, to fix a day for the hearing, the judge felt himself bound by the certificate to fix, and did fix, a day earlier than the day on which the case normally would have come on for hearing. The defendants contended that HILBERY, J., had an absolute discretion in the matter, but that, if he was bound by the certificate, in the circumstances the order of DONOVAN, J., was wrong, and they applied for an extension of time in which to appeal from that order.

Beyfus, Q.C., H. H. Edmunds and McGougan for the defendants.
Salmon, Q.C., and I. C. Baillieu for the plaintiff.

SOMERVELL, L.J.: This is a notice of motion on behalf of the defendants asking for an extension of time for appealing against an order made by **DONOVAN, J.**, on June 10, 1952, by which he gave a certificate for an early trial. The effect of such a certificate is that, if an application is made to the judge in charge of the list to fix a day for the hearing, the case can be brought forward from its place in the list. The grounds which led the learned judge to make that order were that there was evidence before him that the plaintiff was in an unbalanced state of health, and that it was desirable that the issues which he had raised in the proceedings should be disposed of as quickly as possible. According to an affidavit by the solicitors to the defendants the learned judge, when he made the order, indicated that the granting of the certificate in no way bound the judge in charge of the list, who had an absolute discretion in the matter and could fix a date for trial compatible with the facts put before him by the parties. Having regard to those observations the defendants did not appeal from the order.

When the matter came before **HILBERY, J.**, who was in charge of the list, to fix a day, he stated that, on his interpretation of R.S.C., Ord. 36, r. 1A, once a certificate for an early trial had been granted he had no option but to fix a day for the hearing which would be before the date on which the case would come on for trial in the ordinary course of events, and that, as the list stood at that moment, the latter date would probably be about March, 1953. Counsel for the defendants submitted that that was wrong, but he wanted to be able to submit—and that was why he asked for an extension of time for appealing—that, if that was right, then **DONOVAN, J.**, was wrong in making the order which he did. **HILBERY, J.**, having indicated that he would make an order for some time before March, adjourned the matter so that the parties might make such application to this court as they thought proper.

I have come to the conclusion, with respect, that **HILBERY, J.**, was wrong in thinking that his discretion was fettered. The purpose of the making of an order such as **DONOVAN, J.**, made is to ensure that all reasonable efforts are made to expedite the hearing. It should not be regarded as fettering the discretion of the learned judge in charge of the list to consider all the circumstances put before him when the application to fix a day is made. If, considering all those circumstances, with unfettered discretion he decided that the proper date was one later than that on which the case would have come on for hearing in the ordinary course, it would be his duty to fix that later date. This court having come to that conclusion, no order should be made on this notice of motion, but the matter should go back before the judge who is in charge of the list and will have the guidance of this court as to the effect of the order of **DONOVAN, J.** I would dismiss the motion.

JENKINS, L.J.: I agree.

HODSON, L.J.: I agree.

Motion dismissed.

Solicitors: *Gordon Gardiner, Carpenter & Co.* (for the defendants); *Theodore Goddard & Co.* (for the plaintiff).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

DONALDSON v. McNIVEN.

[COURT OF APPEAL (Lord Goddard, C.J., Singleton and Birkett, L.JJ.), October 2, 1952.]

Negligence—Air rifle—Liability of parent.

A The defendant, who lived in a populous district of Liverpool, allowed his son, aged thirteen years, to have an air rifle on condition that it was never used outside the house. There was a large cellar to the defendant's house where the son was allowed to use the air rifle. Behind the house and providing access to it and other houses was an alley-way where children came to play. Without the defendant's knowledge, the son fired the air rifle in the alley-way and injured the plaintiff, a child aged five, who was standing at the entrance to the alley-way.

B **HELD:** there was no ground for disturbing the finding of fact in the court below that there was no such lack of supervision by the defendant of his son's activities as would constitute negligence on his part, and, therefore, the tort was that of the defendant's son alone and the defendant was not liable in damages.

C Decision of PEARSON, J. ([1952] 1 All E.R. 1213), affirmed.

AS TO DANGEROUS ARTICLES, see HALSBURY, Hailsham Edn., Vol. 23, p. 629, para. 883; and FOR CASES, see DIGEST, Vol. 36, pp. 56-58, Nos. 353-364.

APPEAL by the plaintiff from an order of PEARSON, J., dated Feb. 25, 1952, and reported [1952] 1 All E.R. 1213.

D The plaintiff, through his father as next friend, claimed damages from the defendant for personal injuries sustained through the negligent discharge of an air rifle by the defendant's thirteen-years-old son. It was not contended that the defendant was negligent in allowing his son to have the use of an air rifle, but it was contended that he was negligent in not exercising proper supervision over his son's use of the rifle. PEARSON, J., held that the defendant had not been guilty of negligence.

E *Nance* for the plaintiff.

Youlds for the defendant.

F **LORD GODDARD, C.J.:** This is an appeal from a judgment of PEARSON, J., before whom the plaintiff, a boy of five years of age, brought an action, through his father as next friend, for personal injuries sustained by him through the wrongful act of the defendant's son. The defendant's son, who was thirteen years of age and apparently an ordinary, normal boy, caused the injuries through firing an air-gun down an alley-way in the Scotland Road district of Liverpool, rather out of bravado, after he had promised his father that he would never use it out of the cellar of his father's house. The boy had bought the gun to the knowledge of his father when they were on a visit to London. His father seemed G always to have been reluctant to let him have it, but the boy had given his mother his word of honour that he would never use it in the open, and the father had given strict orders to the boy that he should not use it in the open. As a matter of fact, he gave the boy a beating when he found he had used it in the open. So long as the boy was using the air-gun in the cellar of the house, where he was allowed to use it, he was firing match sticks, which would not hurt anyone, H but he seemed, unknown to his father, to have got some air-gun pellets, and one day, when showing the gun to another boy, he, apparently, could not resist the temptation of going out and firing it. Unhappily the plaintiff came into range, and he got a pellet in his eye and lost it.

How can the defendant be made liable for that? It might have been contended, but it was not, that it was negligent of him to let his son have the air-gun at all, but that was not the case which was made at the trial, and, therefore, PEARSON, J., dealt with the matter on the footing that it was not negligent or

wrong for the defendant to permit his son to have possession of the gun. The case was put entirely on lack of supervision, but how are you going to supervise a small boy for every hour of the day? If there was nothing wrong in the defendant allowing his son to have an air-gun (and I am far from saying there was anything wrong), I cannot see that he could do more than extract a promise from his son never to use the air-gun in the street. He cannot be watching his son all day and every day, nor is there any obligation on him as a parent to do so. Some people have thought that parents ought to be responsible for the torts of their children, but they are not. The negligence in this case was merely the negligence of the boy. On the findings of the learned judge the parents had done all that parents could reasonably do, and I can see no ground for imputing negligence to the father. Therefore, this appeal fails.

SINGLETON, L.J.: I am of the same opinion. Counsel for the plaintiff has put forward everything that could be put forward in support of this appeal, but I fail to see that he has shown that PEARSON, J., erred in the slightest degree. The learned judge had to consider the measure of duty owed by the defendant, who is the father of a boy of thirteen. That boy acquired an air-gun. It was against his mother's wish that he should have it, but she gave way, and the father allowed the boy to keep it on condition that he only used it in the cellar of the house. The boy gave an undertaking to his father to that effect, but forgot, or overlooked, that undertaking. He used the air-gun in a passage with an unfortunate result to the plaintiff. PEARSON, J., considered all the facts. He did not consider that the defendant was negligent, and I do not see that this court can interfere with that finding. Indeed, many people may think that the defendant was acting correctly in obtaining an undertaking from his son, whom he had no reason to distrust, rather than locking away the air-gun. There may be different views on that, but to say that the father is responsible in law is going further than PEARSON, J., would go, and, as I think, further than this court can go. The appeal must be dismissed.

BIRKETT, L.J.: I agree entirely with the two judgments which have been delivered. The moment it was conceded in this court (as counsel for the plaintiff frankly did concede) that it could not be a negligent act on the part of the defendant to allow his boy to be in possession of an air-gun, the only question for consideration was whether the conduct of the defendant was that of a reasonable and prudent father? The judgment of the learned judge shows conclusively that to that question he gave the greatest possible care, and he came to the conclusion that the facts did not justify him in finding negligence against the defendant. For my part I agree with that conclusion and I think this appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *Clement Daniels & Co.*, agents for *J. Trevor Booth & Banfi*, Liverpool (for the plaintiff); *Helder, Roberts & Co.*, agents for *John A. Behn, Twyford & Reece*, Liverpool (for the defendant).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

PRACTICE NOTE.

MIDDLETON v. MIDDLETON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Davies, J.), October 6, 1952.]

Divorce—Practice—Re-hearing—Affidavit in support of application—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 36 (1).

The affidavit in support of an application for the re-hearing of a divorce petition under r. 36 (1) of the Matrimonial Causes Rules, 1950, should set out the merits of the case, either in the affidavit itself or by exhibiting thereto the proposed pleadings.

B AS TO RE-HEARING OF DIVORCE SUITS, see HALSBURY, Hailsham Edn., Vol. 10, p. 779, para. 1233; and FOR CASES, see DIGEST, Vol. 27, pp. 491-494, Nos. 5234-5267, and Digest Supps.

Cases referred to:

(1) *Winter v. Winter*, [1942] 2 All E.R. 390; [1942] P. 151; 111 L.J.P. 95; 167 L.T. 258; 2nd Digest Supp.

C (2) *Tucker v. Tucker*, [1949] P. 105; [1949] L.J.R. 76; 2nd Digest Supp.

APPLICATION by the wife under the Matrimonial Causes Rules, 1950, r. 36 (1), for the re-hearing of an undefended divorce suit heard by Mr. Commissioner GRAZEBROOK, K.C., on Dec. 20, 1951, when the husband was granted a decree nisi on the ground of the wife's desertion.

D *C. T. Reeve* for the wife.
H. H. Harris for the husband.

LORD MERRIMAN, P., in the course of his judgment, stated that the wife alleged in her affidavit filed in support of the application that she had been forced to leave home by the husband's cruelty, but there were no particulars or details of this allegation. His LORDSHIP referred to *Winter v. Winter* (1) and *Tucker v. Tucker* (2), and continued: I think it should be understood that there should be something in the nature of an affidavit of merits in support of such an application as this. In *Tucker v. Tucker* (2), for example, where the ground relied on was that the cruelty which had been charged and proved was condoned, the circumstances were all set out on affidavit, and, taking the assertions in the affidavit pro veritate, this court came to the conclusion that there was no good reason to suppose that the allegation of condonation could be supported, and, therefore, that the decree had been wrongfully obtained. In the present case we have allowed, without adjournment for verification by affidavit, counsel for the wife to put in the draft of her proposed answer and cross-prayer, and it is immaterial, to my mind, whether in any similar case all the allegations on which the party relies are set out in the affidavit itself or whether they are set out by exhibiting the proposed pleadings. That is a mere matter of form, but the substance of the matter is that it should be brought to the mind of this court what it is that, in spite of standing by and allowing everything to go by default, the party now wishes to lay before the court.

Solicitors: *L. H. Whitlamsmith* (for the wife); *H. E. Thomas & Co.*, Woolwich (for the husband).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

**Re STONEHAM'S SETTLEMENT TRUSTS. POPKISS AND
ANOTHER v. STONEHAM AND ANOTHER.**

[CHANCERY DIVISION (Danckwerts, J.), October 2, 1952.]

Trust and Trustee—Appointment of new trustee—Concurrence of continuing trustee—“Retiring trustee”—Trustee compulsorily retired for remaining out of the United Kingdom for more than twelve months—Trustee Act, 1925 (c. 19), s. 36 (1) (8).

Trust and Trustee—Removal of trustee—Trustee remaining out of the United Kingdom for more than twelve months—Removal against his will—Trustee Act, 1925 (c. 19), s. 36 (1).

In 1939 C., the sole surviving trustee of a settlement which was made in 1924 by a settlor who died in 1927, appointed S. to be a trustee with him. S. having remained out of the United Kingdom for a continuous period of more than twelve months, C. alone executed a deed of appointment, dated Dec. 11, 1950, whereby he appointed two new trustees in place of himself and S., and, by the same deed, he retired from the trusts of the settlement. S. was not called on to concur in the new appointments, and was not ready to retire from the trusts. On a summons to determine the validity of the appointments of the new trustees,

HELD: (i) under the Trustee Act, 1925, s. 36 (1), a trustee who remained out of the United Kingdom for more than twelve months could be removed against his will, and, therefore, S. could be removed from the trusts of the settlement whether or not he agreed.

(ii) a trustee who had been compulsorily removed from a trust, because he had remained out of the United Kingdom for a continuous period of more than twelve months, was not a “refusing or retiring trustee” within the meaning of s. 36 (8) of the Act of 1925, and, therefore, S. was not a person whose concurrence was required to the appointments of the two new trustees; C., being a “retiring trustee”, within s. 36 (8), was within the wider construction which was to be applied by that sub-section to the words “continuing . . . trustee” in s. 36 (1); and, as he was the only person who answered that description, the appointments made by him were valid.

FOR THE TRUSTEE ACT, 1925, s. 36 (1) and (8), see HALSBURY'S STATUTES, Second Edn., Vol. 26, pp. 107, 108.

Cases referred to:

- (1) *Stones v. Rowton*, (1853), 17 Beav. 308; 22 L.J.Ch. 975; 22 L.T.O.S. 9; 51 E.R. 1052; 43 Digest 675, 1064.
- (2) *Travis v. Illingworth*, (1865), 2 Drew. & Sm. 344; 34 L.J.Ch. 665; 12 L.T. 135; 62 E.R. 652; 43 Digest 676, 1066.
- (3) *Re Coates to Parsons*, (1886), 34 Ch.D. 370; 56 L.J.Ch. 242; 56 L.T. 16; 43 Digest 682, 1119.

ADJOURNED SUMMONS to determine the validity (a) of an appointment of new trustees, dated Dec. 11, 1950, whereby the two plaintiffs were appointed the trustees of a settlement, dated Feb. 15, 1924, and made by the testator, Allen Henry Philip Stoneham, in place of the two defendants, and (b) of an appointment of new trustees, dated Dec. 11, 1950, whereby the plaintiffs were appointed the trustees of the testator's will, dated Mar. 4, 1927, in place of the two defendants and the testator's widow (who died on Dec. 18, 1950).

Each of the appointments was made by the second defendant alone, and, by the deed relating to the settlement, after making the new appointments, he retired from the trusts of the settlement. Similarly, by the deed relating to the will, after making the new appointments, he retired from the trusts of the will. The ground for the appointment of a new trustee in place of the first defendant was that the first defendant had remained out of the United Kingdom for a continuous period of more than twelve months. In regard to the removal of

the testator's widow from the trusts of the will, she had remained out of the United Kingdom for more than twelve months and, also, wished to be discharged from the trusts. The first defendant contended that the appointments were not valid as he had not concurred in them.

A. F. M. Berkeley for the plaintiffs.

Hunter-Brown for the first defendant.

A *Arthur Bagnall* for the second defendant.

DANCKWERTS, J.: This case raises a short point of some interest and importance, which does not appear to have had hitherto to be directly decided by a judge. It arises in regard to the appointment of new trustees under a settlement, dated Feb. 15, 1924, and under a will, dated Mar. 4, 1927, both made by Mr. Allen Henry Philip Stoneham, who died on Apr. 12, 1927, his will being proved on June 17, 1927. In each case the point depends on the statutory power of appointing new trustees. The original trustees of the settlement were a Mr. Holyfield and the second defendant, Henry Tudor Crosthwaite. On Dec. 14, 1938, Mr. Holyfield died, and the second defendant, who was then left sole trustee, by an appointment, dated Mar. 27, 1939, appointed Mr. Stoneham, the first defendant (who was a son of the testator), to be a trustee of the settlement with him. The executors and trustees of the will were the testator's widow, the first defendant and the second defendant.

The two appointments with which I am now concerned were each dated Dec. 11, 1950. By the appointment relating to the settlement the second defendant alone appointed the plaintiffs, Richard Barclay Popkiss and Owen Michael Lewin, to be trustees in the place of the first defendant and himself, and, by the same deed, he (the second defendant) retired from the trusts. By the appointment relating to the will the second defendant alone again appointed the two plaintiffs to be trustees in the place of the first defendant, the testator's widow and himself, and, again, he retired from the trusts of the will. The basis of the appointment, in the case of the settlement, was that the first defendant had remained out of the United Kingdom for more than twelve months, and, in the case of the will, that the first defendant and the widow had remained out of the United Kingdom for more than twelve months. In the case of the widow it was also recited that she wished to retire and be discharged from the trusts concerned. The widow died on Dec. 18, 1950. The property involved is of considerable value, and the validity of the two appointments is contested by the first defendant on the ground that he was entitled to be called on to concur in the appointments which were made, and, therefore, the appointments made by the second defendant alone were not valid. The first defendant, however, does not dispute that he was out of the United Kingdom for more than twelve months and he does not allege that the second defendant (who acted on the advice of his solicitors) acted otherwise than in good faith. It is plain from the correspondence which has been exhibited that the first defendant was not entirely ready to retire from the trusts if he could avoid it, and there was some disagreement between the parties as to the persons who should be appointed to be new trustees.

The point depends entirely on the effect of the statutory power which is to be found in the Trustee Act, 1925, s. 36. The relevant provisions of that section are practically identical with the provisions which were contained in s. 10 of the Trustee Act, 1893, and s. 31 of the Conveyancing Act, 1881. The Act of 1881 introduced for the first time the particular words which I have to consider, the power to appoint new trustees having depended previously on s. 27 of the Trustees and Mortgagees Act, 1860 (Lord Cranworth's Act, 23 & 24 Vict., c. 145), or on somewhat similar provisions which were to be found in express powers to appoint new trustees contained in settlements and wills.

Section 36 (1) of the Act of 1925 is in these terms:

"Where a trustee, either original or substituted, and whether appointed

by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, or is an infant, then, subject to the restrictions imposed by this Act on the number of trustees,—(a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or (b) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee; may, by writing, appoint one or more other persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee so deceased remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, or being an infant, as aforesaid.”

In the present case there are no such persons as those mentioned in para. (a).

Before the Act of 1881 was passed there had been judicial decisions on express powers contained in wills and settlements, viz., *Stones v. Rowton* (1), in 1853, and *Travis v. Illingworth* (2), in 1865, which decided that persons who were not going to continue as trustees after the appointment to be made were not surviving or continuing trustees for the purpose of an express power in similar terms to the provisions of s. 31 of the Act of 1881 and s. 36 (1) of the Act of 1925. It is probably for that reason that a special provision, which, as it seems to me, effected a change, was introduced in s. 31 (6) of the Act of 1881, in s. 10 (4) of the Trustee Act, 1893, and in s. 36 (8) of the Act of 1925.

The Trustee Act, 1925, s. 36 (8), is in these terms:

“The provisions of this section relating to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.”

It is clear that the references to a refusing or retiring trustee were directed to the decisions in *Stones v. Rowton* (1) and *Travis v. Illingworth* (2) and were to enable a difficulty to be overcome when there might otherwise be no one who could execute the statutory power.

It is plain, I think, that on the provisions of s. 36 (1) of the Act of 1925, as was the case on the provisions of s. 31 (1) of the Act of 1881 and s. 10 (1) of the Act of 1893, neither of the defendants would have been within the description of the persons who could execute the statutory power, but the second defendant, at any rate, is a “retiring trustee”, who is within the wider construction which is to be applied to the words “continuing trustee” by s. 36 (8) of the Act of 1925. The real point is: Do those wider provisions also include the first defendant? As it seems to me, the first defendant is a person who can be removed under the statutory power whether or not he agrees. The words of s. 36 (1) are, in my opinion, quite plain in that respect, and I do not understand the doubts which appear to have been suggested in LEWIN ON TRUSTS, 15th ed., p. 422, and UNDERHILL’S LAW OF TRUSTS AND TRUSTEES, 10th ed., p. 449, viz., that it is questionable whether a trustee who has remained outside the United Kingdom for more than twelve months can be removed against his will. It seems to me that the provision is clear and that the first defendant can be removed against his will. But that is not the end of the matter, because it may still be possible that he is entitled to demand that he shall have a hand in the appointment of the new trustee or trustees. Is he a person who is “a refusing or retiring trustee?” He has been removed because he has been out of the United Kingdom, for the reason, no doubt, that it is inconvenient to have a trustee who does not reside in the country where the trusts have to be performed normally, but it does not follow that he is refusing to act, and, indeed, it seems clear on the facts that he is prepared to act. Is he, however, a trustee who is retiring? He was, I think,

not entirely prepared to retire—not, at any rate, in all the circumstances. It is really a case where the trustee who is removed is taken from the trusts compulsorily and does not retire of his own volition. It seems to me, in the absence of any authority which binds me to decide otherwise, that a person who is compulsorily removed from a trust is not a person who retires and is not a retiring trustee.

A As I said, the matter does not seem to have had to be decided by any judge directly, but in *Re Coates to Parsons* (3), which was decided in 1886, NORTH, J., had to consider the provisions of s. 31 of the Act of 1881 in the case of a person who was alleged to have been removed from the trusts under the provisions of that section by reason of his having been outside the United Kingdom for more than twelve months. NORTH, J., said (34 Ch.D. 377):

B “If I were dealing with an instrument containing a power to appoint new trustees expressed in the words of s. 31 (1), and not containing anything further, I should, for the reasons which I have stated, come to the conclusion that the persons who were continuing to act as trustees had the power of appointing new trustees, without the concurrence of a person who was ceasing to be a trustee by virtue of the appointment.”

C That, of course, would cover not only the case of a trustee who is out of the country, but also the case of a trustee who wished to be discharged and retire on the new appointment. NORTH, J., then proceeded to consider whether s. 31 (6) of the Act of 1881 (which was in similar terms to s. 36 (8) of the Act of 1925) covered the case of a trustee who had remained outside the United Kingdom for more than twelve months. He got out of the difficulty of having to decide whether or not such a person was within the sub-section as he found that there was no
D evidence in the case which was before him that the person concerned was ready and willing to act. He said (*ibid.*):

E “I hold, therefore, that under the terms of the Act the nine trustees, who were clearly continuing trustees, were competent to make the appointment, unless it were shown that the person who had been absent for so long, and in whose place there was a clear right to substitute a new trustee, was willing and competent to act. This has not been shown, and it seems to me, therefore, that the first objection, viz., that W. R. Dearlove ought to have concurred in making the appointment, is not established.”

Of course, it is a perfectly fair observation that, unless it was possible for the trustee who had been out of the United Kingdom to have concurred in making the appointment, it was not necessary to consider s. 31 (6) of the Act of 1881,
F but the learned judge was able to decide the matter on the basis of the facts. He was, in effect, able to come to the conclusion that, even if the sub-section did apply, the person who was absent overseas could not, on the evidence, satisfy the terms of the sub-section, and, therefore, could not be a person who was entitled to have concurred in making the appointment.

G It seems to me, therefore, that *Re Coates to Parsons* (3) is not a decision which fetters the view which I should otherwise be disposed to take in regard to the proper construction of s. 36 (8) of the Act of 1925, and I come to the conclusion that a trustee who has been removed against his will, because of absence from the United Kingdom for consecutive periods of more than twelve months, is not
H “a refusing or retiring trustee” within the meaning of s. 36 (8). In my opinion, therefore, the first defendant was not a person whose concurrence was required to the appointments which were made by the second defendant, that the second defendant was the only person who answered the description contained in s. 36 (1) of the Act of 1925, as modified or extended by the provisions of s. 36 (8), and, therefore, the appointments which were made by him were perfectly valid and effective.

Declaration accordingly.

Solicitors: *Neish, Howell & Haldane* (for the plaintiffs and the second defendant); *Kenneth Brown, Baker, Baker* (for the first defendant).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

Re WRIGHT (*deceased*). BARCLAYS BANK, LTD. *v.*
WRIGHT AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), October 2, 1952.]

Income Tax—Annuity—Annuity free of income tax—"Net income of £10 per week"—*Annuitant not entitled to £10 free of tax.*

By his will a testator directed his trustees to set aside a sum out of his residuary estate sufficient at the time of appropriation to produce "a net income of £10 per week" and he directed his trustees to pay such income to H. during her life or until she should marry.

HELD: the word "net" was not of itself sufficient to free H. from the burden of income tax in respect of her annuity, and, there being no context to show clearly that the testator intended the contrary, her annuity was not payable free of income tax.

Re Wells' Will Trusts ([1940] 2 All E.R. 68), *Re Loveless* ([1918] 2 Ch. 1), and *Re Batley* ([1951] Ch. 558), applied.

AS TO "FREE OF TAX" GIFTS IN WILLS, see HALSBURY, Hailsham Edn., Vol. 17, p. 259, para. 528; and FOR CASES, see DIGEST, Vol. 39, pp. 166-168, Nos. 572-593.

Cases referred to:

- (1) *Re Williams*, [1936] 1 All E.R. 175; [1936] Ch. 509; 105 L.J.Ch. 362; 154 L.T. 640; Digest Supp.
- (2) *Re Wells' Will Trusts*, [1940] 2 All E.R. 68; [1940] Ch. 411; 109 L.J.Ch. 261; 162 L.T. 422; 2nd Digest Supp.
- (3) *Re Loveless*, [1918] 2 Ch. 1; 87 L.J.Ch. 461; 119 L.T. 24; 39 Digest 167, 585.
- (4) *Gleadow v. Leetham*, (1882), 22 Ch.D. 269; 52 L.J.Ch. 102; 48 L.T. 264; 39 Digest 167, 581.
- (5) *Re Waller*, [1916] 1 Ch. 153; 85 L.J.Ch. 188; 114 L.T. 42; 21 Digest 46, 293.
- (6) *Re Batley*, [1951] Ch. 558; 2nd Digest Supp.

ADJOURNED SUMMONS to determine (inter alia) whether, on the true construction of the will of the testator, the sum directed to be set aside and appropriated pursuant to the direction contained in cl. 8 (b) thereof ought to be such as to produce an income of £10 per week at the date of such setting apart and appropriation (a) before deduction of income tax at the standard rate current at the date of such setting aside and appropriation or (b) after deduction of income tax at such standard rate.

B. S. Tatham for the plaintiff, one of the trustees of the will.

J. A. Brightman for the second defendant, the annuitant.

E. I. Goulding for the third and fourth defendants, residuary legatees.

Elverston for the fifth to the twelfth defendants inclusive, children and grandchildren of the testator, interested in the residue.

The first and the thirteenth defendants did not appear.

DANCKWERTS, J. : The testator, who died on Dec. 10, 1949, by his will dated Aug. 15, 1946, made certain provisions for the payment of weekly sums out of the residuary estate to his wife and to a lady whose name was Henrietta Charlotte Wear. The material provision relating to Henrietta Charlotte Wear (hereinafter called the annuitant) is in these terms:

"To set aside and appropriate another sum sufficient at the time of such appropriation to produce a net income of £10 per week and I direct the bank and my trustee to pay such income to the said Henrietta Charlotte Wear during her life (the first payment to be made at the expiration of one week from the date of my death) or until she shall marry and upon the happening

of that event such income shall be reduced to £2 10s. per week and I declare that after such appropriation as aforesaid such income shall be the primary and only fund for answering the said payment and that any deficiency of such income in any year shall be borne by the said Henrietta Charlotte Wear and shall not be made good to her and from and after the death or marriage as the case may be of the said Henrietta Charlotte Wear the whole of the capital sum representing the investments yielding such income or such part thereof as may be in excess of that required to provide the said income of £2 10s. per week shall fall into and form part of my residuary trust fund."

It was argued by counsel for the annuitant that the effect of this is to provide for her an annuity until she marries of £10 a week after providing for income tax, or, in other words, an annuity of £10 a week free of tax. He says, with some force I agree, that the word "net" is one which has often been used in referring to annuities as distinguishing a sum received by the annuitant after income tax has been paid in comparison with the income, described as "gross income", before tax has been paid and taken out of the fund, and he has called my attention to this use of the language by LORD WRIGHT, M.R., and by ROMER, L.J., in *Re Williams* (1). It is true that words of that kind have been used in regard to the subject of an annuity, be it free or not of income tax, but I am also faced with the situation that the matter of these bequests is not free from authority, at any rate in regard to similar words, such as "a clear annuity" or "an annuity after deductions" of so much. For instance, in *Re Wells' Will Trusts* (2), an annuity given "free of all deductions" was held not to be a gift of an annuity free of tax, but one which must suffer liability to tax. In *Re Loveless* (3) a gift of "a clear annuity" was held not to be free of tax. Another example was *Gleadow v. Leetham* (4), decided in 1882.

In those cases words which I am bound to say, if the matter had been free from authority, might have suggested to my mind that the testator intended to give an annuitant a sum which was to be enjoyed by her without deduction of the liability of income tax have not been held to be sufficient for that purpose. The words "clear" and "free of deductions" have been held referable to other matters. For instance, in *Re Waller* (5), SARGANT, J., held that the words "net income" had a reference to liability for settlement estate duty, and, therefore, freed the annuity in question from liability to bear any part of that burden. In that case it does not appear whether the matter of income tax was considered or not, and it may well have been that the annuitant had to suffer the income tax on that annuity. At any rate, it is not authority one way or the other. Counsel for the annuitant said that that showed that, at any rate, the word "net" was as wide as the word "clear", but it does not show that the word "net" is wider and more effective than the word "clear" in regard to the question of income tax, though there may be a sufficient context in a will to show that the testator intends the annuitant to be relieved from the burden of income tax without using the words "free of tax": see, for instance, *Re Batley* (6).

One must find with the words some indication that the annuitant is to be freed from tax because otherwise the burden of income tax is the normal and proper burden which should fall on the annuitant, the deduction, or manner by which the tax is paid, being merely a method of collection. Although the Court of Appeal in *Re Batley* (6) differed from the decision of VAISEY, J., there was a principle to which VAISEY, J., referred in that case which seems to me to have some relevance. He said that, if one is to find relief of the annuitant from the burden of income tax, one must find words to that clear effect. In the present case, the only word which can have that effect is "net", and, in view of the authorities, I am unable to see why the word "net" is any more effective and compelling than the words "clear" or "free of deduction". It seems to me that I should be introducing unnecessary refinements into what has become more

or less a principle of construction if I were to give a different effect to the use of the word "net" from that which has been applied to the use of the word "clear", which seems to me as strong a word as the word "net". Therefore, on the whole, I come to the conclusion in this case that the annuity given to Henrietta Charlotte Wear must be subject to the liability to bear income tax in the ordinary way.

Order accordingly.

Solicitors : *Edward F. Iwi*, agent for *Vyvyan Wells & Sons*, Finchley (for the plaintiff and the third and fourth defendants) ; *Kinch & Richardson* (for the second defendant) ; *Tackley, Fall & Read* (for the fifth to the twelfth defendants inclusive).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

R. v. BATH LICENSING JUSTICES AND ANOTHER.

Ex parte CHITTENDEN.

[QUEEN'S BENCH DIVISION (Upjohn, J., sitting as vacation judge), August 28, 1952.]

Licensing—Licence—Occasional licence—Jurisdiction to grant applications for consecutive periods of three days each—Applications in respect of events at festival lasting two months—Revenue Act, 1862 (c. 22), s. 13—Licensing (Consolidation) Act, 1910 (c. 24), s. 64 (1) (2) (4).

On Aug. 12, 1952, G. applied to justices for their consent to the grant to him of four occasional licences, for consecutive periods of three days each, authorising him to sell intoxicating liquors in certain public gardens in Bath in connection with the Festival of Bath which was being held during August and September, 1952. Each licence was for the occasion of public open-air dances, illuminations and entertainments, and the four licences covered the period from Aug. 18 to Aug. 30, 1952, excluding Sunday, Aug. 24. The justices granted the applications, being of the opinion that the events to be provided in the gardens were sufficiently different from the normal use of the gardens to justify them regarding each day referred to in the applications as an "occasion". On a motion for certiorari to quash the justices' orders,

HELD: the justices had jurisdiction, under the Licensing (Consolidation) Act, 1910, s. 64 (1), to grant their consent to a series of occasional licences for consecutive periods of three days each if they considered that the licences were "conducive to public convenience, comfort, and order", within the Revenue Act, 1862, s. 13, and were otherwise proper; there was no necessity for occasional licences to be for separate and independent occasions, nor was it necessary for there to be a lapse of, at least, one day between the periods for which successive licences could be granted; and in the circumstances of the present case the justices had jurisdiction to grant the applications.

AS TO OCCASIONAL LICENCES, see HALSBURY, Hailsham Edn., Vol. 19, pp. 113-115, paras. 269-271; and FOR CASES, see DIGEST, Vol. 30, Replacement, pp. 81, 82, Nos. 624-627.

Case referred to:

- (1) *Chandler v. Emerton JJ.*, [1940] 3 All E.R. 146; [1940] 2 K.B. 261; 109 L.J.K.B. 663; 163 L.T. 80; 104 J.P. 342; 30 Digest, Replacement, 81, 625.

MOTION for an order of certiorari to bring up and quash four orders made by Bath licensing justices on Aug. 12, 1952, under the Licensing (Consolidation) Act, 1910, s. 64 (1), whereby they gave their consent to the grant by the Commissioners of Customs and Excise of four occasional licences to the respondent,

Charles Green. The application for certiorari was brought by Robert John Chittenden, a member of the City of Bath Licensed Victuallers Protection Association, acting on behalf of the association.

A On July 18, 1952, the respondent obtained the consent of the justices to the grant to him by the Commissioners of Customs and Excise of five occasional licences to sell intoxicating liquors from 8 p.m. to 11 p.m. in a marquee at Sydney Gardens, Bath, in connection with the Festival of Bath which was to be held there during August and September, 1952. Each of these licences was for a period of three days or less, but, in fact, they covered every day from Aug. 2 to Aug. 16, except Sunday, Aug. 3 and Sunday, Aug. 10. The applicant, Mr. Chittenden, had opposed the grant of these licences, but, as he did not move in time, there was no application before the court for certiorari to quash the orders of July 18. On Aug. 12 the respondent obtained the consent of the justices to the grant to him of four occasional licences to sell intoxicating liquors at Sydney Gardens from 8 p.m. to 10.30 p.m., the licences being (i) for Aug. 18, 19 and 20; (ii) for Aug. 21, 22 and 23; (iii) for Aug. 25, 26 and 27; and (iv) for Aug. 28, 29 and 30. All nine occasional licences granted to the respondent were identical in form and were for the occasion of public open-air dances, illuminations and entertainments, and the respondent intended to apply for similar licences for September. The applicant moved for an order of certiorari to quash the orders of Aug. 12 on the grounds, inter alia, (a) that there had to be a lapse of, at least, one day between the periods for which successive occasional licences could be granted, and (b) that a period of two months could not be regarded as an "occasion" within the meaning of the Revenue Act, 1862, s. 13, and the Licensing (Consolidation) Act, 1910, s. 64.

D *S. H. Lamb* for the applicant.

Wingate-Saul for the respondent, Green.

The justices did not appear.

UPJOHN, J., stated the facts and continued: The sole question which I have to consider is whether the justices had jurisdiction to give their consent to the grant by the Commissioners of Customs and Excise of these occasional licences. That must depend primarily on the Licensing (Consolidation) Act, 1910, it being in pursuance of s. 64 of that Act that the justices gave their consent to the issue of the licences.

Section 64 (1) reads:

F "An occasional licence shall not be granted except with the consent of a petty sessional court, and unless twenty-four hours at least before applying for that consent the applicant has served on the superintendent of police for the district notice of his intention to apply for the consent, setting out his name and address, the place and occasion in respect of which the licence is required, the period for which the licence is to be in force, and the hours to be specified in the consent of the justices."

G I need not read the proviso. Section 64 (2) reads:

"The consent required by this section shall be substituted for the consent mentioned in s. 13 of the Revenue Act, 1862, s. 20 of the Revenue Act, 1863, s. 5 of the Revenue Act, 1864, and s. 19 of the Licensing Act, 1874."

H Section 64 (4) is important:

"For the purposes of this Act an 'occasional licence' is a licence for the sale of intoxicating liquor granted under the authority of the Commissioners of Customs and Excise in pursuance of s. 13 of the Revenue Act, 1862, s. 20 of the Revenue Act, 1863, and s. 5 of the Revenue Act, 1864."

It will be convenient to consider those Acts to which reference is made in s. 64 of the Act of 1910. The Revenue Act, 1862, s. 13, reads:

"It shall be lawful for the [Commissioners of Customs and Excise],

whenever they shall consider it conducive to public convenience, comfort, and order, and with the consents in writing of two justices of the peace usually acting at the petty sessions for the petty sessional division within which the place of sale is situate, to authorise any officer of [customs and excise] to grant to any person who shall be duly authorised to keep a common inn, alehouse, or victualling house, and who shall have taken out the proper excise licences to sell therein beer, spirits, wine, or tobacco, an occasional licence under this Act empowering him to sell the like articles for which he shall have taken out such licences as aforesaid at any such other place, and for and during such space or period of time, not exceeding three consecutive days at any one time, as the said commissioners shall approve, and as shall be specified in such occasional licence; and any person who shall have taken out such occasional licence shall not be liable to any penalty or forfeiture whatever by reason or on account of his selling the articles mentioned in the said licence during the time and at the place specified therein . . . ”

A

B

The respondent had the proper excise licences, within the meaning of the section. The section plainly gives power to the Commissioners of Customs and Excise, with the consent of the petty sessional court, to grant an occasional licence whenever they consider it conducive to public convenience, comfort and order, provided it is not for a space or period exceeding three consecutive days at any one time.

C

In the following year the Revenue Act, 1863, was passed, and s. 19 thereof reads:

D

“ In lieu of the duty now chargeable on a victualler’s occasional licence, specified in sched. (B.) of [the Act of 1862] there shall be charged and paid the following duty; (that is to say,) for and upon every occasional licence to be granted to any person who shall be duly authorised to keep a common inn, alehouse, or victualling house, and licensed to sell therein beer, spirits, wine, or tobacco, to sell the like articles for which he shall be so licensed at any such other place, and for and during such space or period of time not exceeding six days as shall be specified in such occasional licence, the sum of 2s. 6d. for every day so specified as aforesaid for which the same shall be granted: Provided always, that when any person shall have taken out such an occasional licence for six successive days, and shall desire to take out another occasional licence for a time in immediate succession, or only separated by the intervention of Sundays and holidays, then the duty chargeable for every licence after the first, and for any number of days not exceeding six, shall not exceed 10s.”

E

F

The curious feature about that section is that it refers to an occasional licence for a “ space or period of time not exceeding six days ”, although s. 13 of the Act of 1862, which had not been expressly repealed or amended, clearly stated that the occasional licence was to be for a period not exceeding three days, and this was reiterated in sched. (B.) to the Act of 1862 [which was repealed by the Inland Revenue Act, 1880, s. 49 and sched. II].

G

The Revenue (No. 1) Act, 1864, s. 5, provided for the grant by the Commissioners of Customs and Excise of another type of licence which did not require the consent of the justices to its issue. There, again, the licences were to be for a period “ not exceeding three consecutive days at any one time ”.

H

Section 19 of the Act of 1863 was repealed by the Finance (1909-10) Act, 1910, s. 96 (1), and sched. VI. It may also be noted that s. 320 and sched. XII of the Customs and Excise Act, 1952, which received the Royal Assent on Aug. 1, 1952, but does not come into force until Jan. 1, 1953, repeal, inter alia, s. 13 of the Act of 1862 and s. 19 and s. 20 of the Act of 1863. By s. 151 (1) of the Act of 1952 the Commissioners of Customs and Excise may grant an occasional

licence for a period not exceeding in Great Britain three weeks or in Northern Ireland three days at one time.

A Counsel for the applicant contends that, having regard to s. 13 of the Revenue Act, 1862, the justices cannot give their consent to the grant of a licence for more than three consecutive days at any one time, and they cannot avoid the section by employing the method which they have employed, viz., of giving their consent to the grant of a series of three-day licences which cover the whole of August, which process, unless my judgment is against them, they are proposing to repeat throughout September. He further submits that there must be, at least, one day between the periods for which successive licences can be granted and that the justices have evaded s. 64 of the Licensing (Consolidation) Act, 1910, by, in effect, consenting to the grant of a licence for the whole of August. B The second branch of his argument is that each of the licences is described as an "occasional licence", and that the circumstances in which each of the licences is granted cannot be described as an "occasion". He contends that, as the Festival of Bath was to last for two months, an application should have been made for a term licence under s. 14 (2) of the Licensing (Consolidation) Act, 1910, it being wholly outside the ambit of s. 13 of the Act of 1862 or s. 64 of the Act of 1910 to suppose that Parliament ever intended that a period such as a festival of two months was to be considered as an "occasion". C He pointed out that an "occasion" meant something of a temporary character and not something that went on week after week. He contended that there could be a series of separate occasions or separate events during the festival, e.g., a dance on one night or some show on another night, which could be the subject of the grant of an occasional licence, but that an occasional licence could not be granted for a period extending *de die in diem* over the whole period of two months, and that one could not break up what was really one whole occasion, which was outside the ambit of these Acts because it lasted for two months, into a series of artificial occasions of three days each. D

E The argument for the respondent was that s. 19 of the Act of 1863, which referred to an occasional licence of six days, impliedly repealed, not the whole of s. 13 of the Act of 1862, but that part of it which refers to a period not exceeding three days, and that, reading the Act of 1862 and the Act of 1863 together, there was no limitation on the time for which an occasional licence could be granted under s. 13 of the Act of 1862, and, therefore, under s. 64 of the Licensing (Consolidation) Act, 1910. So he contended that it was within the jurisdiction of the justices to give their consent to the grant of one licence for the whole of this F period of two months (August and September), and that the fact that they have thought fit to split up the period and give their consent to the grant of a series of (if they are successful) some eighteen occasional licences, does not invalidate the consents which they have given and which they are proposing to give. It is curious that s. 13 of the Act of 1862 and s. 19 of the Act of 1863 should be in these inconsistent terms, but I should hesitate long before I found that s. 19 of the Act of 1863 impliedly repealed the relevant provisions of s. 13 of the Act of 1862. G However, I do not think it necessary to come to any conclusion on that matter, because the licences which were granted were all licences for three days and, therefore, were within s. 13 of the Act of 1862, and, consequently, of s. 64 of the Licensing (Consolidation) Act, 1910.

H The real point, in my judgment, is this: Can this method of consenting to the grant of licences by the Commissioners of Customs and Excise be properly exercised having regard to the terms of s. 13 of the Act of 1862? In other words: In the circumstances of this case can these periods of three days each be considered proper periods for the grant of occasional licences? The only relevant authority which was cited to me on that point is *Chandler v. Emerton JJ.* (1), in which applications were made to justices for occasional licences authorising the applicant to sell intoxicating liquors at dances at a hall on thirteen

nights—four Tuesdays, four Thursdays and five Saturdays—in one calendar month. It may be material to note that all the Tuesday dances were promoted by one person, all the Thursday dances by another person, and all the Saturday dances by a third person. The justices refused to grant the applications on the ground that they had no jurisdiction to do so, considering that the word “occasional” constituted a complete bar to the grant of applications made regularly. CHARLES, J., delivering the judgment of the Divisional Court, said ([1940] 3 All E.R. 147):

“The justices . . . had undoubted jurisdiction, if they gave consideration to the matter, to refuse, if they thought for some good reason that the occasional licences ought not to be granted. They might think that the occasions were too frequent, perhaps. They might think that the occasions were not proper. There are numerous reasons whereby an authority can exercise its undoubted jurisdiction. Unfortunately, here they did something quite different. They said: ‘We being of the opinion that the contentions of the appellant were wrong and that on the facts proved and admitted before us we had no jurisdiction to grant the said applications considering the word “occasional” constituted a complete bar to the grant of applications made regularly and accordingly refused them.’ That is to say, it is no longer a question of discretion, because, if the word ‘occasional’ constitutes a complete bar to them, they have no business to consider whether they will grant a licence to the same man once or twice or thrice. The word ‘occasional’ is a complete bar to their jurisdiction. We are quite clear that, whatever may be the rights and wrongs of this matter, and whatever may be the direction in which the justices will find it proper to exercise their discretion in these matters, when we are asked whether they were right in law and were acting within their jurisdiction in refusing the applications on the sole ground that the word ‘occasional’ prevented them from so doing, the answer of this court is in the negative . . .”

That authority, therefore, establishes that the fact that applications are made for the grant of occasional licences for regular periods is not by itself a complete bar, but, as counsel for the applicant rightly pointed out, it does not carry the matter any further.

From the affidavit of the justices, which was sworn by Mr. Robert North Green-Armytage, the chairman of the bench of justices who formed the court on Aug. 12, it appears that they gave most careful consideration to the whole of this matter. They said:

“We were of opinion that the events to be provided by the city council in the Sydney Gardens were sufficiently different from the normal use of the gardens to justify our regarding each day referred to in the applications as an ‘occasion’—something unusual, illuminations, open-air dancing, fireworks, and so on, would be available to the public which would not be there on a normal day or, indeed, at any time, except for some three hours at night, and the sale of intoxicants, with other refreshments, would be merely ancillary to these matters.”

They went on to say:

“We found more difficulty in bringing the proposed licences within the adjective ‘occasional’, which we related not to the nature of the occasion, but to the regularity of its occurrence, and we were conscious of the danger of permitting a number of occasional licences to develop into practically a permanent licence. We would not have been disposed to consent at one time to the grant of occasional licences covering the whole period to the end of September, as we felt it desirable to retain some control in the hands of the justices in case the events provided ceased to be an ‘occasion’ or the facilities for the supply of intoxicants proved unnecessary, or gave rise to legitimate complaints.”

Those, I think, are two very important passages in the reasons given by the justices.

A Before expressing my judgment on the major question, it may be convenient to deal with the submission of counsel for the applicant that there must be a lapse of at least one day between the periods for which two successive occasional licences can be granted. I see nothing in the Acts which makes that necessary, and that view is fortified by the fact that s. 19 of the Act of 1863 contemplated that a person who had taken out an occasional licence for six successive days might apply for

“ . . . another occasional licence for a time in immediate succession, or only separated by the intervention of Sundays and holidays . . . ”

B I see no objection to a grant of immediately successive occasional licences under s. 64 of the Licensing (Consolidation) Act, 1910.

C That, however, does not dispose of the applicant's main point, viz., that a period of two months cannot be regarded as an “occasion” for the purpose of s. 64 of the Act of 1910 and s. 13 of the Act of 1862, and that such a period cannot be broken down into a series of artificial occasions so as to evade the Acts. In my opinion, however, the vital words in s. 13 of the Act of 1862 are these:

“It shall be lawful for the [Commissioners of Customs and Excise], whenever they shall consider it conducive to public convenience, comfort, and order, and with the consents in writing of two justices of the peace . . . to grant . . . an occasional licence . . . ”

D What has to be considered in granting a licence is whether it is conducive to public convenience, comfort and order, and it must not exceed three days. Under s. 13 it is for the Commissioners of Customs and Excise to consider the question of public convenience, comfort and order, but, of course, it is also one of the matters with which the justices may deal. As appears from their affidavit, the justices considered this matter very carefully and, in my judgment, when it is for public convenience, comfort and order, and otherwise proper—and no suggestion against the propriety of these licences has been made—there is nothing whatever to prevent justices from giving their consent to the grant of a series of licences, provided that each licence is for a period not exceeding three consecutive days. Although the word “occasional”, which occurs throughout licensing law but is nowhere defined, has, apparently, given rise to the view that the grant of an occasional licence must be for a separate and independent occasion only, that, in my view, is not its normal meaning, and I have been referred to no authority to show that the use of the adjective “occasional” connotes that necessity before the justices can give consent. They have to consider the matters set out in s. 13 of the Act of 1862 and all other matters properly raised before them. If they come to the bona fide conclusion that the circumstances of the case are appropriate to the grant of an occasional licence, although one of a series, as in this case, in my judgment, there is nothing to prevent them giving their consent. I dismiss the application with costs.

Application dismissed.

Solicitors: *J. E. Lickfold & Sons*, agents for *Titley, Long & Co.*, Bath (for the applicant); *Sharpe, Pritchard & Co.*, agents for *J. E. Dixon*, town clerk, Bath (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

R. v. WILSON, Esq. (Metropolitan Magistrate) AND OTHERS.
Ex parte PEREIRA.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Finmore and McNair, JJ.),
 October 8, 1952.]

Bastardy—Child born abroad of British mother domiciled abroad—Putative father British subject domiciled in England—Jurisdiction to make affiliation order—Bastardy Laws Amendment Act, 1872 (c. 65), s. 3—Maintenance Orders Act, 1950 (c. 37), s. 27 (2).

On July 15, 1950, the applicant, a British woman, domiciled in Gibraltar, gave birth to an illegitimate child in Gibraltar. On Jan. 25, 1952, after she had come to reside in England, she applied to a metropolitan magistrate to issue a summons under the Bastardy Laws Amendment Act, 1872, s. 3, for an affiliation order against the putative father, an Englishman domiciled in England. The magistrate refused to issue the summons on the ground that he had no jurisdiction to do so. On an application for mandamus,

HELD: section 27 (2) of the Maintenance Orders Act, 1950, had not altered the law that bastardy proceedings could not be brought in England in the case of a child born abroad to a mother who was domiciled abroad at the time of its birth, but dealt only with a case where the mother was domiciled and the child was born in some part of the United Kingdom other than that in which the court in which the proceedings were taken was situate, and, therefore, as the child in the present case was born in Gibraltar to a woman domiciled in Gibraltar at the time of its birth, the magistrate had no jurisdiction to issue a summons against the putative father.

R. v. Blane (1849) (13 Q.B. 769) and *Tetau v. O'Dea* ([1950] 2 All E.R. 695), followed.

AS TO THE REQUISITES FOR JURISDICTION IN AFFILIATION PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 582-584, paras. 802-804; and FOR CASES, see DIGEST, Vol. 3, pp. 387, 388, Nos. 253-269.

FOR THE MAINTENANCE ORDERS ACT, 1950, s. 27 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 135.

EDITORIAL NOTE. The Maintenance Orders Act, 1950, s. 27 (2), provides: ". . . any jurisdiction conferred by Part I of this Act, or any enactment therein referred to, upon a court in any part of the United Kingdom is exercisable notwithstanding that any party to the proceedings is not domiciled in that part of the United Kingdom; and any jurisdiction so conferred in affiliation proceedings shall be exercisable notwithstanding that the child to whom the proceedings relate was not born in that part of the United Kingdom." The Bastardy Laws Amendment Act, 1872, is one of the enactments referred to in Part I of the Act of 1950. In a note to s. 27 (2) of the Act of 1950 in LUSHINGTON'S LAW OF AFFILIATION AND BASTARDY, 7th ed. (1951), p. 187, it is stated that "The Secretary of State has advised justices that this sub-section provides 'that so far as England is concerned the fact that the illegitimate child in question was born outside England shall not be a bar to the making of an affiliation order. The purpose of this provision is to overrule the decision in *R. v. Blane* (1849) (13 Q.B. 769) followed in the recent case of *Tetau v. O'Dea* ([1950] 2 All E.R. 695). It will be observed that the words 'outside that part of the United Kingdom' are wide enough to cover a case in which the birth occurs outside the United Kingdom and that the words 'or any enactment therein referred to' are wide enough to apply the new principle as respects not only bastardy proceedings taken by virtue of this Act, but also under the ordinary bastardy law." (Home Office Circular No. 241/1950)." In the present case the Divisional Court have held that *R. v. Blane* and *Tetau v. O'Dea* are still good law and the question of the mother's domicile is still material, so that proceedings cannot be taken under the Bastardy Laws Amendment Act, 1872, and the Maintenance Orders Act,

1950, if the mother of a child born abroad is not domiciled in the United Kingdom at the time when the child is born.

Cases referred to:

- (1) *Tetau v. O'Dea*, [1950] 2 All E.R. 695; 114 J.P. 499; *sub nom. O'Dea v. Tetau*, [1951] 1 K.B. 184; 2nd Digest Supp.
(2) *R. v. Blane*, (1849), 13 Q.B. 769; 18 L.J.M.C. 216; 13 L.T.O.S. 257; 13 J.P. 825; 116 E.R. 1458; 3 Digest 387, 257.
(3) *R. v. Humphrys. Ex p. Ward*, [1914] 3 K.B. 1237; 84 L.J.K.B. 187; *sub nom. R. v. Humfrys. Ex p. Ward*, 111 L.T. 1110; 79 J.P. 67; 3 Digest 387, 258.

MOTION for an order of mandamus directed to Clyde Wilson, Esq., the metropolitan magistrate sitting at the South Western Magistrate's Court, requiring him to issue and determine according to law a summons by the applicant, under the Bastardy Laws Amendment Act, 1872, and the Maintenance Orders Act, 1950, against the respondent, Ralph Kershaw.

On Jan. 25, 1952, the applicant applied to the magistrate to issue a summons against the respondent, Kershaw, under the Act of 1872, on the ground that he was the father of a female child born to her in Gibraltar on July 15, 1950. At the time of the child's birth the applicant was domiciled in Gibraltar, but she was now resident in England. She stated that she intended to reside in England permanently, and she alleged that Kershaw was an Englishman domiciled in England. The magistrate dismissed the application on the ground that, in view of the decisions in *R. v. Blane* (2) and *Tetau v. O'Dea* (1), he had no jurisdiction to deal with the matter.

Vowden for the applicant.

D. J. L. Fitzgerald for the respondent.

LORD GODDARD, C.J.: This is an application for an order of mandamus directed to Mr. Clyde Wilson, the metropolitan magistrate sitting at the South Western Magistrate's Court, requiring him to issue and determine a summons under the Bastardy Laws Amendment Act, 1872, and the Maintenance Orders Act, 1950, against the respondent, Ralph Kershaw, alleged to be the father of a bastard child born to the applicant. The learned magistrate, having considered *Tetau v. O'Dea* (1), a recent decision of this court, refused to issue a summons on the ground that the child was born at Gibraltar of a mother who was at that time domiciled at Gibraltar.

I think it is unnecessary to say more than that *Tetau v. O'Dea* (1) is an authority which completely justifies the magistrate in the view which he took. That case followed *R. v. Blane* (2), which was decided in 1849 and has never been overruled, although there has been a good deal of legislation with regard to bastardy since that date. So, too, after *Tetau v. O'Dea* (1) was decided on July 24, 1950, the Maintenance Orders Act, 1950, was passed on Oct. 26 of that year, and so there would have been time, had the legislature desired it, to change the law and deal with it in that Act, though, if that had been done, I think that objection would have been taken that it was outside the long title to the Act, which is:

"An Act to enable certain maintenance orders and other orders relating to married persons and children to be made and enforced throughout the United Kingdom."

Looking at the Act of 1950, I think that it merely enables maintenance and similar orders made in one part of the United Kingdom to be enforced in another part and deals with similar matters, and I do not think that the law relating to the present question is in any way altered by the Act. Therefore, it seems to me that *Tetau v. O'Dea* (1) applies, because the ratio decidendi of that case was not the nationality of the parties but the fact that the child was born abroad of a mother domiciled abroad at the time of its birth.

R. v. Humphrys. Ex p. Ward (3) conflicts, to some extent, with *R. v. Blane* (2), which we followed in *Tetau v. O'Dea* (1), but in *R. v. Humphrys* (3) both the putative father and the mother were domiciled in England. The mother had gone abroad, the child was born abroad, and after its birth the mother returned to this country. The court drew a distinction between the facts in that case and the facts in *R. v. Blane* (2). BANKES, J., said ([1914] 3 K.B. 1240):

"If the facts proved before the magistrates show that the status of the child is governed by some foreign law so that the fulfilment of the condition precedent cannot be proved without recourse to foreign law, then no doubt the case would fall within the principle of *R. v. Blane* (2); but in the absence of such evidence it is not the law, and *R. v. Blane* (2) does not decide, that in the case of a bastard child of English parents the mere fact that the child is born abroad bars bastardy proceedings."

The mere fact that the child of a mother domiciled in this country is born abroad does not bar proceedings, but, in the case which is now before us, at the time the child was born the applicant was domiciled abroad. Whether or not she has now changed her domicile is another matter. She says that she is now resident in this country and intends to stay here, but the evidence in regard to that matter is not such as the court would accept on the question of a change of domicile. However, we need not decide that question because it is admitted that the applicant was domiciled in Gibraltar at the time the child was born, and, therefore, the magistrate was right in refusing to issue a summons, and this application fails.

FINNEMORE, J.: I agree. Counsel for the applicant tried to distinguish this case from *Tetau v. O'Dea* (1) and *R. v. Blane* (2) on the ground that in each of the two earlier cases the mother was a foreigner, in the one case a German, and in the other a Frenchwoman. It seems to me, however, that that was not the ratio decidendi, the important point, in each case, being that at the time of the birth the mother was domiciled abroad. In the present case the applicant was domiciled in Gibraltar at the time of the birth and the child was born in Gibraltar. The facts, therefore, are quite different from those in *R. v. Humphrys. Ex p. Ward* (3), in which the majority decision was that, where the mother was still domiciled in England, the fact that she was abroad when the child was born was not necessarily a bar to proceedings in this country under the bastardy laws. If, however, the mother is domiciled abroad at the time of the birth, it seems to me that the case is one which cannot be dealt with in the courts of this country under the bastardy laws, and, therefore, in the case which is now before us, the magistrate was right in refusing jurisdiction.

McNAIR, J.: I agree. I think that the case is clearly covered by *R. v. Blane* (2) and *Tetau v. O'Dea* (1). I was at first disposed to think that the law might have been changed by s. 27 (2) of the Maintenance Orders Act, 1950, which received the Royal Assent some three months after the decision in *Tetau v. O'Dea* (1) had been given, but, on re-consideration, I think it is possible to read the concluding words of that sub-section in a more limited sense as dealing only with a case where the child has been born in some part of the United Kingdom.

Application refused.

Solicitors: *R. W. Platt* (for the applicant); *T. D. Jones & Co.*, agents for *George Clough & Willis*, Bury (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

MIDDLESEX COUNTY COUNCIL v. MINISTER OF LOCAL GOVERNMENT AND PLANNING AND ANOTHER.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.J.J.), October 3, 6, 1952.]

Compulsory Purchase—Land the property of local authority—Special Parliamentary procedure—Material date of ownership by local authority—Acquisition of Land (Authorisation Procedure) Act, 1946 (c. 49), sched. I, Part III, para. 9.

On Jan. 21, 1949, a borough council made an order for the compulsory purchase of 123 acres of land for use as a cemetery. On Feb. 22, 1949, within the time specified for objections, objection to the order was made by the county council within whose area the land in question was. The borough council submitted the order to the Minister of Health for confirmation in accordance with the provisions of s. 1 (1) of, and sched. I, para. 1, to, the Acquisition of Land (Authorisation Procedure) Act, 1946, and the Minister, in view of the objection, ordered an inquiry to be held. On Nov. 7, 1949, two days before the inquiry began, the county council purchased by agreement with the owner the land comprised in the order. On Apr. 18, 1950, the Minister confirmed the order. On an application by the county council to quash the order, on the ground that, as the order authorised the purchase of land which was the property of a local authority, under para. 9 of sched. I to the Act it was subject to special Parliamentary procedure,

HELD: for a case to fall within para. 9 the land must be the property of the local authority (per SOMERVELL, L.J.) at the time when that authority made an objection to the order under para. 3 (1) of the schedule, or (per JENKINS, L.J.) on the day immediately following the expiration of the period within which objections must be made. On neither of those dates were the county council the owners of the land, and, therefore, the order by the borough council was not subject to special Parliamentary procedure and the Minister had jurisdiction to confirm it.

Marriott v. Minister of Health ([1936] 2 All E.R. 865), distinguished. Decision of ORMEROD, J. ([1951] 2 All E.R. 732), reversed.

FOR THE ACQUISITION OF LAND (AUTHORISATION PROCEDURE) ACT, 1946, sched. I, Part III, para. 9, see HALSBURY'S STATUTES, Second Edn., Vol. 3, p. 1077.

Case referred to:

(1) *Marriott v. Minister of Health*, [1936] 2 All E.R. 865; [1937] 1 K.B. 128; 106 L.J.K.B. 149; 155 L.T. 94; 100 J.P. 432; Digest Supp.

APPEALS by the Minister of Local Government and Planning and the Islington Borough Council from an order of ORMEROD, J., dated July 27, 1951, and reported [1951] 2 All E.R. 732, quashing a compulsory purchase order made by the borough council under the London Government Act, 1939, s. 100, and confirmed by the Minister of Health* under the Acquisition of Land (Authorisation Procedure) Act, 1946, s. 1 (1) and sched. I.

On Jan. 21, 1949, the borough council made the Metropolitan Borough of Islington (Land at Trent Park) Compulsory Purchase Order, 1949, relating to 123 acres of Trent Park, situated in the administrative county of Middlesex.

* By art. 3 (1) and Part I of the schedule to the Transfer of Functions (Minister of Health and Minister of Local Government and Planning) (No. 1) Order, 1951 (S.I., 1951, No. 142), which came into operation on Jan. 30, 1951, the functions of the Minister of Health under the London Government Act, 1939, s. 100, were transferred to the Minister of Local Government and Planning. By art. 1 (1) of the Minister of Local Government and Planning (Change of Style and Title) Order, 1951 (S.I., 1951, No. 1900), which came into operation on Nov. 3, 1951, the style and title of the Minister of Local Government and Planning was changed to Minister of Housing and Local Government.

On Feb. 22, 1949, three days before the time for objections to the order of the borough council expired, the county council lodged an objection. On May 23, 1949, and July 6, 1949, orders were made by the county council for the compulsory purchase of the whole of the land comprising Trent Park, including the 123 acres included in the borough council's order, and to those orders the borough council lodged objections. On Nov. 7, 1949, the county council entered into an agreement under seal with the owner of Trent Park to purchase the entire property. On Nov. 9, 1949, a public local inquiry was held into the objections to all the orders, and on Apr. 18, 1950, the Minister confirmed the order made by the borough council.

The county council contended that as they, a local authority, had made objection to this order (which objection had not been withdrawn) and had become the owners of the property in question before the date of the Minister's inquiry, the order was subject to special Parliamentary procedure under s. 1 (2) of, and sched. I, Part III, para. 9, to, the Act of 1946. The Minister and the borough council contended that the relevant date for the purposes of para. 9 was the date of the order, and that, as at that date the county council were not the owners of the land affected by the order, the order was not subject to special procedure. They also contended that the county council had not made objections as owners of the land, and, therefore, the provisions of para. 9 did not apply. ORMEROD, J., held that regard must be had to the position which existed at the date of the inquiry and not to that which existed at the date of the making of the order by the borough council; at the date of the inquiry the county council were the owners of the property within sched. I, Part III, para. 9, to the Act of 1946; and, therefore, the order was subject to special Parliamentary procedure under the paragraph and must be quashed.

Sir Lynn Ungood-Thomas, Q.C., and J. P. Ashworth for the Minister of Local Government and Planning.

Rowe, Q.C., Squibb and W. J. Glover for the borough council.

H. B. Williams, Q.C., and J. R. Willis for the county council.

SOMERVELL, L.J.: This is an appeal from a decision of ORMEROD, J., which raises a point of construction under the Acquisition of Land (Authorisation Procedure) Act, 1946. [HIS LORDSHIP stated the facts and continued:] Section 1 of the Act provides:

"(1) The authorisation of any compulsory purchase of land—(a) by a local authority . . . shall, subject to the provisions of this and the next following section, be conferred by an order . . . in accordance with the provisions of sched. I to this Act . . . (2) The purchase, in a case falling within the last foregoing sub-section, of land—(a) which is the property of a local authority . . . shall be subject to the special provisions of Part III of the said sched. I."

Section 2 deals with the power of speedy acquisition.

The point is one of construction of para. 9 of sched. I, but it is right that I should refer to the earlier paragraphs, partly because they indicate the general nature of the procedure, and, also, because they were, to some extent, relied on by counsel on both sides. Paragraph 1 of Part I provides:

"A compulsory purchase order authorising a compulsory purchase by a local authority . . . in a case falling within sub-s. (1) of s. 1 of this Act shall be made by the local authority and submitted to and confirmed by the authority having power under the enactment in question to authorise the purchase (hereafter in this schedule referred to as the 'confirming authority') in accordance with the following provisions . . ."

Paragraph 3 (1) (a) provides for publication in local newspapers of a notice stating that an order has been made and specifying the time, not being less

than twenty-one days from the first publication of the notice, within which and the manner in which objections to the order can be made. Paragraph 3 (1) (b) provides that unless a special direction is given, notice is to be served on every owner, lessee and occupier (except tenants for a month or any period less than a month) of land comprised in the order. Those notices also have to specify the time for objection which must be not less than twenty-one days from the service. Paragraph 4 was discussed in argument and there may be difficult points of construction, some of which are not, in my view, necessary for decision so far as this case is concerned. Paragraph 4 (1) provides:

“If no objection is duly made by any such owner, lessee or occupier as aforesaid or if all objections so made are withdrawn, the confirming authority, upon being satisfied that the proper notices have been published and served, may, if the authority thinks fit, confirm the order with or without modifications.”

It seems to me reasonably plain that that sub-section is dealing only with objections by owners, lessees or occupiers, and it is sufficient for the construction of para. 9 to note in passing that under these earlier paragraphs objections by owners, lessees or occupiers are specially dealt with and for certain purposes come into a category of their own.

In my view, this appeal turns on the special provisions of Part III relating to land of the descriptions specified in s. 1 (2) of the Act. Paragraph 9 provides:

“A compulsory purchase order shall, in so far as it authorises the compulsory purchase of land which is the property of a local authority . . . be subject to special Parliamentary procedure in any case where an objection to the order has been duly made by the local authority . . . and has not been withdrawn.”

The Middlesex County Council objected to the order made by the borough council, but they were not at that time the owners. Their objection, therefore, was not an objection as owners. They only became owners on Nov. 7, 1949, some months after the time for submitting objections had expired. In my view, the words “duly made” in para. 9 mean, among other things, made within the time specified in the notice. In the present case the learned judge has held that Middlesex County Council, although they objected at a time when they were not owners, had fulfilled the conditions of para. 9, and were entitled to say that an objection to the order had been duly made by the local authority within the meaning of that paragraph. In my opinion, the proper construction of the paragraph is that the objection to the order which is to be duly made must be made by the local authority as owner of the land which it is sought to purchase. As no such objection was ever made by the Middlesex County Council within the time limited, I do not think that the special Parliamentary procedure became applicable to this order.

That, perhaps, would be sufficient to dispose of the case, but I would like to add one or two other observations. Counsel rightly submitted for the Middlesex County Council that this was a matter of jurisdiction. I agree. The only question is in what circumstances the Minister has jurisdiction to confirm without the order being subject to special Parliamentary procedure. I do not think there is anything surprising in the result for which the respondents contend. It might well be that a distinction is logically drawn between the case in which a local authority is the owner at the time when the original order is made, or, possibly, becomes the owner before the time for objection expires, and the case in which it becomes the owner at a later date. That is a distinction which, I think, is drawn by para. 9. A further question, which does not arise in this case, is whether the special procedure applies only when the local authority is the owner at the time of the original order or whether it applies if the authority becomes owner at any date before the period for objection has expired,

I propose to leave that point open in case it arises and it is desired to argue it on some future occasion.

In *Marriott v. Minister of Health* (1) a compulsory purchase order was made under the Housing Act, 1930, at a time when there were on the area dwelling-houses which had been condemned as unfit for human habitation and which the owners had been required to clear, but had not at that time cleared. By the time the public inquiry was held the buildings had been demolished and that was made known to the inspector. This court, affirming the judgment of SWIFT, J., held that, having regard to the provisions of the Act of 1930, the condition of affairs at the date of the public inquiry was not only relevant, but must be taken into account by the Minister, and, as at the date of the inquiry there was no subject-matter on which the Act could operate, the order ought not to have been confirmed. That decision, based on different words in a different Act which deals with a different subject-matter, does not assist us in the present case, and certainly cannot affect the construction which, if I am right, is the correct construction of para. 9 of sched. I to the Act of 1946. For the reasons which I have given, I would allow the appeal.

JENKINS, L.J.: I agree. Section 1 (1) of the Act of 1946 provides that the authorisation of any compulsory purchase of land by a local authority shall, subject to the provisions of that section and s. 2, be conferred by a compulsory purchase order in accordance with the provisions of sched. I to the Act. Section 1 (2) provides:

"The purchase, in a case falling within the last foregoing sub-section, of land—(a) which is the property of a local authority or which has been acquired by statutory undertakers for the purposes of their undertaking, (b) forming part of a common, open space or fuel or field garden allotment, or held inalienably by the National Trust, or (c) being, or being the site of, an ancient monument or other object of archaeological interest, shall be subject to the special provisions of Part III of the said sched. I."

It will be observed that there are other descriptions of property besides property of a local authority which under s. 1 (2) are, in regard to their compulsory purchase, subject to the special provisions of Part III of sched. I to the Act. Turning to sched. I, one finds that by Part I, para. 1:

"A compulsory purchase order authorising a compulsory purchase by a local authority (hereafter in this schedule referred to as the 'acquiring authority') in a case falling within sub-s. (1) of s. 1 of this Act shall be made by the local authority and submitted to and confirmed by the [Minister of Health] in accordance with the following provisions of this schedule."

In para. 3 there are provisions as to notices, specifying the time within which and the manner in which objections to the order can be made. I will not repeat what has been already said about the remaining provisions of Part I of the schedule as I do not think they give much assistance one way or the other on the present question, but I will go straight to Part III, on the construction of which the case really turns. Land which belongs to a local authority, or has been acquired by statutory undertakers for the purposes of their undertaking, or which is held by the National Trust inalienably, is dealt with in para. 9 of Part III. The special provisions regarding other descriptions of land mentioned in s. 1 (2) of the Act are not directly material, but it is worth while observing how the case of land forming part of a common, open space, or fuel or field garden allotment, and the case of land being, or being the site of, an ancient monument or other object of archaeological interest, are treated in

Part III. A common, open space, or fuel or field garden allotment is dealt with in para. 11 (1), which provides that:

A “In so far as a compulsory purchase order authorises the purchase of any land forming part of a common, open space or fuel or field garden allotment, the order shall be subject to special Parliamentary procedure unless the Minister of Agriculture and Fisheries (in the case of a common or of a fuel or field garden allotment) or the Minister of Town and Country Planning (in the case of an open space not being a common or such an allotment) is satisfied [on certain matters] and certifies accordingly.”

B So, in that case special Parliamentary procedure must apply wherever land of one of the relevant descriptions is concerned unless the appropriate Minister certifies his satisfaction as to the matters mentioned. Paragraph 12 deals with the case of land being, or being the site of, an ancient monument or other object of archaeological interest. It provides that compulsory purchase orders with regard to land of that description

C “. . . shall be subject to special Parliamentary procedure unless the Minister of Works certifies that the acquiring authority has entered into an undertaking with the Minister to observe such conditions as to the use of the land as in his opinion are requisite having regard to the nature thereof.”

D Thus, in those two cases there are plain provisions to the effect that whenever a compulsory purchase order authorises the purchase of land of one of the descriptions mentioned, the special Parliamentary procedure must be observed unless the Minister concerned gives his certificate dispensing with that necessity.

E The provisions relating to land which is the property of a local authority are entirely different, and the difference is, perhaps, instructive. It will be seen that there is nothing in para. 9 comparable to the provisions in paras. 11 and 12. Paragraph 9 does not say that, so far as land belonging to a local authority is concerned, the compulsory purchase order shall be subject to Parliamentary procedure unless the local authority consents to the purchase or anything of that kind. The ownership of land by a local authority only necessitates special Parliamentary procedure if the conditions set out in para. 9 are observed. On the true construction of the paragraph what are those conditions? It begins by referring to the compulsory purchase order. It says that such order, F in so far as it authorises the compulsory purchase of land of the relevant description, shall be subject to special Parliamentary procedure in certain cases. Going back to para. 1 of the schedule, one observes that a compulsory purchase order authorising a compulsory purchase by a local authority shall be made by the local authority and submitted to and confirmed by (in this case) the Minister of Health. Bearing that in mind, it seems to me that the reference G at the beginning of para. 9 to a compulsory purchase order, in so far as it authorises a compulsory purchase of land and so on, is a reference to the order as made by the acquiring local authority. It clearly cannot be a reference to the order as confirmed by the Minister, for, ex hypothesi, where special Parliamentary procedure is necessary there can be no question of confirmation by the Minister. In such a case the special Parliamentary procedure has to H be carried out and appropriate provisions are contained in the Statutory Orders (Special Procedure) Act, 1945, as to the method of bringing the order into operation after that special procedure has been complied with.

Attention is thus directed to the point of time at which the local authority has made an order authorising the compulsory purchase of land. At that point of time the order, in a case where no property of any of the special descriptions mentioned in sub-s. (2) of s. 1 is in question, is subject to confirmation by the Minister in accordance with the ordinary procedure. Paragraph 9

is dealing at the same point of time with cases where something else may be required, namely, the special Parliamentary procedure. The order is to be subject to that procedure if two conditions are fulfilled and not otherwise. The first condition, so far as material to the immediate case, is that the land should be the property of a local authority. The second condition is that objection to the order shall have been duly made by the local authority and not withdrawn. It seems to me that (subject to the possibility of subsequent withdrawal of any objection duly made) the language of para. 9 makes it reasonably clear that the latest date for considering the matter, and seeing whether those two essential conditions exist, and, accordingly, whether the special Parliamentary procedure is required or not, is the date immediately following the expiration of the period within which objections, if any, must be made. Considering the situation as at that date, the Minister (in effect) has to ask himself: Is this an order for the compulsory purchase of any land belonging to a local authority? If so, has that local authority duly objected? If it is found, when those questions are asked as at that date, that none of the land comprised in the compulsory purchase order is the property of a local authority, it seems to me necessarily to follow that no case for special Parliamentary procedure has arisen or can thereafter arise, for, if the local authority is not the owner of any of the land, it cannot object in any relevant sense, and if it becomes for the first time owner of some of the land after the time allowed for making objections has expired, no objection it then makes as owner can be "duly made".

I think it is plain in the context that the objection referred to in para. 9 must be an objection by the local authority as owner of some part of the land, and that any objection it may make otherwise than as such owner is nihil ad rem for the purposes of that paragraph. If, when reviewing the situation as at the date immediately following the period within which objections are to be made, one finds that some local authority, not being the owner of any part of the land, has, otherwise than as owner, made an objection of some kind, that does not, in my view, affect the matter. The opposite construction involves, to my mind, the very odd conclusion that if within the time prescribed for making objections a local authority chooses to make some objection or other, not at that time having any interest in the land, then the question whether special Parliamentary procedure will be necessary or not is left at large, I know not for how long, because possibly that local authority, having already objected on quite different grounds, may fulfil the other condition of para. 9 by becoming the owner of the land. That is a construction of para. 9 which I am unable to accept, and I think it is reasonably plain that what is necessary under that paragraph is that a local authority should be the owner of some of the land concerned, and as owner should have made an objection within due time and not withdrawn its objection.

It seems to me that *Marriott v. Minister of Health* (1), on which the learned judge, to some extent, founded himself is directed to a different point. The point there was that in the event which happened the area to which the compulsory purchase order related had been so dealt with that at the time when the confirmation of the order was under consideration it had ceased to be a clearance area so that the statutory foundation for the proposed compulsory acquisition could be said to have gone. There is nothing of that sort in the present case. The position here is simply that in certain circumstances land of a particular description, namely, land owned by a local authority, can only be acquired compulsorily through the medium of the special Parliamentary procedure, and the question is whether, on the true construction of the relevant provisions of the Act of 1946, the circumstances of the present case were, in the events which happened, such as to bring the special Parliamentary procedure into play. For the reasons given by my Lord and those which I have

endeavoured to express, I consider that this question should be answered in the negative, and that the appeal should, accordingly, succeed.

HODSON, L.J.: I agree.

Appeal allowed.

Solicitors: *Solicitor, Ministry of Housing and Local Government* (for the Minister); *H. D. Clark*, town clerk (for the borough council); *C. W. Radcliffe* (for the county council).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

SAYCE v. COUPE.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Finnemore and McNair, JJ.), October 10, 1952.]

Customs—Keeping uncustomed goods—Intent to defraud—Use of goods—Customs Consolidation Act, 1876 (c. 36), s. 186.

Tobacco—Sale by unlicensed person—Aiding and abetting of sale by purchaser—Tobacco Act, 1842 (c. 93), s. 13.

The respondent purchased a quantity of cigarettes from a person who was not licensed to deal in tobacco. After the purchase he found that the packets containing the cigarettes bore labels indicating that the cigarettes were duty free and were intended only for the use of United States armed forces. He thereupon told the seller that the cigarettes were of no use to him, and the seller said that he would take them back at a later date. Thereafter the respondent smoked some of the cigarettes and gave others away, but none was returned to the seller.

HELD: (i) by dealing with the cigarettes as he did the respondent was guilty of keeping uncustomed goods with intent to defraud the revenue, within the meaning of the Customs Consolidation Act, 1876, s. 186.

(ii) by buying the cigarettes in the circumstances in which he did the respondent was guilty of aiding and abetting a sale of tobacco by an unlicensed person, contrary to the Tobacco Act, 1842, s. 13.

AS TO THE FACTS THAT MUST OR MAY BE PROVED IN A CRIMINAL PROSECUTION, see HALSBURY, Hailsham Edn., Vol. 9, pp. 183-189, paras. 267-271; and FOR CASES, see DIGEST, Vol. 14, pp. 368-376, Nos. 3892-3959, and Digest Supp.

AS TO PRINCIPALS IN THE SECOND DEGREE, see HALSBURY, Hailsham Edn., Vol. 9, pp. 30-33, paras. 30-32; and FOR CASES, see DIGEST, Vol. 14, pp. 91, 92, Nos. 605-616.

FOR THE CUSTOMS CONSOLIDATION ACT, 1876, s. 186, see HALSBURY'S STATUTES, Second Edn., Vol. 21, p. 327; and FOR THE TOBACCO ACT, 1842, s. 13, see *ibid.*, p. 128.

Case referred to:

(1) *R. v. Cohen*, [1951] 1 All E.R. 203; [1951] 1 K.B. 505; 115 J.P. 91; 2nd Digest Supp.

CASE STATED by Oldham justices.

At a court of summary jurisdiction, sitting at Oldham on Mar. 3, 1952, the appellant, George Sayce, one of Her Majesty's officers of Customs and Excise, preferred informations against the respondent, Wilson Coupe, charging (i) that on Dec. 4, 1951, he knowingly kept uncustomed goods, namely, 3,580 American cigarettes with intent to defraud His Majesty of the duties due thereon, contrary to s. 186 of the Customs Consolidation Act, 1876; and (ii) that on Nov. 24, 1951, he did aid, abet, counsel, and procure a person unknown to sell certain tobacco, viz., 5,600 cigarettes otherwise than as a licensed manufacturer of, or dealer in, or retailer of, tobacco, selling tobacco in his entered premises or on premises wherein

he carried on the business of a licensed dealer in, or retailer of, tobacco, contrary to s. 13 of the Tobacco Act, 1842.

It was proved or admitted that on Nov. 24, 1951, two American soldiers in plain clothes visited the respondent's premises in company with one Wood, who was a man of good character well known to the respondent. The respondent was invited by Wood to buy a quantity of American cigarettes then in the possession of the two American soldiers, and he bought from twenty-four to twenty-eight cartons each containing ten packets of twenty cigarettes, for which he paid Wood £38. The price paid for each packet was said by the soldiers to be the wholesale price of the cigarettes. One of the soldiers stated that similar cigarettes were on sale in all the public houses in Warrington, that he was supplying such cigarettes to a café proprietor in Blackpool, and that the cigarettes offered to the respondent were part of an order requested by that café proprietor which he did not now require. The soldier and Wood further stated that the cigarettes were honestly obtained. The cartons, containing from four thousand eight hundred to five thousand six hundred cigarettes, were then delivered into the possession of the respondent who gave two cartons to Wood. On the following morning the respondent examined the cartons and discovered that each of the packets was sealed with a label indicating that the cigarettes were duty free and only for use of the United States armed forces. The respondent thereupon informed Wood that, as the cigarettes were duty free, they were of no use to him. Wood said that the American soldiers would be returning in a month's time, and that he, Wood, would take them back. On Dec. 4, 1951, the respondent was interviewed by an officer of the Customs Investigation Department and admitted without hesitation the purchase of the cigarettes and produced from a room upstairs seventeen cartons and from behind the counter of the bar nine packets, together 3,580 cigarettes. Between Nov. 24 and Dec. 4 the respondent and his wife had smoked some of the cigarettes and he had given others to his customers, together between 1,220 and 2,020 cigarettes. The respondent was licensed to sell tobacco and had previously obtained all his supplies from one Ainsworth in Oldham. The respondent was aware that Wood was not licensed to sell tobacco, but thought that the cigarettes had come through a licensed dealer.

It was contended on behalf of the appellant (*a*) that, even though the respondent denied on oath any intent to defraud, yet, as he had used and disposed of a considerable quantity of the cigarettes after he had become aware that they were imported duty free for the use of members of the United States armed forces, he must have intended to defraud His Majesty of the duties and was guilty of the offence charged under the first information; (*b*) that his purchase of the cigarettes from Wood or the American soldiers constituted the offence charged under the second information. It was contended on behalf of the respondent (*a*) that he had given an explanation of how he had come to purchase the cigarettes which, at the time of the purchase, he did not know to be uncustomed, and that this explanation indicated that he had no intent to defraud or to act dishonestly in any way; (*b*) that on his becoming aware that the cigarettes were uncustomed his conduct and expressed intention indicated that he had no intent to defraud; and (*c*) that he was an honest trader who had, in fact, no intent to defraud.

The justices accepted as true the respondent's statement that he had no intent to defraud and dismissed both summonses.

J. P. Ashworth for the appellant.

F. P. R. Hinchcliffe for the respondent.

LORD GODDARD, C.J., stated the facts and continued: The justices dismissed both informations against the respondent. We understand the reasons why they dismissed the first summons, although we do not agree with them, but we do not understand why they dismissed the second summons, to which

it does not seem to the court there was any defence and in spite of the argument of counsel for the respondent we are of opinion that the appeal must be allowed on both points.

A The first information was laid in respect of keeping, and not of dealing in, the cigarettes, but it is obvious from the way the Case is stated and the conclusion of the justices that the matter was fought in the court below on the basis that the only issue raised was whether there was any intent to defraud. It seems to me that there could have been no answer to a charge of dealing in the cigarettes because the respondent had dealt in them by smoking them and giving them away. The only inference to be drawn from the fact that the respondent was keeping the cigarettes is that he intended to go on doing what he was doing. The respondent, who seems to have been perfectly frank throughout, did not attempt to say he was going to do anything else except that at some unspecified B time he would have given any that were left to the American soldiers. I am not going to say that the justices came to a perverse decision because they set out exactly their train of reasoning and the facts on which they relied, but I do say that they have misdirected themselves and misunderstood the nature of the offence and the wording of the statute. Where people are found dealing, to use C the word in a general sense, with uncustomed goods, knowing them to be uncustomed, they are defrauding Her Majesty of the duty. They know that if they smoke uncustomed goods the duty which ought to have been paid before the goods were consumed or dealt with will not be paid.

D In *R. v. Cohen* (1) I endeavoured to assist justices who have to try these customs cases either at quarter sessions or in courts of summary jurisdiction, and in giving the reserved judgment of the court I said ([1951] 1 All E.R. 206):

E "Another ingredient of the offence is the intent to defraud, and of this the jury should be reminded, but, as in all cases where an intent to defraud is a necessary ingredient, the intent must usually be inferred from the surrounding circumstances. If a jury is satisfied that the accused knew, which would include a case in which he had wilfully shut his eyes to the obvious, that the goods were uncustomed, and he had them in his possession for use or sale, it would follow, in the absence of any other circumstance, that he intended to defraud the revenue."

I put in *ex abundanti cautela* those words "in the absence of any other circumstance" because the changes and chances in this mortal life are so manifold and circumstances are so diverse that it is possible to conceive that some answer F might be available to the defendant. I think the justices came to the conclusion that the respondent was a very respectable man of good character. Perhaps they thought that he did not realise that he was defrauding the revenue. That, however, is not an answer to the charge. If people are dealing in this way with uncustomed goods, they defraud the revenue, and that is enough. It may be that there is not the same moral stigma or blame which is attached to many cases G of fraud, but a person defrauds the revenue if knowingly and consciously he acts with dutiable goods in such a way that the customs are deprived of the duty. For these reasons we shall send the first information back to the justices with an intimation that an offence was proved on the first information and it is their duty to convict.

H The justices have given no reason for dismissing the second information, but it is abundantly clear that the respondent, who himself was licensed to deal in tobacco, could have taken the trouble to learn what are the obligations of a person who holds such a licence. Here is a man, who previously bought all his supplies from somebody else, suddenly buying large quantities of cigarettes from another man whom he knows is not a tobacconist and has not a wholesale licence. If he does not know that that is an offence, it is his duty as a licensee to know the conditions under which he can trade, and this was a sale in disobedience of the statute. This second charge should not be treated as a technical offence, any

more than the first charge. The second summons charges the respondent with aiding and abetting "a person unknown" (who must have been Wood) to commit the offence, that is to say, buying these goods from a person whom he knew was not a licensed dealer in tobacco. Counsel for the respondent has argued that because the statute does not make it an offence "to buy", but only makes it an offence "to sell", the charge of aiding and abetting the sale cannot be preferred. It is obvious that it can be preferred. The statute does not make it an offence to buy, but none the less, on ordinary general principles of criminal law, a person who, knowing the circumstances and knowing that an offence is being committed, takes part in or facilitates the commission of the offence, becomes guilty as a principal in the second degree, and, therefore, it is impossible to say that a person who buys does not aid and abet a sale. For these reasons the justices ought also to have convicted on the second information.

FINNEMORE, J.: I agree.

McNAIR, J.: I agree.

Appeal allowed. Case remitted.

Solicitors: *M. G. Whittome, Solicitor for Customs and Excise* (for the appellant); *C. J. C. Davenport & Son, agents for Lees & Riches, Oldham* (for the respondent).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

R. v. PEARCE.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Finnemore and McNair, JJ.), October 13, 1952.]

Criminal Law—Sentence—Attempt to commit crime—Sentence not to exceed that imposable for full offence—Road Traffic Act, 1930 (c. 43), s. 28 (1) (b)—Criminal Justice Act, 1948 (c. 58), s. 21 (1) (a).

In March, 1951, the defendant was convicted of attempting to take and drive away a motor vehicle without the consent of the owner, contrary to s. 28 (1) of the Road Traffic Act, 1930, and was sentenced to three years' corrective training.

HELD: although for the common law misdemeanour of attempting to commit an offence the court had a discretion as to the length of sentence it could impose, it should not give a longer sentence for the attempt than could have been given for the substantive offence (in the present case twelve months' imprisonment) and, therefore, the defendant should be discharged.

R. v. Morris ([1950] 2 All E.R. 965), applied.

AS TO PUNISHMENT FOR A COMMON LAW MISDEMEANOUR, see HALSBURY, Hailsham Edn., Vol. 9, p. 227, para. 319, and 1952 Supp.; and FOR CASES, see DIGEST, Vol. 14, p. 477, Nos. 5195, 5196, and 2nd Digest Supp.

Case referred to:

(1) *R. v. Morris*, [1950] 2 All E.R. 965; [1951] 1 K.B. 394; 115 J.P. 5; 2nd Digest Supp.

REFERENCE by the Secretary of State under s. 19 (a) of the Criminal Appeal Act, 1907.

The defendant did not appear and was not represented.

LORD GODDARD, C.J., delivered the following judgment of the court. The defendant was convicted at the County of London Sessions in March, 1951, of attempting to take and drive away a motor vehicle without the consent of the owner, contrary to s. 28 (1) of the Road Traffic Act, 1930, and was sentenced to three years' corrective training. He appealed against conviction, and the appeal was dismissed. An appeal by him against sentence was abandoned and

never came before the court. Recently he petitioned the Home Secretary on the ground that in the circumstances he was not liable to be sentenced to corrective training, and the Home Secretary has referred the matter to the court.

A On his conviction, two previous convictions were proved against the defendant, and it was also shown that he had been sent to Borstal on more than one occasion. The difficulty that arises is that under the Road Traffic Act, 1930, s. 28 (1) (b), the maximum term of imprisonment prescribed for taking and driving away a motor car without the consent of the owner is twelve months. In *R. v. Morris* (1) this court held that, when a man is convicted of a common law misdemeanour, the court, in its discretion, can impose a fine or pass a sentence of imprisonment for any term which the court thinks right. As the defendant attempted to commit the offence in the present case, he was guilty of a common law misdemeanour, but it is not right, if a man is convicted only of an attempt to commit an offence, B although technically that may be a common law misdemeanour and so he may be liable to a term of imprisonment at the discretion of the court, that he should be given a longer sentence for the attempt than he could have been given if he had committed the full offence. If the defendant had not only attempted to drive away this car, but had actually driven it away, the utmost sentence he C could have received would have been twelve months' imprisonment, and he could not have been sent to corrective training because the offence of which he would have been convicted would not have been "punishable with imprisonment for a term of two years or more" within the Criminal Justice Act, 1948, s. 21 (1) (a).

D In *R. v. Morris* (1), which was a case where a man was indicted for conspiracy to smuggle goods and it was argued that the misdemeanour of smuggling was not punishable by a longer sentence than two years' imprisonment, it was shown that the smuggling had been going on for a long time and the conspiracy was one of the most dangerous description. We held, therefore, that HALLETT, J., was justified in passing a sentence of four years' imprisonment, but, in giving the judgment of the court, I said ([1950] 2 All E.R. 968):

E " . . . if the evidence showed that the defendant had been concerned in only one offence it would obviously be wrong to impose, on his conviction of conspiracy, a longer sentence than he could have received if he had been merely convicted of the substantive offence."

A fortiori, that applies to an attempt, and if for the full offence Parliament has laid down a definite sentence, it is wrong, if a defendant is convicted of an attempt, F to give a longer sentence than could have been given for the substantive offence.

As the whole case was referred to us by the Secretary of State, we can deal with it under s. 19 (a) of the Criminal Appeal Act, 1907, as if it were an appeal, and, accordingly, direct that the defendant be immediately discharged.

Order accordingly.

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

HOLLAND v. PERRY.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Finnemore and McNair, J.J.),
October 8, 14, 1952.]

Street Traffic—Licence—Unlicensed vehicle—Minimum penalty—"Amount of duty chargeable"—Rebuttal of presumption—Vehicles (Excise) Act, 1949 (c. 89), s. 15 (1).

The penalty imposed by s. 15 (1) of the Vehicles (Excise) Act, 1949, is prima facie to be calculated by reference to the annual duty, but it is open to a defendant to show that in fact part of that annual duty has been paid so that only a portion of the annual duty remains chargeable.

On Dec. 16, 1951, the respondent used on a public road a motor vehicle for which there was no licence in force. There was no evidence that the vehicle had been used on any other day in 1951.

HELD: the maximum penalty was three times the annual duty.

Per curiam: This will also apply in the case of a car acquired by a purchaser during a year. If, for instance, during the year he bought a car which had no licence and used it, when prosecuted he could show the date when he acquired the car and the court would then be able to find what the duty payable on the car would have been had it been licensed. It would not, in our opinion, be open to a defendant in such circumstances to say: "Well, if I had licensed it I should only have licensed it for a short period, such as a quarter". If he had not taken advantage of the provisions of s. 11, his intention to do so, even if the justices thought it was a genuine intention, would not avail him.

AS TO LICENCES FOR MECHANICALLY PROPELLED VEHICLES, see HALSBURY, Hailsham Edn., Vol. 28, pp. 425-431, paras. 923-928; and FOR CASES, see DIGEST, Vol. 39, pp. 237-240, Nos. 115-154, and Digest Supp.

FOR THE VEHICLES (EXCISE) ACT, 1949, s. 15 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 21, p. 1446.

CASE STATED by Surrey justices.

At a court of summary jurisdiction sitting at Caterham on Mar. 31, 1952, the appellant, an officer of the Surrey County Council, preferred an information against the respondent, Dudley Thomas Perry, charging that he, on Dec. 16, 1951, did unlawfully use on a public road a motor vehicle for which a licence was not in force, contrary to the Vehicles (Excise) Act, 1949, s. 15 (1). It was proved or admitted that the vehicle was used on Dec. 16, 1951, and no evidence was given that it was used on any other day in 1951. The annual duty in respect of the vehicle was £30.

It was contended on behalf of the appellant that (a) by the Vehicles (Excise) Act, 1949, s. 15 (1), the penalty for an offence under that section should be either an excise penalty of £20 or an excise penalty equal to three times the amount of the duty chargeable in respect of the vehicle, whichever sum was the greater; (b) by s. 1 (b) of the Act the duty was to be paid annually; (c) by the Excise Management Act, 1827, s. 78, the justices had power to mitigate any excise penalty, but such mitigation should not reduce the penalty to less than one-fourth part thereof; (d) that for the purposes of s. 15 (1) of the Act the duty chargeable in respect of the vehicle was the annual duty, namely, £30, and the maximum penalty which the justices could impose was £90 and the minimum £22 10s. The respondent pleaded Guilty to the charge.

The justices were of the opinion that the maximum penalty they were empowered to impose by virtue of s. 15 (1) of the Act of 1949 was three times the amount of duty chargeable in respect of the vehicle for the last quarter of the year, namely, three times £8 5s., which amounted to £24 15s., and, in exercise of their power to mitigate under the Act of 1827, they imposed a penalty of £12.

J. P. Ashworth for the appellant.

The respondent did not appear.

Cur. adv. vult.

Oct. 14. **LORD GODDARD, C.J.**, read the following judgment of the court. This is a Special Case stated by justices for the county of Surrey before whom the respondent was charged with unlawfully using on a public road a certain motor vehicle for which a licence was not in force, contrary to the Vehicles (Excise) Act, 1949, s. 15 (1). The respondent pleaded Guilty and admitted a previous conviction for a similar offence by him and the justices imposed a penalty of £12. The question that arises is whether the justices had any power to impose a penalty of less than £22 10s. in the circumstances which hereafter appear. The vehicle was, in fact, a goods vehicle, and the annual duty imposed by the Act was £30. By s. 15 (1) of the Act a person using an unlicensed vehicle on a public road is liable to (a) an excise penalty of £20 or (b) an excise penalty equal to three times the amount of the duty chargeable in respect of the vehicle, whichever is the greater. As this was a second offence the justices had no power to mitigate the fine under s. 4 of the Summary Jurisdiction Act, 1879, but by s. 78 of the Excise Management Act, 1827, they have a general power to mitigate provided they do not reduce the penalty to less than a quarter. It was contended for the appellant that the maximum penalty was £90, and, therefore, that the least fine that could be imposed was one of £22 10s.

The question we have to decide is what is the meaning of the words in s. 15 (1) "the amount of the duty chargeable in respect of the vehicle", and this involves a consideration of two or three sections in the Act. By s. 1 it is provided that, subject to the provisions of the Act, there shall be charged in respect of mechanically propelled vehicles used on public roads the duties of excise provided by the next five following sections and the duty so chargeable shall be paid annually on a licence to be taken out by the person keeping the vehicle. Section 5 which deals with goods vehicles provides that the duty chargeable in respect of a goods vehicle shall be that set out in sched. IV to the Act and the duties therein set out are all annual duties. By s. 11 it is provided that, notwithstanding anything in s. 1 (b), a licence may be taken out for such periods of the year and on payment of such rates as the Minister may by order made by statutory instrument prescribe. We need not set out the proviso to that section or go into all the provisions of the statutory instrument which has been made in pursuance of that section. It is enough to say that a licence may be taken out for any period of the year commencing before Oct. 1, and expiring on Dec. 31, for any quarterly period or for any period less than a quarterly period expiring on the last day of any quarterly period and the provisions are such that if a licence is taken out to be current only during the last month of a quarter a proportion of the quarterly payment will only be required.

The evidence in this case showed that the vehicle was used on Dec. 16 and no evidence was given that it was used on any other day in that year, and, accordingly, the justices were of opinion that the maximum penalty was three times the amount of duty chargeable in respect of the particular vehicle for the last quarter of the year. In fact, if the view which they took of the section is right it would have been rather less, since, if they were entitled to consider that this vehicle was only used in the month of December, the duty chargeable would have been, had it been licensed for that month only, less than if it had been licensed for the whole quarter. No evidence at all was given by the respondent, so the only evidence before the justices was that the vehicle was being used on one day and had no licence.

In our opinion, the words "the amount of the duty chargeable in respect of the vehicle" in s. 15 must *prima facie* apply to the duty charged by s. 1 of the Act and must also refer to the duty chargeable as specified in sched. IV as provided by s. 5. If, therefore, a person is found driving a vehicle which is unlicensed, *prima facie* he is liable to a penalty of three times the annual excise duty, but, if he has taken advantage of s. 11 and taken out a licence for part of the year and paid the duty for a part of the year, it would follow that the duty chargeable

in respect of the vehicle would only be so much of the annual duty as had not already been paid. Thus, if a man licenses his car for the first two quarters of a year and uses it during the second half of that year without taking out a further licence, he could, in our opinion, show that the amount of the duty chargeable was only the annual sum less the amount already paid by him. It is true that this would require him to give evidence that he had paid duty and would not require the excise authorities as prosecutors to prove what was the duty owing, but it is possible in a criminal case as in a civil case for the onus to shift. He is found using an unlicensed car. He is, therefore, liable to a penalty equal to three times the amount of the duty chargeable. The duty chargeable in the Act is a duty for the whole year. If, therefore, he has paid duty for part of the year, it is for him to show it. As the respondent in this case gave no evidence, we think he was liable to pay the penalty of three times the amount of the full duty, that is to say £90, and, therefore, the justices were bound to impose a penalty of at least a quarter of that sum, namely, £22 10s. It is abundantly clear that there is neither hardship nor injustice in this result as, if the respondent had paid duty during the previous part of the year, he, no doubt, would have given evidence to that effect.

The result at which we have arrived will also apply in the case of a car acquired by a purchaser during a year. If, for instance, during the year he bought a car which had no licence and used it, when prosecuted he could show the date when he acquired the car and the court would then be able to find by reference to s. 11 and the statutory instrument what the duty payable on the car would have been had it been licensed. It would not, in our opinion, be open to a defendant in such circumstances to say: "Well, if I had licensed it I should only have licensed it for a short period, such as a quarter". If he had not taken advantage of the provisions of s. 11, his intention to do so, even if the justices thought it was a genuine intention, would not avail him.

We decide that the penalty imposed by s. 15 is *prima facie* to be calculated by reference to the annual duty, but that it is open in any case to a defendant to show that in fact part of that annual duty has been paid so that only a portion of the duty remains chargeable. The case must go back to the justices with an intimation that they must impose a penalty of not less than £22 10s. While we are differing from them we fully appreciate the reasons for their decision and recognise the clarity with which this case is stated.

Case remitted.

Solicitor: *Treasury Solicitor* (for the appellant).

[Reported by F. GUTTMAN, ESQ., *Barrister-at-Law*.]

MEAD v. PLUMTREE.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Finemore and McNair, JJ.), October 15, 1952.]

Town and Country Planning—Enforcement notice—Need to specify date on which notice takes effect—Notice invalid—No appeal to justices against notice—Right to question validity on subsequent summons for contravention—Town and Country Planning Act, 1947 (c. 51), s. 23 (3) (4), s. 24 (1) (3).

An enforcement notice served on the occupier of land under s. 23 (1) of the Town and Country Planning Act, 1947, required him to remove certain materials from the land and to discontinue its use as a site for the deposit of waste, scrap, and other materials in connection with his business of a general dealer "within fifty-six days after the date of the service of this notice." A footnote, referring to the number of days, was appended: "Not less than twenty-eight days". The occupier did not appeal against the notice under s. 23 (4), and he was subsequently convicted under s. 24 (3) of having used the land without permission under Part III of the Act in contravention of the notice. On appeal,

HELD: (i) under s. 23 (3) the notice must specify both the date on which it was to take effect (which must be not less than twenty-eight days from the service of the notice) and also the period within which the work was to be done from the date on which the notice took effect; the notice in the present case did not comply with those requirements; and, therefore, it was bad.

Burgess v. Jarvis ([1952] 1 All E.R. 592), followed.

(ii) section 23 (4) provided for an appeal to a court of summary jurisdiction on the grounds specified in paras. (a) and (b) of the sub-section against a notice which was valid and did not provide for an appeal on the ground that the notice was invalid, and, therefore, the occupier was not precluded by reason of the fact that he had not appealed against the notice under s. 23 (4) from relying on the invalidity of the notice by way of defence to proceedings under s. 24 (3).

Perrins v. Perrins ([1951] 1 All E.R. 1075), distinguished.

FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 23 (3) (4), and s. 24 (1) (3), see HALSBURY'S STATUTES, Second Edn., Vol. 25, pp. 525 and 527.

Cases referred to:

- (1) *Perrins v. Perrins*, [1951] 1 All E.R. 1075; [1951] 2 K.B. 414; 115 J.P. 346; 2nd Digest Supp.
- (2) *Burgess v. Jarvis*, [1952] 1 All E.R. 592; [1952] 2 Q.B. 41; 116 J.P. 161.

CASE STATED by Essex Quarter Sessions.

At a court of summary jurisdiction sitting at Chelmsford on Nov. 15, 1951, the appellant, Mead, was convicted of having since Aug. 23, 1951, without permission under Part III of the Town and Country Planning Act, 1947, used land in the parish of Writtle, Essex, for the deposit of waste, scrap, and other materials in connection with the business of a general dealer in contravention of an enforcement notice served on him on or about June 27, 1951, by Chelmsford Rural District Council as agents for Essex County Council, the local planning authority, contrary to s. 24 (3) as extended by s. 75 (1) of the Act. He appealed against the conviction to quarter sessions.

At the hearing by quarter sessions on Feb. 14, 1952, it was proved or admitted that the appellant was the occupier of the land and used it as a site for the deposit of waste, scrap, and other materials in connection with the business of a general dealer in contravention of previous planning control within the meaning of s. 75 (1) (9) of the Town and Country Planning Act, 1947, and that such use constituted development within the meaning of s. 12 (2) (3) and (4) of the Act and

was continuing. Chelmsford Rural District Council had served on the appellant an enforcement notice, dated June 27, 1951, which recited the facts as to user of the land and continued:

"Now therefore the rural district council of Chelmsford do hereby give you notice in pursuance of their powers as agent of the local planning authority under s. 23 and s. 24, as extended by s. 75 of the [Town and Country Planning Act, 1947], to remove the said materials from the said land and to discontinue the said use within *fifty-six days after the date of the service of this notice . . .

[Footnote] *Not less than twenty-eight days".

The appellant had not obtained permission for the use of the land under Part III of the Act of 1947. He took steps to appeal against the enforcement notice, but the steps were ineffective and no valid appeal was prosecuted. He contended that the enforcement notice was defective and a nullity in that it did not specify a date on which it was to take effect as required by s. 23 (3) of the Act of 1947, and that, as s. 23 (4) provided no appeal against a notice which was defective for this reason, he was entitled to rely on the defect as a defence to a charge alleging non-compliance with the notice. Chelmsford Rural District Council contended that the enforcement notice was good, and that, even if it was defective for the reasons alleged, the appellant was precluded from relying on the defect through his failure to appeal against the notice under s. 23 (4), and quarter sessions had no jurisdiction to entertain the question of the validity of the notice.

Quarter sessions held that they were bound by the decision in *Perrins v. Perrins* (1) to hold that they had no jurisdiction to entertain the question of the validity of the notice and dismissed the appeal. The appellant appealed.

Percy Lamb, Q.C., and *Jellinek* for the appellant.

Benev, Q.C., and *Hines* for the respondent.

LORD GODDARD, C.J.: This is a Case stated by the appeal committee of the quarter sessions for the county of Essex to which the appellant appealed against a conviction by justices of the offence of disregarding an enforcement notice. A notice served on him ordered him to discontinue the use of land in his occupation for the purpose for which he was using it. He ignored that notice, and he was summoned and fined. He appealed to quarter sessions against the conviction, and sought to take the point that the notice served on him was a bad notice and, therefore, he should never have been convicted by the justices because he was not bound to comply with the notice which was not such a notice as the Act required. Quarter sessions held that they had no jurisdiction to entertain the appeal because the case was covered by the decision of this court in *Perrins v. Perrins* (1) and they dismissed the appeal. With all respect to the learned chairman and the appeal committee, I have difficulty in understanding how they thought that *Perrins v. Perrins* (1) had anything to do with this case.

A notice was served on the appellant dated June 27, 1951, several months before the decision of the Court of Appeal in *Burgess v. Jarvis* (2), which, if it had been given beforehand, I have no doubt would have caused the notice to be in a very different form. The notice required him to remove materials from the land and to discontinue the use

"within fifty-six days after the date of the service of this notice. Dated this June 27, 1951;"

and a footnote to the fifty-six days is appended: "Not less than twenty-eight days". I should have thought that made it more obscure, rather than clearer, since s. 23 (3) of the Town and Country Planning Act, 1947, says:

"Subject to the provisions of the next following sub-section, an enforcement notice shall take effect at the expiration of such period (not being less

than twenty-eight days after the service thereof) as may be specified therein."

The appellant contended that it was a defective notice because the section requires an enforcement notice to specify the date at which it is to take effect.

A In my view, the only construction that can be placed on the words of the sub-section is that the notice must specify the date at which it is to take effect, and that that date must be not less than twenty-eight days after the service, the object being to give the recipient a chance of appealing or of seeing the town planning authorities and, perhaps, persuading them to take a different view. The recipient must also be told within what time he is to do the work. This notice does not say when it is to take effect. It simply tells the appellant that he is to discontinue using the land for the purpose within fifty-six days after the service of the notice. B Counsel for the respondent has suggested that the notice should be read as meaning that the notice will take effect in twenty-eight days and that the appellant has twenty-eight days in which to do the work. We cannot hold that that is what the notice says or that that would comply with the section, and that is the opinion expressed by the Court of Appeal in *Burgess v. Jarvis* (2). C Counsel for the respondent said that, as this was a criminal case, we were at liberty to disregard the decision of the Court of Appeal in *Burgess v. Jarvis* (2), but I should be sorry to disregard a decision of the Court of Appeal merely because we are sitting on an appeal from justices and the Court of Appeal were sitting on an appeal from a judge in chambers in a civil proceeding. D Moreover, not only should I not feel at liberty to do so, but this section can only be construed in one way—that a notice must contain two dates, i.e., the date when the notice is to take effect (which must be not less than twenty-eight days from the service) and the time within which the work is to be done from the date on which the notice takes effect.

E That was not done here, and the position would appear to be as the appellant contends—that, as a bad notice was served on him, he committed no offence. It is said, however, in argument that quarter sessions had no jurisdiction to decide that particular point. It would be odd if the justices before whom the appellant was summoned for failing to comply with the notice could not go into the question whether it was a good or a bad notice, and could hold that he had committed an offence while refusing to hear his plea that the notice was one with which he was not bound to comply. The difficulty which seems to have been present in the minds of the committee is this. Section 23 (4) gives certain F rights of appeal against a notice, which means a valid notice and not one not complying with the Act. It provides:

G " . . . and on any such appeal the court—(a) if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof, or, as the case may be, that the conditions subject to which such permission was granted have been complied with, shall quash the notice to which the appeal relates; (b) if not so satisfied, but satisfied that the requirements of the notice exceed what is necessary for restoring land to its condition before the development took place, or for securing compliance with the conditions, as the case may be, shall vary the notice accordingly . . . "

H That is what can be contended on an appeal against a notice. The recipient can say: "This notice never ought to have been served on me because I had received, or did not require, permission", or: "I have carried out the conditions subject to which permission was granted", or: "This notice exceeds what is reasonable for me to be called on to do". The sub-section does not provide for an appeal against the notice on the ground that it is a bad notice because that involves, not an appeal against the notice, but a contention that the recipient never had a notice served on him at all, which is what the appellant contends in this case. Quarter sessions, however, thought they could not entertain the

point because s. 24 (1) provides that a person who is entitled to appeal against a notice under s. 23 (4) and does not do so cannot dispute, in any proceedings to recover expenses reasonably incurred by the local planning authority in doing the work on his default, the validity of the notice on any ground which could have been raised on such an appeal. Quarter sessions thought they were bound by the decision of this court in *Perrins v. Perrins* (1), but that case has nothing to do with this case. There the occupier of land received a notice under the Town and Country Planning Act, 1947, s. 23 (1), to cease using it as a camping site. When summoned for disobeying the notice, he contended that he ought not to have been served with it because he had always used the land as a camping site. It was held that he could not go into that question because it was an objection to the notice which could have been taken by way of appeal under s. 23 (4), and, by s. 24 (1), if it was not taken by way of appeal, it could not be raised in the proceedings. That has no application here because this point is not one in respect of which jurisdiction is given to justices on such an appeal against the notice, and, therefore, the appellant can now raise it by way of defence. The case must go back to quarter sessions with the intimation, first, that they had jurisdiction to hear the appeal, and, secondly, that, in view of the decision in *Burgess v. Jarvis* (2) and in the opinion of this court, this enforcement notice was bad and they ought to allow the appeal.

FINNEMORE, J.: I agree.

McNAIR, J.: I agree.

Appeal allowed.

Solicitors: *Robbins, Olivey & Lake*, agents for *W. P. Hill*, Hertford (for the appellant); *Torr & Co.*, agents for *Stamp Wortley & Co.*, Chelmsford (for the respondent).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

TAYLOR v. KENYON.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Finnemore and McNair, JJ.), October 16, 1952.]

Street Traffic—Driving while disqualified for holding licence—Absolute prohibition—Road Traffic Act, 1930 (c. 43), s. 7 (4).

In October, 1951, the respondent was charged with driving a motor vehicle at an excessive speed. He forwarded his licence to the court, but did not attend the hearing, at which he was convicted, fined, and disqualified for holding a licence for three months. His licence was retained by the court, and a letter was sent to the respondent informing him of the disqualification, a notice of fine being enclosed in the same envelope. The respondent paid the fine, but at no time made any inquiry regarding his licence, and on Nov. 29, 1951, he drove a motor vehicle on a road. When charged with driving while disqualified for holding a licence, he denied any knowledge of the disqualification in October.

HELD: per LORD GODDARD, C.J., and FINNEMORE, J., without deciding whether the respondent was to be deemed to have knowledge of his disqualification because he had deliberately refrained from making inquiries the result of which he might not care to have, s. 7 (4) of the Road Traffic Act, 1930, imposed an absolute prohibition against driving while disqualified which was effective as soon as the sentence of disqualification had been pronounced in open court, and, therefore, the respondent was guilty of an offence under the sub-section.

AS TO SUSPENSION OF LICENCES, see HALSBURY, Hailsham Edn., Vol. 31, pp. 785, 786, paras. 1229, 1230; and FOR CASES, see DIGEST, Vol. 42, p. 876, No. 243.

FOR THE ROAD TRAFFIC ACT, 1930, s. 7 (4), see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 580.

Case referred to:

- (1) *Evans v. Dell*, [1937] 1 All E.R. 349; 156 L.T. 240; 101 J.P. 149; Digest Supp.

CASE STATED by county of Chester justices.

A At a court of summary jurisdiction sitting at Wilmslow on Feb. 22, 1952, the appellant, a superintendent of police, preferred an information against the respondent, John Ronald Kenyon, charging that on Nov. 29, 1951, he, then being disqualified under Part I of the Road Traffic Act, 1930, for holding or obtaining a licence, did unlawfully drive on a highway a motor lorry, contrary to s. 7 (4) of the said Act.

B It was proved or admitted that on Oct. 18, 1951, the respondent was convicted by a court of summary jurisdiction sitting at Nuneaton of the offence of exceeding a speed limit, was fined £2 10s., and was disqualified for holding or obtaining a licence for the period of three months from that date. There was no appearance by or on behalf of the respondent who had sent his driving licence to the court prior to the hearing. On Oct. 18, 1951, the clerk to the justices wrote to the respondent informing him that he had been convicted, fined, and also disqualified for holding a licence. In the envelope containing that letter there was also a notice relating to the fine. The respondent received the envelope containing the said documents, but, having taken out the notice of fine, overlooked the letter and was never aware of its contents or even its existence. The respondent paid his fine, but he never received back his driving licence at any time up to Nov. 29, 1951. It had occurred to the respondent that he might have been disqualified, but he took no steps to find out what was the position with regard to his licence. On Nov. 29, 1951, he drove a motor lorry on a highway, he not then in fact knowing that he was disqualified.

E It was contended on behalf of the appellant that on the evidence, even if the respondent did not actually know that he was disqualified for holding a licence, he had sufficient mens rea to render him guilty of the offence, and, alternatively, that mens rea was not a necessary ingredient of the offence charged. On behalf of the respondent it was contended that, as he did not know of the disqualification, he could not be convicted of the offence. The justices dismissed the information.

R. J. Parker for the appellant.

F *P. J. M. Thomas* for the respondent.

G LORD GODDARD, C.J., stated the facts and continued: It was a very proper thing for the clerk of the court to send the respondent a notice of the fine which had been imposed and a letter telling him of the disqualification. Whether it is necessary in law to send those documents is a different matter, because the decision of the justices is pronounced in open court, and, once it is pronounced and entered in the court register, it is the judgment of the court.

H The respondent managed to persuade the justices before whom he was charged with driving while disqualified that through some mishap, although he took out of the envelope the notice of the fine, he did not take out the letter telling him he had been disqualified. I say frankly that I should have had very great difficulty in accepting that evidence, for, in my view, the respondent well knew there was another letter in the envelope and did not want to know what was in it. He admitted in court that he had suspected he might have been disqualified, but he made no inquiry. This seems to me to be a clear case of a man shutting his eyes to the obvious and refraining from getting information which he did not want to get. But, in my opinion, it is not necessary to go into that question at all. In s. 7 (4) of the Road Traffic Act, 1930, there is an absolute prohibition against a person driving when he is disqualified, and, if a sentence of disqualification is pronounced in open court, there is an end of it. He is disqualified, and

he is given notice of the disqualification by the court retaining his licence. In my opinion, this case must go back to the justices with an intimation that the offence was proved and a direction to convict, and I am far from saying this is in any way an excusable case or that special reasons exist in it for not putting in force the salutary provision of the statute which regards this as a very serious offence.

FINNEMORE, J.: I agree.

McNAIR, J.: In this case I do not feel it necessary to express any opinion on the question which has been argued as to whether mens rea is necessary for an offence under s. 7. I think, with my Lord, that the only possible inference to be drawn from the facts found by the justices is that the respondent deliberately refrained from making inquiries the result of which he might not care to have, within the meaning of the expression used by LORD HEWART, C.J. ([1937] 1 All E.R. 353) in *Evans v. Dell* (1). *Appeal allowed.*

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Hugh Carswell*, Chester (for the appellant); *Peacock & Goddard*, agents for *Barlow, Parkin & Co.*, Stockport (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

NEWSOM v. ROBERTSON (INSPECTOR OF TAXES).

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), July 24, 30, October 13, 1952.]

Income Tax—Deduction against profits—Travelling expenses—Barrister travelling between chambers and home where he did part of his professional work—Income Tax Act, 1918 (c. 40), sched. D, Rules Applicable to Cases I and II, r. 3 (a).

The taxpayer carried on the profession of a barrister at chambers in London. At his home outside London he used a study for the purpose of doing work which he took home in the evenings and at week-ends. During vacations he seldom came to London, but did the greater part of his work at home. In computing the profits of his profession for assessment to income tax, he claimed deduction of the expenses which he incurred in travelling between his home and his chambers.

HELD: these expenses were not incurred wholly and exclusively for the purposes of the taxpayer's profession, and, therefore, their deduction was not allowable.

Decision of DANCKWERTS, J. ([1952] 1 All E.R. 1290), affirmed.

AS TO DEDUCTIONS IN RESPECT OF TRAVELLING EXPENSES, see HALSBURY, Hailsham Edn., Vol. 17, p. 221, para. 446; and FOR CASES, see DIGEST, Vol. 28, p. 89, Nos. 520-523.

Cases referred to:

- (1) *Bentleys, Stokes & Lowless v. Beeson*, [1952] 2 All E.R. 82.
- (2) *Smith's Potato Estates, Ltd. v. Bolland. Smith's Potato Crisps* (1929), *Ltd. v. Inland Revenue Comrs.*, [1948] 2 All E.R. 367; [1948] A.C. 508; [1948] L.J.R. 1557; 30 Tax Cas. 267; 2nd Digest Supp.

APPEAL by the taxpayer from an order of DANCKWERTS, J., dated Apr. 30, 1952, and reported [1952] 1 All E.R. 1290, dismissing the taxpayer's appeal as to certain travelling expenses and allowing the Crown's appeal as to other expenses on the ground that the travelling expenses for which the taxpayer claimed deduction in computing his professional profits for assessment to income tax were not incurred wholly and exclusively for the purpose of his profession.

Millard Tucker, Q.C., J. W. P. Clements and Abel-Smith for the taxpayer.
Heyworth Talbot, Q.C., and Sir Reginald Hills for the Crown.

Cur. adv. vult.

Oct. 13. The following judgments were read.

SOMERVELL, L.J.: These are two appeals from a judgment of DANCKWERTS, J., under the Income Tax Acts. The taxpayer, Mr. Newsom, is a barrister, who has chambers in Lincoln's Inn. His home is at Whipsnade, Bedfordshire. He claimed to deduct the expenses incurred by him in travelling to and fro between his home and his chambers. On the facts as found, to which I will refer later, the Special Commissioners decided that such expenses were not deductible during term time when Mr. Newsom came up daily to his chambers, but were deductible during the vacation. Both sides appealed and the learned judge dismissed the taxpayer's appeal and allowed the appeal of the Crown in respect of the vacation expenses. The taxpayer appeals to this court.

I will deal first with the position in term time. The relevant facts may be summarised as follows. The house in which he lived, the Old Rectory, Whipsnade, was his home in the ordinary sense. He lived there with his wife and family. He likes living in the country. He took work home and did it in the evenings and at week-ends. He had a study, a number of legal text-books, and a set of law reports. If he chose he could have done the work which he did at Whipsnade in his chambers, but he did not so choose. He has received from the Inland Revenue a study allowance under r. 3 (c) of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918.

The relevant rule is 3 (a), though rules 3 (b) and 3 (c), which I will also read, were referred to:

"In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—(a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation: (b) any disbursements or expenses of maintenance of the parties, their families or establishments or any sums expended for any other domestic or private purposes distinct from the purposes of such trade, profession, employment or vocation: (c) the rent or annual value of any dwelling-house or domestic offices or any part thereof, except such part thereof as is used for the purposes of the trade or profession: Provided that where any such part is so used, the sum so deducted shall be such as may be determined by the commissioners, and shall not, unless in any particular case the commissioners are of opinion that, having regard to all the circumstances, some greater sum ought to be deducted, exceed two-thirds of the annual value or of the rent bona fide paid for the said dwelling-house or offices . . ."

The Special Commissioners, I think rightly, posed the question whether this expenditure was "money wholly and exclusively laid out or expended for the purposes of his profession". On the above facts, which are elaborated in the Case, the commissioners found that Mr. Newsom exercised his profession partly at 15 Old Square and partly at the Old Rectory. They then proceed to consider the purpose or purposes of the journey, and I will read para. 12 of the Case:

"(6) We must now examine, in the light of the evidence, the 'purpose' or 'purposes' of the various journeys the expenses of which are claimed as deductions. Dealing first with the journeys undertaken during term time, we think it convenient to start with those which are undertaken in the evening from Old Square to the Old Rectory. What is the 'purpose' of these journeys? On the evidence, we find that the purpose is a dual one, namely, (a) to eat, sleep and pursue his domestic avocations, generally, in his 'home' there, and (b) to do further professional work in his 'place of business' (namely his study) there. Is this dual 'purpose' one which can properly be said to be 'wholly and exclusively' for the purposes of his profession as a barrister? On the facts of this case we regard (a), not as something merely incidental or subsidiary to (b), but as a substantive 'purpose' in itself,

for which he would make the journey even if (b) were not combined with it. We are unable, therefore, to regard the expense of this journey as incurred 'wholly and exclusively' for the purposes of his profession. (7) Next, we consider the purpose of the journey from the Old Rectory to Old Square the following morning. On the evidence we are of opinion that he leaves the Old Rectory qua 'home' and only incidentally qua 'place of business'; and that a substantive 'purpose' of the journey is to proceed from his 'home', as such, to the place of business where he intends to commence his professional work for the day. We cannot regard this journey as undertaken wholly and exclusively for the purposes of his profession."

Though I agree with the conclusion, I doubt if it is helpful to consider the journeys separately. It is the expenses of going to and fro which have to be considered. It would be an impossible result to hold that one journey was "wholly and exclusively", and the other not.

Counsel for Mr. Newsom based his argument naturally on the finding that Mr. Newsom's profession was exercised partly at the Old Rectory. Many examples were given in the course of the argument, but the following would be, I think, a fair example of the type of case to which counsel for the taxpayer would assimilate the present. A professional man, say a solicitor, has two places of business, one at Reading and one in London. He normally sees clients and does his professional work at Reading up till noon and then comes to London. He may live at Reading or in London or at neither. I would have agreed with counsel for the taxpayer that the journeys to and fro between Reading and London were deductible within the rule. He is carrying on one profession partly in London and partly at Reading. It is, therefore, necessary to examine in the light of the facts what is meant by the finding that the taxpayer exercises his profession at the Old Rectory and what are the implications of the fact that the Inland Revenue have recognised that he uses a room there for the purposes of his profession.

One thing is quite clear—that Whipsnade, as a locality, has nothing to do with Mr. Newsom's practice. That differentiates it from the case of the solicitor which I have put. If he had found a house that suited him in Hertfordshire or Oxfordshire, everything would have gone on in precisely the same way. There is, I think, force in the criticism of counsel for the Crown of the form of the commissioners' finding in the Crown's favour, which I have read, namely, that there was a dual *purpose*. Mr. Newsom's purpose in making the journeys was to get home in the evenings or at week-ends. The fact that he intended to do professional work when he got there and did so does not make this even a subsidiary "purpose" of his profession. An author who has to go to the seaside to recuperate may write an article while he is there, but in ordinary language that was not the purpose of the journey. He was exercising his profession there, but some authors who do not depend on libraries or local colour can do that anywhere. The places where they exercise their profession would be irrelevant to their profession and I cannot see how the cost of moving from one to the other could be said to be wholly and exclusively laid out for the purpose of their profession. It would be laid out because the author found it pleasant to have, say, two homes. The position would not, I think, be affected by the fact that the author might be entitled to a study allowance in one or, perhaps, both of his homes.

The conclusion of the Special Commissioners with regard to the expenses in term time seems to me to be right in law. I would myself have doubted whether the journeys to and fro were for the purposes of the profession in any sense. If they were, then, in my opinion, they were a second and subsidiary purpose.

The commissioners distinguished the vacations on the ground that Mr. Newsom, who did a considerable volume of work in the vacations, normally resided at Whipsnade and only occasionally came up to London to his chambers. They, therefore, held that Whipsnade became his professional base, his chambers

A being like a branch office. The learned judge rejected this contention. The commissioners accepted that a practising barrister need not have chambers and can carry on his profession anywhere he pleases. That is unusual in London, at any rate, and anyhow is not this case. Mr. Newsom had chambers in Lincoln's Inn. They remained open in the vacation. I think they remained his professional base although for his own convenience he had papers sent down from there, or, possibly, on instructions, direct by solicitors, to Whipsnade. The learned judge held that the position throughout the period of assessment must be taken as a whole. So far as this case is concerned, I agree. There might, of course, be cases where quoad travelling expenses the position for one period* of the year might differ from the rest of the year. The learned judge based his decision on what I may call the principle of a dual purpose. He had the authority for that principle not only in the words "wholly and exclusively", but also in a statement in a judgment of this court in *Bentleys, Stokes & Lowless v. Beeson* (1) ([1952] 2 All E.R. 82, at p. 87). I agree with the learned judge's reasoning though, as I have stated, I doubt whether the taxpayer in the present case reaches this stage. I, therefore, would dismiss the appeal.

C DENNING, L.J.: In the days when income tax was introduced, nearly 150 years ago, most people lived and worked in the same place. The tradesman lived over the shop, the doctor over the surgery, and the barrister over his chambers, or, at any rate, close enough to walk to them or ride on his horse to them. There were no travelling expenses of getting to the place of work. Later, as means of transport quickened, those who could afford it began to live at a distance from their work and to travel each day by railway into and out of D London. So long as people had a choice in the matter—whether to live over their work or not—those who chose to live out of London did so for the purposes of their home life because they preferred living in the country to living in London. The cost of travelling to and fro was then obviously not incurred for the purpose of their trade or profession. Nowadays many people have only a very limited choice as to where they shall live. Business men and professional men cannot E live over their work, even if they would like to do so. A few may do so, but once those few have occupied the limited accommodation available in Central London, there is no room for the thousands that are left. They must live outside, at distances varying from three miles to fifty miles from London. They have to live where they can find a house. Once they have found it, they must stay there and go to and from it to their work. They simply cannot go and live over F their work.

What is the position of people so placed? Are their travelling expenses incurred wholly and exclusively for the purposes of the trade, profession, or occupation? I think not. A distinction must be drawn between living expenses and business expenses. In order to decide into which category to put the cost of travelling, you must look to see what is the base from which the trade, profession, or occupation is carried on. In the case of a tradesman, the base of his G trading operation is his shop. In the case of a barrister, it is his chambers. Once he gets to his chambers, the cost of travelling to the various courts is incurred wholly and exclusively for the purposes of his profession. But it is different with the cost of travelling from his home to his chambers and back. That is incurred because he lives at a distance from his base. It is incurred for the purposes of H his living there and not for the purposes of his profession, or at any rate not wholly or exclusively, and this is so whether he has a choice in the matter or not. It is a living expense as distinct from a business expense.

On this reasoning I have no doubt that the commissioners were right in regard to Mr. Newsom's travelling expenses during term time. The only ground on which counsel for the taxpayer challenged their finding during term time was because Mr. Newsom had a study at his home at Whipsnade completely equipped with law books and did a lot of work there. The commissioners did not regard

this as sufficient to make his home during term time a base from which he carried on his profession, and I agree with them. His base was his chambers in Lincoln's Inn. His home was no more a base of operations than was the train by which he travelled to and fro. He worked at home just as he might work in the train, but it was not his base.

The commissioners found, however, that during the vacation his professional base was not at his chambers in Lincoln's Inn, but at his home at Whipsnade. I do not think this was a correct inference from the facts before them. His professional base was throughout in Lincoln's Inn, and it did not cease to be so simply because he rarely went there during the vacation. For these reasons I agree that the appeal should be dismissed.

ROMER, L.J.: I agree that these appeals must be dismissed. In order that the taxpayer's expenses of travelling to and fro between Whipsnade and London should qualify for tax purposes as permissible deductions from his gross earnings as a barrister it must be shown that they were incurred wholly and exclusively for the purposes of his profession. This general test involves the following questions, namely: (i) Were the expenses incurred for the purpose of enabling the taxpayer to carry on and earn profits in his profession (per LORD SIMONDS in *Smith's Potato Estates, Ltd. v. Bolland. Smith's Potato Crisps (1929), Ltd. v. Inland Revenue Comrs.* (2) ([1948] 2 All E.R. 367, at p. 374) ? and (ii) If so, were they exclusively so incurred ? Unless an affirmative answer can be given to each of these questions the expenses cannot be said to fall within the only exempting provision which is relevant to this appeal, namely, r. 3 (a) of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918.

Now it is, of course, true that on days when Mr. Newsom had to appear in court in the Chancery Division the expense of his journey to London from Whipsnade was incurred for the purpose of enabling him to do so in the sense that, if he did not come to London, he could not earn his brief fee. But if this view of the position were sufficient to justify the deduction of his fares to London for income tax purposes, every taxpayer in England whose profits are assessable under sched. D could claim as a permissible deduction his expenses of getting from his place of residence to his place of work. On the other hand, it could scarcely be argued that the cost of going home at the end of the day would be similarly eligible as a deduction and it would be a curious result of r. 3 (a) that the morning journey should qualify for relief but that the evening journey should not. Mr. Newsom, in a letter to the inspector of taxes, frankly disclaimed any right to relief founded merely on the ground of having to proceed from his home to his place of work and conceded that a man's "profession is not exercised until he arrives at the place at which it is carried on." In my judgment, this proposition is, in general, true. Moreover, it cannot be said even of the morning journey to work that it is undertaken in order to enable the traveller to exercise his profession. It is undertaken for the purpose of neutralising the effect of his departure from his place of business, for private purposes, on the previous evening. In other words, the object of the journeys, both morning and evening, is not to enable a man to do his work, but to live away from it.

Is the position altered, then, by the fact, as found by the commissioners, that Mr. Newsom worked in his house at Whipsnade as well as in his chambers in Lincoln's Inn ? I am clearly of opinion that it is not. It seems to me impossible to say that this element assimilates the case to that of a man who possesses two separate places of business, and, for the furtherance and in the course of his business activities, has to travel from one to another. The taxpayer could, if he liked, carry on the whole of his profession in London—though he certainly could not do so at Whipsnade if only for the reason that the courts of the Chancery Division do not sit there. It seems to me, accordingly, that it is almost impossible to suggest that when the taxpayer travelled to Whipsnade in the evenings, or at week-ends, he did so for the purpose of enabling him "to carry on and earn

profits in his " profession—let alone that he did so exclusively for that purpose. That purpose, as I have said, could be fully achieved by his remaining the whole of the time in London. He went to Whipsnade, not because it was a place where he worked, but because it was the place where he lived and in which he and his family had their home. Even busy barristers occasionally have an evening free from legal labour, and I feel sure that, if Mr. Newsom were lucky enough to have one, he would not remain in London on the ground that there was no work to take him to Whipsnade.

As a result of these various considerations, it seems to me that neither of the questions to which I have referred in connection with the test which has to be applied in claims such as the present permits of an affirmative answer, and, in these circumstances, the appeals cannot, in my judgment, be sustained. In the above observations I have drawn no distinction between term time and vacation, and I agree with the grounds on which the learned judge based his view that the same considerations apply to both.

Appeals dismissed.

Solicitors: *Darley, Cumberland & Co.* (for the taxpayer); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

CIVIL AIR TRANSPORT INCORPORATED v. CENTRAL AIR TRANSPORT CORPORATION.

[PRIVY COUNCIL (Viscount Simon, Lord Normand, Lord Oaksey, Lord Reid and Sir Lionel Leach), July 21, 22, 23, 24, 28, October 13, 1952.]

International Law—Recognition of foreign government—Retroactive effect—Ownership of aircraft in Hong Kong—Property of Chinese nationalist government—Sale before recognition by British government of communist government as de jure government of China—Effect of decrees of communist government before recognition.

C.A.T.C., an unincorporated body, was a commercial air transport enterprise of the government of the Republic of China. It was administered by a board of governors under Ministerial direction, and its assets included aircraft operating to and from Hong Kong. In April, 1949, the National Government of the Republic of China (hereafter called the "nationalist government") was forced by communist forces in China to move its headquarters from Nanking. In September, 1949, forty aircraft belonging to the nationalist government, and forming part of the fleet of civil aircraft operated by C.A.T.C., were lying on an airfield in Hong Kong. On Oct. 1, 1949, the Central People's Government of China (referred to hereafter as the "communist government") proclaimed itself to be the government of China and purported to dismiss the Ministers of the nationalist government and to appoint new ones. By the Representation of Foreign Powers (Control) Ordinance, 1949, which was enacted in Hong Kong on Nov. 4, 1949, no person was to function on behalf of any foreign power (which was defined to include the government, whether legal or de facto, of any foreign State) without the consent of the governor of Hong Kong. On Nov. 9, 1949, the president of C.A.T.C. flew from Hong Kong to Peking and transferred his allegiance to the de facto communist government, and, at about the same time, the majority of C.A.T.C.'s employees defected to the communist government although they remained in Hong Kong. In a document, dated Nov. 12, 1949, and addressed to the manager, officers and workmen of C.A.T.C., the acting premier of the de facto communist government declared C.A.T.C. to be the property of the communist government, appointed the defecting manager as general manager of C.A.T.C., and,

inter alia, asked officers and workmen of C.A.T.C. remaining in Hong Kong to "bear the responsibility of protecting the assets." In consequence, on Nov. 13, the nationalist government suspended the registration certificates of all C.A.T.C.'s aircraft and appointed a new acting president of C.A.T.C. who, on Nov. 16, dismissed the defecting employees, suspended the rest of C.A.T.C.'s Chinese staff in Hong Kong, and appointed a security officer to take all measures permissible by law to ensure that C.A.T.C. property in Hong Kong was not removed or injured by unauthorised persons. On Nov. 17, with police approval, the security officer posted special guards to protect the aeroplanes, but a few days later he had to withdraw them at the request of the police, and, without his consent, defecting ex-employees took physical control of the aircraft. On Nov. 24 the Supreme Court of Hong Kong granted an interim injunction restraining these ex-employees from entering or remaining on C.A.T.C.'s premises or removing or tampering with C.A.T.C.'s property. This injunction was disregarded by the ex-employees, who remained in physical control of the aircraft, and on Nov. 25 they obtained an injunction restraining C.A.T.C. from removing the property from the premises. On Dec. 9, most of the mainland of China being under the control of the communist forces, the nationalist government moved its headquarters to Formosa. On Dec. 12 it accepted the offer of an American partnership to purchase all the physical assets of C.A.T.C., one of the terms of the agreement being that the assets sold would not be used for transport to or from the communist areas of China. On Dec. 19, 1949, in accordance with another term of the agreement, these assets, which included the forty aeroplanes lying on the airfield in Hong Kong, were transferred by the partnership to the appellant company. Until midnight of Jan. 5/6, 1950, the government of the United Kingdom recognised the nationalist government as being the *de jure* government of China, but it also recognised that between Oct. 1, 1949, and Jan. 5/6, 1950, the communist government was the *de facto* government of those parts of the Republic of China over which it had established effective control. As from midnight of Jan. 5/6, 1950, the government of the United Kingdom ceased to recognise the nationalist government and recognised the communist government as the *de jure* government of China. On Jan. 13, 1950, the communist government instructed its general manager of C.A.T.C. to take over all assets of C.A.T.C. in Hong Kong. The appellant company sought a declaration from the Supreme Court of Hong Kong that the forty aircraft on the airfield in Hong Kong were its property, but its claim was dismissed. On appeal to the Privy Council,

HELD: (i) the validity of the transaction between the nationalist government and the American partnership was to be judged as at the date when it was entered into, and not in the light of subsequent events which might have turned out differently; on Dec. 12, 1949, the property in the forty aircraft which were in the British colony of Hong Kong was in the nationalist government, which was then recognised by the government of the United Kingdom as the *de jure* government of China, and, therefore, the nationalist government was entitled to sell the aircraft and its motive for making the sale was immaterial; a government's policy in selling chattels which it owned was not subject to the review of foreign tribunals and the question whether its action in this regard was against the interests of those whom it was supposed to serve was a political one; British courts could not take it on themselves to pronounce whether a foreign government, recognised by the government of the United Kingdom, was acting contrary to the interests of its people, and a government was not a trustee in those matters in any legal sense; and, therefore, the right in municipal law to follow property which was subject to a trust into the hands of a third party could not have any application in the present case.

(ii) so long as the nationalist government retained de jure recognition (i.e., until midnight of Jan. 5/6, 1950), purported decrees or orders of the communist government could be deemed effective only within the territory and as regards assets then under its control, and, therefore, the forty aircraft in Hong Kong did not become the property of the communist government by reason of that government's decree of Oct. 1, 1949, purporting to dismiss the Ministers of the nationalist government.

(iii) primarily, retroactivity of recognition operated to validate acts of a de facto government, and not to invalidate acts of the previous de jure government; at the time of the sale the forty aeroplanes in Hong Kong belonged to the nationalist government, and the physical control which the defecting ex-employees maintained over the aircraft was in defiance of the injunction granted by the Supreme Court of Hong Kong on Nov. 24, 1949, and, if the ex-employees were acting on behalf of the de facto communist government, their action was a criminal offence by the law of Hong Kong, being a direct infringement of the ordinance of 1949, no consent under the ordinance having been given by the governor; in these circumstances, the illegal action of the defecting ex-employees in taking control of the aircraft could not give ground for the principle of retroactivity; and, therefore, the title conferred by the contract of Dec. 12, 1949, was not extinguished and the appellant company was entitled to the declaration which it sought.

AS TO ACTS OF REVOLUTIONARY GOVERNMENTS, see HALSBURY, 1952 Supp., Vol. 26, Public Authorities and Public Officers, para. 568.

Cases referred to:

- (1) *The Arantzazu Mendi*, [1939] 1 All E.R. 719; [1939] A.C. 256; 160 L.T. 513; *sub nom. Spain Republic Government v. Arantzazu Mendi*, 108 L.J.P. 55; Digest Supp.
- (2) *Boguslawski v. Gdynia Ameryka Linie*, [1950] 2 All E.R. 355; [1951] 1 K.B. 162; *affd. H.L. sub. nom. Gdynia Ameryka Linie Zeglugowe Spolka Akcyjna v. Boguslawski*, [1952] 2 All E.R. 470; 2nd Digest Supp.
- (3) *Banco de Bilbao v. Sancha*, [1938] 2 All E.R. 253; [1938] 2 K.B. 176; 107 L.J.K.B. 681; 159 L.T. 369; Digest Supp.
- (4) *Compania Naviera Vascongado v. Cristina S.S.*, [1938] 1 All E.R. 719; [1938] A.C. 485; 107 L.J.P. 1; 159 L.T. 394; Digest Supp.

APPEAL by the appellant company, under the Supreme Court of Hong Kong (Jurisdiction) Order in Council, 1950, s. 3, from an order of the Supreme Court of Hong Kong (appellate jurisdiction) (GOULD and SCHOLES, JJ.), dated Dec. 28, 1951, dismissing the appellant company's appeal from an order of SIR GERALD HOWE, C.J., in the Supreme Court of Hong Kong (original jurisdiction), dated May 21, 1951, whereby he dismissed the company's claim for a declaration that forty aircraft on the government airfield at Kai Tak in the colony of Hong Kong were the property of the company.

The aircraft were formerly part of the assets of the respondent, Central Air Transport Corporation (referred to hereafter as C.A.T.C.), an unincorporated commercial enterprise of the government of the Republic of China, which was directed and controlled by the Minister of Communications through a board of governors. On Dec. 12, 1949, the National Government of the Republic of China (referred to hereafter as the nationalist government) sold the assets of C.A.T.C. to an American partnership. On Dec. 19, 1949, in accordance with a term of the agreement between the nationalist government and the partnership, the latter transferred these assets to the appellant company, and on the same day the aircraft were registered by the company in the United States of America. As from midnight of Jan. 5/6, 1950, the government of the United Kingdom ceased to recognise the nationalist government and recognised the Central People's

Government (referred to hereafter as the communist government) as the de jure government of China. On Feb. 1, 1950, the communist government purported to register the aircraft in China.

To enable the ownership of the aircraft to be decided by a court of law, the Supreme Court of Hong Kong (Jurisdiction) Order in Council, 1950, was made and came into operation on May 10, 1950. Section 1 (1) provided that, in any action concerning the aircraft which might be instituted in the Supreme Court of Hong Kong after the order came into operation, it should not be a bar to the jurisdiction of the court that the action impleaded a foreign sovereign State. On May 19, 1950, the appellant company commenced an action for a declaration that the aircraft were its property. Service of the writ was attempted on the communist government and a sealed copy was delivered to the office of C.A.T.C. On Dec. 2, 1950, no appearance nor notice of intention to appear having been filed on behalf of C.A.T.C., the appellant company obtained leave to proceed ex parte. HOWE, C.J., held that the transaction between the nationalist government and the American partnership was not valid or enforceable in British courts, the grounds for his decision being (inter alia) (a) that the agreement of Dec. 12, 1949, was invalid as the nationalist government had acted, not in good faith as trustees, but for an improper purpose, and (b) that the subsequent recognition of the communist government as the de jure government of China had the retroactive effect of conferring on that government as from Oct. 1, 1949, the ownership of the assets of C.A.T.C. On an appeal by the appellant company, the Appeal Court of Hong Kong agreed with the first ground given by HOWE, C.J., for his decision, and dismissed the appeal.

Sir Hartley Shawcross, Q.C., and R. I. Threlfall for the appellant company. The respondent corporation did not appear.

Oct. 13. VISCOUNT SIMON: This appeal came before the Judicial Committee in most unusual circumstances. It concerns the ownership of forty aircraft lying on the government airfield at Kai Tak in Hong Kong. An Order in Council, cited as the Supreme Court of Hong Kong (Jurisdiction) Order in Council, 1950, made by his late Majesty in Council on May 10, 1950, which came into operation forthwith, after reciting that the ownership of these aircraft (part of seventy aircraft covered by the order) was in dispute and that it was just and desirable that the question of their ownership and of right to their possession should be decided by a court of law before they were permitted to leave Hong Kong, provided (inter alia) as follows:

"1. (1) In any action or other proceeding concerning the aircraft which may be instituted in the Supreme Court of Hong Kong after the date of the coming into operation of this order, it shall not be a bar to jurisdiction of the court that the action or other proceeding impleads a foreign sovereign State. (2) If a defendant in any such action or other proceedings fails to appear, or to put in a defence, or to take any other step in the action or other proceeding which he ought properly to take, the court shall, notwithstanding any rule enabling it to give judgment in default in such a case, inquire into the matter fully before giving judgment . . . 3. Any person claiming ownership or right to possession of any of the aircraft and aggrieved by the decision of the court in an action or other proceeding . . . may appeal therefrom to the Full Court and from thence (sic) to His Majesty in Council, and such an appeal shall lie notwithstanding such person has not taken part in previous proceedings . . . 5. (1) Until the governor is satisfied that ownership or right to possession of the aircraft have been finally determined the aircraft shall remain in Hong Kong and the governor may give such directions and take such steps whether by way of detention of the aircraft or otherwise, as shall appear to him necessary to prevent their removal and to ensure their maintenance and protection. (2) When the governor is

satisfied that ownership or right to possession has been finally determined he may give such directions and take such steps as shall appear to him necessary to give effect to [the] decision of the court. (3) If any person fails to comply with any direction given by the governor under this section he shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding H.K. \$5,000 or to imprisonment for a term not exceeding six months or to both such fine and such imprisonment . . . 6. . . .

(2) The aircraft referred to in this order are the aircraft mentioned in the preamble to this order together with any spare parts, machinery and equipment for use in relation to any of the aircraft, and the governor may in case of doubt give directions designating more particularly the aircraft spare parts machinery and equipment referred to."

On May 19, 1950, the present appellant, Civil Air Transport Incorporated, a corporation formed under the laws of the State of Delaware, U.S.A., issued a writ in the Supreme Court of Hong Kong against the present respondent, Central Air Transport Corporation (hereinafter called C.A.T.C.) claiming a declaration

" . . . that the forty aircraft now on the government airfield at Kai Tak in the colony of Hong Kong formerly the property of the defendants together with spare parts, machinery and equipment for use in relation thereto wherever situate within the jurisdiction of this honourable court are the property of the plaintiffs and/or that the plaintiffs have the sole right to possession thereof "

C.A.T.C. is not an incorporated body, but is an organ of the government of China.

Service of the writ was attempted on the Central People's Government of the People's Republic of China (which, for brevity, it will be convenient to call "the communist government", and which may be taken as claiming these aircraft as its property) and subsequently an order was made for service by leaving a sealed copy of the writ at the office of C.A.T.C. in Hong Kong. No appearance or notice of intention to appear was filed, and, were it not for the Order in Council

referred to above, the action might have proceeded no further (although the communist government and C.A.T.C. had notice of it), since it might be regarded as impleading a foreign sovereign State which enjoyed jurisdictional immunity. The Order in Council, however, expressly required the Hong Kong court to entertain the action, even in the absence of the defendant, inquiring "into the matter fully before giving judgment". The action was tried before SIR GERALD

HOWE, Chief Justice of Hong Kong, on Mar. 27 and 28, 1951. On May 21, 1951, he delivered a reserved judgment dismissing the claim and, in view of the importance of reaching finality in the matter as soon as possible, directed that any appeal from his decision should be brought within two months. Notice of appeal to the Full Court was given within this time and the appeal was heard by the Full Court (GOULD and SCHOLES, JJ.) on Aug. 21 and 22, 1951. On Dec. 28, 1951, the Full Court dismissed the appeal, and it is from this decision that appeal is now brought to Her Majesty in Council.

C.A.T.C. is a State-owned enterprise operating under Ministerial control which provided air-services (including communication to and from Hong Kong) by means of civil aircraft belonging to the government of China. This enterprise came into existence under the previous nationalist government of China [the National Government of the Republic of China] and continued as an organ of that government until it passed to the communist government which at a certain date, in the view of His Majesty's government in the United Kingdom, succeeded it. It is beyond dispute that the forty aircraft which are the subject of this case originally belonged to the nationalist government and formed part of the fleet of civil aircraft operated by C.A.T.C. as an organ of that government. By September, 1949, these forty aircraft were already lying on the Kai Tak airfield at Hong Kong, where they have remained up to the decision of this appeal. They

had been flown there by the orders of the nationalist government. That government, under increasing pressure from communist forces in China, had moved its headquarters in April, 1949, from Nanking, its capital, to Canton. Thence it moved to Chungking on Oct. 12, thence to Chengtu on Nov. 29, and thence to Taiwan (Formosa) on Dec. 9, 1949. By this last date nearly the whole of the mainland of China was under the control of communist forces acting for the rival de facto government, which, on Oct. 1, had proclaimed itself to be the government of China and had purported by decree to dismiss the ministers of the nationalist government and to appoint new ones. A

On Dec. 5, 1949, two citizens of the United States, Chennault and Willauer, in partnership, wrote a letter to the Minister of Communications in the nationalist government at Taiwan, offering to purchase from that government (inter alia) the physical assets of C.A.T.C. "a major part of which are now located in the colony of Hong Kong". The letter also included an offer to buy the nationalist government's interest in a Chinese company called the Chinese National Aviation Corporation, hereafter referred to as "C.N.A.C." (the owner of the other thirty aircraft referred to in the Order in Council), but this does not affect the point now immediately in issue. The consideration for the sale, so far as assets of C.A.T.C. were concerned, was to be \$1,500,000 in promissory notes, and the purchasers were to organise a corporation to which the assets would be transferred and whose promissory notes would be substituted for those of the purchasers. The terms of the letter are elaborate and had, evidently, already been the subject of negotiation and informal agreement between the partnership and the nationalist government, for the letter ends with signatures of acceptance by Liu Shao-Ting, Vice-Minister of Communications and concurrently chairman of board of directors of C.A.T.C., and also by the Deputy Secretary-General of Executive Yuan and concurrently chairman of board of directors of C.N.A.C. Any doubt whether these signatures amount to an acceptance by the nationalist government of the partnership's offer is set at rest by a letter of confirmation dated Dec. 12, 1949, signed for the nationalist government by the Premier, Yen Hsi-Shan, and notifying the partnership that the sale is final and complete on the terms agreed. One of these terms was that the assets sold would not be used for transport to or from the communist areas of China. On Dec. 19, 1949, the partnership of Chennault and Willauer by bill of sale transferred these assets, including these forty aeroplanes, to the appellant company. There cannot be any doubt that, if the bargain of Dec. 12 conferred on the partnership a good title to these specific goods, that title duly passed on Dec. 19 to the appellant company. B C D

It is now necessary to recount certain events which occurred before the alleged sale in December. On Nov. 9, 1949, the then president of C.A.T.C., one Mr. Chen, flew from Hong Kong to Peking and transferred his allegiance to the de facto communist government. About the same time the majority of C.A.T.C.'s employees in Hong Kong also defected from the nationalist government, though they remained in Hong Kong. In consequence of these occurrences the Chinese Civil Aeronautics Administration (a department of the nationalist government) on Nov. 13 suspended the registration certificates of all C.A.T.C.'s aircraft, the result of which would be that the authorities at Kai Tak aerodrome would not have permitted the machines with which this case is concerned to leave the ground. On the same day, one Ango Tai, an employee of C.A.T.C., who had remained loyal to the nationalist government, was appointed by that government to be acting president of C.A.T.C. with full power to deal with all its affairs. E F G H

On Nov. 16 Ango Tai, in exercise of this power, dismissed the defecting employees of C.A.T.C. and suspended the rest of C.A.T.C.'s Chinese staff in Hong Kong, and also appointed one Parker to be chief of security for C.A.T.C. at Hong Kong and to take all necessary measures permissible by law to ensure that the property of C.A.T.C. was not removed or injured by unauthorised persons. Parker was to engage special guards and to take other precautionary steps, such as roping

off the areas where the aeroplanes were located on Kai Tak aerodrome, provided that the Hong Kong officials, viz., the commissioner of police and the director of civil aviation, approved. Parker acted accordingly and by next day seventy-five special guards were appointed with police approval and duly posted. A few days later, however, for reasons not explained at the trial, the commissioner of police informed Parker that the guards at Kai Tak must be withdrawn, and without A Parker's consent certain of the defecting ex-employees took physical control of these assets. Thereupon Anglo Tai commenced proceedings in the name of C.A.T.C. in the Supreme Court of Hong Kong against the principal ex-employees who had thus acted and on Nov. 24 SIR LESLIE GIBSON, C.J., granted an interim injunction against them prohibiting this interference, and restraining them from entering or remaining on C.A.T.C.'s premises or removing or tampering with B C.A.T.C.'s property. Next day the defendants in that action obtained from GOULD, J., an interim injunction restraining C.A.T.C. from removing the property from the premises concerned. The injunction granted by SIR LESLIE GIBSON, C.J., was, after some difficulty, duly served—but it was disregarded and the physical control of the aeroplanes by these ex-employees for the time being continued.

C One other set of facts must be put on record, to complete the picture of the situation at about this date. On Nov. 12, 1949, Mr. Chow En-loi, acting as premier of the de facto communist government, issued the following document:

"To General Manager Chi Yi Liu, General Manager Cheuk Lin Chen, and all officers and workmen of China National Aviation Corporation and Central Air Transport Corporation. My hearty welcome to you who rise D gloriously to uphold the cause under the guidance of the two general managers Liu and Chen. I hereby accept in the name of the Cabinet of the People's Central Government of the Chinese People's Republic the telegraphic request made by you on 9.11.1949, declare the China National Aviation Corporation and the Central Air Transport Corporation to be the property of the Chinese People's Republic and exercise (the right of) control of the E said China National Aviation Corporation and the said Central Air Transport Corporation on behalf of the People's Central Government. I hereby appoint Chi Yi Liu to be general manager of the China National Aviation Corporation and Cheuk Lin Chen, general manager of the Central Air Transport Corporation. I hope all officers and workmen of the said two corporations remaining in Hong Kong and specially liberated areas will F hereafter unite in a body under the guidance of the two general managers Liu and Chen, heighten their precautions, shatter the secret plots of the reactionaries, bear the responsibility of protecting the assets and wait for further instructions (from me). The (cost of) living for all the officers and workmen shall be borne by the People's Central Government. I again hope that you will stick to the position of patriots, strive to make progress and exert yourselves in the cause of establishing the civil aviation enterprise of G New China. Dated Nov. 12, 1949. (Sgd. & Chopped) Chow En-loi."

Cheuk Lin Chen is the Mr. Chen who had gone to Peking three days before to put himself under the de facto government. Two months later, the following instructions were issued:

H "For the perusal of Chi Yi Liu, general manager, China National Aviation Corporation, Des Voeux Road, Central, and Cheuk Lin Chen, general manager, Central Air Transport Corporation, Queen's Road, Central. Hereby appoint Chi Yi Liu, general manager of China National Aviation Corporation, to undertake the responsibility of taking over all assets of China National Aviation Corporation in Hong Kong (and) appoint Cheuk Lin Chen, general manager of Central Air Transport Corporation, to undertake the responsibility of taking over all assets of the Central Air Transport Corporation in Hong Kong. Apart from sending order by mail (the said officers

concerned) are requested to act in accordance herewith and report as soon as possible. Chung Chik Ping, Head of Civil Aviation Bureau of the People's Central Government of the People's Republic of China. Jan. 13, 1950."

It is to be observed that the earlier of these documents, which was issued before the recognition de jure of the communist government, does not contain directions to "take over" the assets of C.A.T.C. in Hong Kong, but enjoins officers and men of C.A.T.C. to bear the responsibility of "protecting the assets" and to wait for further instructions. The later document, which was issued after de jure recognition, gives the further instructions to "take over all assets of [C.A.T.C.] in Hong Kong". If, however, the contract of Dec. 12, 1949, had the result of transferring the property in the forty aeroplanes effectively and finally to the partnership on that date, these aeroplanes would have ceased to be assets of C.A.T.C. thenceforward.

Before reaching a decision in the present action, the Hong Kong court required to know what government was recognised by His Majesty's government in the United Kingdom as the government of China, whether de jure or de facto, and between what dates, and this information was, as is usual (see *The Arantzazu Mendi* (1) ([1939] 1 All E.R. 721), obtained from the Foreign Office in London. A series of questions for this purpose had been propounded and answered before trial of the present action and their Lordships thought it well to address an additional question to the Foreign Office during the hearing of the appeal to clear up any possible ambiguity that remained. The information thus obtained (which is to be regarded as matter of which British courts take judicial notice) may be set out as follows:

(a) Referred to at the original hearing. *Questions.*

"1. Does His Majesty's government recognise the republican government of China (the nationalist government) as the de jure government of China? 2. If not when did His Majesty's government cease so to recognise that government? 3. Is the Central People's Government or any other government recognised as the de jure government and, if so, from what date? 4. Has the republican government ceased to be the de facto government (either at the time of moving seat of government to Formosa or otherwise) and, if so, from what date? 5. Is any other government recognised as the de facto government and, if so, from what date? 6. What is the status of Formosa? Is Formosa part of China or is it foreign territory vis-à-vis China?"

Replies to above by Foreign Office on Feb. 11, 1950.

"1. His Majesty's government in the United Kingdom do not recognise the nationalist government (republican government) as de jure government of the Republic of China. 2. Up to and including midnight of Jan. 5/6, 1950, His Majesty's government recognised the nationalist government as being the de jure government of the Republic of China and as from midnight January 5/6, 1950, His Majesty's government ceased to recognise the former nationalist government as being de jure government of the Republic of China. 3. As from midnight of Jan. 5/6, 1950, His Majesty's government recognised the Central People's Government as de jure government of the Republic of China. 4. His Majesty's government recognise that the nationalist government has ceased to be the de facto government of the Republic of China. It ceased to be the de facto government of different parts of the territory of the Republic of China as from the dates on which it ceased to be in effective control of those parts. 5. His Majesty's government do not recognise any government other than the Central People's Government of the People's Republic of China as the de facto government of the Republic of China. Attention, however, is invited to the second sentence

of the answer to question 4. 6. In 1943 Formosa was part of the territory of the Japanese Empire and His Majesty's government consider that Formosa is still de jure part of that territory. On Dec. 1, 1943, at Cairo, President Roosevelt, Generalissimo Chiang Kai-shek and Prime Minister Churchill declared that all the territories that Japan had stolen from the Chinese including Formosa should be restored to the Republic of China. On July 26, 1945, at Potsdam, the heads of the governments of the United States of America, the United Kingdom and the Republic of China reaffirmed: 'The terms of the Cairo Declaration shall be carried out.' On Oct. 25, 1945, as a result of an order issued on the basis of consultation and agreement between the Allied powers concerned, the Japanese forces in Formosa surrendered to Chiang Kai-shek. Thereupon, with the consent of the Allied powers, administration of Formosa was undertaken by the government of the Republic of China. At present, the actual administration of the island is by Wu Kou-Cheng, who has not, so far as His Majesty's government are aware, repudiated the superior authority of the nationalist government. I am advised that the effect of recognition by His Majesty's government as stated in answer to questions 1 to 5 and in particular its retroactive effect (if any) are questions for the court to decide in the light of those answers and of the evidence before it."

(It will be appreciated that reply No. 6 was given before the Treaty of Peace with Japan of December, 1951, when Japan renounced any claim to Formosa.)
(b) Referred to on appeal to Full Court. *Further question.*

"Does His Majesty's government recognise the People's Government as having become the de facto sovereign government or the government exercising effective control on Oct. 1, 1949, when it was proclaimed, or any other date between that date and Jan. 5, 1950, of the part of China of which the nationalist government had ceased to be the de facto government?"

Reply of Foreign Office on March 13, 1950.

"His Majesty's government in the United Kingdom recognise that in the period between Oct. 1, 1949 and Jan. 5/6, 1950, the Central People's Government was the de facto government of those parts of the territory of the Republic of China over which it had established effective control and if control was established after Oct. 1, 1949, as from dates when it so established control."

(c) *Additional question addressed by Judicial Committee to Foreign Office.*

"Referring to the above reply of the Foreign Office on Mar. 13, 1950, was there any declaration or other formal act by His Majesty's government in the United Kingdom on Oct. 1, 1949, or on any and what later date, recognising the Central People's Government as the de facto government, or is the reply to be understood as meaning that His Majesty's government in the United Kingdom, answering on Mar. 13, 1950, assert that their view was as stated in this answer but that there had been no declaration or other formal act of His Majesty's government on Oct. 1, 1949, or during the period mentioned which announced or implied de facto recognition?"

Reply of Foreign Office dated July 28, 1952.

"The only communication relevant to this question made by His Majesty's government to the Central People's Government during the period Oct. 1, 1949, to Jan. 6, 1950, was the following note, which was delivered by His Majesty's Consul-General in Peking on Oct. 5, 1949. 'His Majesty's government in the United Kingdom are carefully studying the situation resulting from the formation of the Central People's

Government. Friendly and mutually advantageous relations, both commercial and political have existed between Britain and China for many generations. It is hoped that these will continue in the future. His Majesty's government in the United Kingdom therefore suggest that, pending completion of their study of the situation, informal relations should be established between His Majesty's consular officers and the appropriate authorities in the territory under the control of the Central People's Government for the greater convenience of both governments and promotion of trade between the two countries.' This communication was not intended at the time when it was made either to constitute or to convey *de facto* recognition. Nevertheless the answer made by the Foreign Office dated March 13, 1950, to the questions addressed to it by the Hong Kong courts and quoted in your letter is to be understood as meaning that His Majesty's government in the United Kingdom answering on that date asserted that their view was as stated in that answer."

Her Majesty's government in the United Kingdom is the sovereign government of Hong Kong and the effect of the above replies is to establish that, at any rate in the courts of Hong Kong and in the present appeal, the former nationalist government must be regarded as the sole *de jure* sovereign government of China up to midnight of January 5/6, 1950, that the present communist government was not the *de jure* government until that time, and that, while the Foreign Office, in its answer of March 13, 1950, acknowledged that from Oct. 1, 1949, onwards the *de facto* government of those parts of China in which the nationalist government had ceased to be in effective control was the communist government, His Majesty's government had not announced or communicated its recognition of the communist government as the *de facto* government over any part of China before it recognised the communist government as the *de jure* government of China on Jan. 5/6, 1950.

The argument of the appellants before the trial judge, SIR GERALD HOWE, C.J., was conveniently summarised by him as follows: (a) C.A.T.C. was wholly owned and controlled by the nationalist government and there was a valid sale on Dec. 12, 1949, by that government to the partnership, a condition being that the partnership should organise a corporation to which the physical assets were to be transferred; (b) the partnership duly transferred the assets by a sale valid in American law to the appellant; (c) a change of government is by succession and not by title paramount, and, accordingly, the nationalist government was empowered to enter into this transaction, being still recognised as the *de jure* government by His Majesty's government, and the doctrine of retroactivity did not apply. The trial judge rejected this argument on two main grounds, which call for the most careful examination.

The first ground (which was also adopted by both the judges of the Full Court) is that the situation of the nationalist government on Dec. 12, 1949, was such that it could not validly enter into such a sale, and that the terms of the purported sale were not such as the government could lawfully impose. In order fully to appreciate the learned judge's view on this point, it is necessary to quote two passages from his judgment:

"The position on Dec. 12, 1949, when this contract was made, was that the nationalist government no longer exercised any effective control over the mainland of China; that government was established outside Chinese territory; the aircraft were in Hong Kong and the members of the staff and employees had attorned to the Central People's Government. Subsequently the courts of Hong Kong held, and, with respect, in my opinion rightly held, that these aircraft, were and had been in the possession and control of the Central People's Government. I will refer here to certain extracts from the document of sale: '(D) The government is unwilling to sell or

otherwise dispose of said physical assets or stock except upon the most binding assurances that after such sale or disposition they will not be used in any way for the benefit of or for the carriage of passengers or goods within, to or from the communist areas of China; and (6) Chennault and Willauer agree that the said assets shall not be used, directly or indirectly for the benefit of or for the carriage of passengers or goods within, to or from the communist areas of China.' By normal diplomatic usage, and, indeed, to be inferred from the terms of the contract quoted above, the then nationalist government must have been fully alive to the probability of the withdrawal of recognition by His Majesty's government in the near future and in fact this took place as from midnight Jan. 5/6, 1950, and it is evident that this transaction was a device entered into with full knowledge by both parties, by which it was hoped that the aircraft might be prevented from passing to the Central People's Government on its recognition de jure for the references to 'communist areas of China' must relate to the areas controlled by that government, recognised as the de facto government of those areas. It is a transaction inimical to the Central People's Government and indeed, as the aircraft were used for a public purpose within and without China, inimical to the interests of the Chinese people . . . In the transaction now before this court, I have no hesitation in reaching the conclusion that not only was it one designed to embarrass the Central People's Government, but it was against the interests of the Chinese people and that it was a transaction incompatible with that trusteeship which every government must assume. The loss of these aircraft in a country so large as China and with poor communications would be severe. The majority of the staff and employees had already attorned to the Central People's Government, and the aircraft were only at any time owned by the nationalist government solely in its capacity of trustee. I cannot hold that at the time of the transaction the nationalist government may properly be said to have sold these aircraft for the purposes of fighting to regain its former territory. In my opinion, this was an act of members of the nationalist government done, not in good faith as trustees, but for an alien and improper purpose."

With great respect to SIR GERALD HOWE, C.J., their Lordships are unable to accept this view of the facts and the inferences drawn from them as leading to the conclusions stated, or to regard them as justifying a denial of the appellant's title. For the purpose of judging the correctness of this first ground (the second ground will be considered later) the validity of the transaction must be judged as at the date when it was entered into, and not in the light of subsequent events, which might have turned out differently. On Dec. 12, 1949, the nationalist government was the de jure government of China, of which C.A.T.C. was an organ, and, therefore, the property in these aeroplanes was in the nationalist government. The machines had been moved to Hong Kong two months before and it was open to their owners to sell them, and thereby to pass the property in them to the purchasers. No doubt, the motive for making the actual sale was to secure that, if they were flown to an area where the communists were able to capture them, they should not be added to communist resources, and the conditions of the contract make this abundantly clear. The nationalist government was in retreat and was by this time all but driven out of China, but it was still resisting its opponents and, in their Lordships' view, the impeached sale was no more "a device" adopted for an "alien and improper purpose" than would have been the blowing-up of a store of ammunition in an arsenal in China from which nationalist forces were on the point of being driven out. Whether the nationalist government on Dec. 12, 1950, were "alive to the probability of the withdrawal of recognition by His Majesty's government in the near future" is, at best, a matter of speculation. Other foreign governments did not take this course and there is no evidence of any warning by His Majesty's

government in the United Kingdom that it was likely shortly so to act. The reference to "normal diplomatic usage" presumably points to the undoubted fact that, by international law, an established and recognised government may be so completely overthrown by insurgent forces which claim to supplant it that the recognition hitherto afforded to it by foreign countries may properly be withdrawn—but when and by whom only the future can show. A government's policy in buying or selling chattels which it owns is not subject to the review of foreign tribunals and whether its action in this regard is against the interests of those whom it is supposed to serve is a political question. British courts cannot take it on themselves to pronounce whether a foreign government, recognised by Her Majesty's government, is acting contrary to the interests of its people, and a government is certainly not a trustee in these matters in any legal sense. The right in municipal law to follow property which is subject to a trust into the hands of third parties cannot have any application here.

It appears to their Lordships that the view under this head adopted by the trial judge, and by the Full Court, really is that on Dec. 12, 1949, the nationalist government knew that it was on the point of being succeeded by a communist government, which would be recognised as the *de jure* government of China, and that, without any regard to public interests or to any injury it was doing to the Chinese people, it got rid of these aeroplanes out of spite, merely to embarrass its inevitable successor. Such a view involves assumptions which their Lordships are not prepared to make. The trial judge claimed to found himself on a sentence in the judgment of DENNING, L.J. ([1950] 2 All E.R. 373) in *Boguslawski v. Gdynia Ameryka Linie* (2). That sentence was not necessary to the actual decision, and it was the decision which was confirmed by the House of Lords. The sentence occurs in a passage where DENNING, L.J., was emphasising the paramount importance of the principle of continuity, i.e., of a succeeding government accepting what has been done by its predecessor, and, if the qualification introduced by the lord justice were to be read as authorising a court to treat as a nullity political decisions and actions of a former government which have resulted in the transfer of property to third parties in circumstances like the present, their Lordships would respectfully disagree. At the same time, their Lordships must not be understood to reject the possibility of our courts refusing, in a conceivable case, to recognise the validity of the disposal of State property by a government on the eve of its fall, e.g., by a despot, who knows that previous recognition is just being withdrawn, where it is clear that his purpose was to abscond with the proceeds, or to make away with State assets for some private purpose.

The second ground on which the decision appealed against was based in the Hong Kong courts (GOULD, J., dissenting) depends on the alleged retroactive effect of the recognition by His Majesty's government in the United Kingdom of the communist government as the *de jure* government of China as from Jan. 5/6, 1950. This argument assumes that up to Dec. 12, 1949, the aeroplanes were the disposable property of the nationalist government and that it validly transferred them as specific and ascertained goods by the contract of that date to the appellant's predecessors in title. On this assumption, the appeal can fail only if the subsequent recognition *de jure* of the communist government annulled the passing of the property. Subsequent recognition *de jure* of a new government as the result of successful insurrection can, in certain cases, annul a sale of goods by a previous government. If the previous government sells goods which belong to it but are situated in territory effectively occupied at the time by insurgent forces acting on behalf of what is already a *de facto* new government, the sale may be valid if the insurgents are afterwards defeated and possession of the goods is regained by the old government. But if the old government never regains the goods and the *de facto* new government becomes recognised by Her Majesty's government as the *de jure* government, purchasers

from the old government will not be held in Her Majesty's courts to have a good title after that recognition.

Primarily, at any rate, retroactivity of recognition operates to validate acts of a de facto government which has subsequently become the new de jure government, and not to invalidate acts of the previous de jure government. It is not necessary to discuss ultimate results in the hypothetical case when, before the change in recognition, both governments purport to deal with the same goods.

A The crucial question under this branch of the analysis in the present appeal is whether anything that happened in Hong Kong to these aeroplanes at the instigation of or on behalf of the de facto communist government before the change of recognition on Jan. 5/6, 1950, is retrospectively validated, so that the title conferred by the contract of Dec. 12, 1949, is extinguished. It might be

B too wide a proposition to say that the retroactive effect of de jure recognition must in all cases be limited to acts done in territory of the government so recognised, for the case of a ship of the former government taken possession of by insurgents on the high seas and brought into a port which is under the control of the de facto government would have to be considered: see *Banco de Bilbao v. Sancha* (3). But the actual question now to be answered concerns chattels

C in the British colony of Hong Kong, which chattels at the time of the sale belonged to the nationalist government. Whatever the degree of physical control over these chattels maintained by the defecting ex-employees, this control was in defiance of the injunction granted by the Supreme Court of Hong Kong on Nov. 24, 1949. Moreover, if these persons could be regarded as acting

D on behalf of the de facto communist government, their action would be a direct infringement of the Representation of Foreign Powers (Control) Ordinance of Nov. 4, 1949, and would be a criminal offence by the law of Hong Kong. Section 3 of this ordinance provides:

"No person shall function on behalf of any foreign power without the consent of the governor . . ."

E By s. 2 "foreign power" is defined to include "(a) the government whether legal or de facto of any foreign State". The governor gave no consent. In such circumstances the action of those who illegally took control of these aeroplanes cannot give ground for the principle of retroactivity. GOULD, J., pointed out that LORD WRIGHT's proposition ([1938] 1 All E.R. 731) in *Compania Napiera Vascongado v. Cristina S.S.* (4), that it did not matter by what mode

F possession was obtained

"... was in relation to a claim of sovereign immunity arising from the independent status in international law of the foreign sovereign. In the present case no such question can be considered and the court must make a declaration of legal rights. If those rights are dependent to any extent on possession of the subject-matter of the dispute, I think that acquisition of possession by a wrongful act cannot confer upon the party so acquiring it any benefit which he did not previously enjoy. In other words, the question must be settled with reference to the right to possession . . . My opinion, therefore, upon this aspect of the case is that the Central People's Government could not show any superior title or right to possession; nor can it rely upon any rights arising out of actual possession acquired in the way it was; therefore, it had no possession which could bring into effect the doctrine of retroactivity. That doctrine, I think, relates to the acts of a government which has already acquired jurisdiction through possession and cannot include the actual act of taking possession if that act be wrongful. On this point I hold, therefore, that the ordinary principle of continuity was not displaced by any consideration of retroactivity and that it follows that the nationalist government was entitled to possession of and had jurisdiction over the aeroplanes."

Their Lordships agree with the argument and conclusions of GOULD, J., on this point.

The learned trial judge attached importance to the announcement of Oct. 1, 1949, the authors of which proclaimed themselves to be the government of China, and to the decree issued on that date purporting in the name of that government to dismiss the ministers of the nationalist government. Their Lordships cannot accept the view that this is any reason for saying "that as from Oct. 1, 1949, these aircraft were owned by the Central People's Government". They adopt on this point the opinion of GOULD, J., who observed:

"The purported dismissal on Oct. 1, 1949, of the ministers of the nationalist government . . . can only be deemed effective within the territory and as regards assets from time to time in the control of the people's government. Elsewhere, and as long as the nationalist government retained *de jure* recognition, such a decree could have no effect."

For the above reasons their Lordships have reached the conclusion that the appeal should be allowed. They have already humbly advised Her Majesty, as announced on July 28 last, to this effect and the Order in Council allowing the appeal was made next day. No order is made as to costs.

Appeal allowed.

Solicitors: *Markby, Stewart & Wadesons* (for the appellant company).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

PRACTICE NOTE.

GELBERG *v.* VIVIAN.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.), October 20, 1952.]

Court of Appeal—Appeal—Notice of appeal—Leave to amend—R.S.C., Ord. 58, r. 2.

Unless the other side objects, no special application to the Court of Appeal for leave to amend a notice of appeal is necessary.

J. D. May for the appellant.

N. R. King for the respondent.

SIR RAYMOND EVERSLED, M.R.: If a party desires to amend his notice of appeal, and gives notice to the other side and the other side does not object, then, so long as there is no question what exactly is the proposed amendment, it is unnecessary to make any application for leave to amend. The court can be informed when the appeal comes on for hearing.

The proper procedure is for the party desiring to amend to give notice to the other side, stating precisely the nature of the proposed amendment, and, if it is not objected to, then no application to the court is necessary.

DENNING, L.J.: I agree.

ROMER, L.J.: I agree.

Solicitors: *F. J. Stewart* (for the appellant); *G. Howard & Co.* (for the respondent).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

MANWARING v. BILLINGTON.

[COURT OF APPEAL (Singleton, Birkett and Morris, L.J.J.), October 7, 8, 9, 1952.]

Statutory Duty—Delegation to employee—What constitutes delegation—Building (Safety, Health and Welfare) Regulations (S.I., 1948, No. 1145), reg. 29 (3) (4).

The plaintiff was employed by the defendant in building operations.

He was instructed by the defendant not to ascend any ladder without putting sacking under it to prevent its slipping and tying it at the top. The plaintiff erected a ladder with the assistance of another workman, who had been similarly instructed, and ascended it without placing sacking or tying it. The ladder slipped and he sustained injuries. It was admitted that there was a breach of the statutory duty imposed by paras. 3 and 4 of reg. 29 of the Building (Safety, Health and Welfare) Regulations, 1948, that every ladder should have a level and firm footing and be securely fixed, but the defendant contended, inter alia, that he had delegated that duty to the plaintiff who was at fault in not carrying it out.

Per curiam: a mere instruction to a workman as to the method of carrying out his duties did not constitute the delegation of a statutory duty relating to that matter; for there to be a delegation of a statutory duty it must be made clear that it is such a duty that is being delegated and that it is not a mere instruction that is being given; in the present case, although there had been a breach of statutory duty, on the evidence the sole cause of the accident was the negligence of the plaintiff; and, accordingly, the defendant was not liable in damages.

FOR THE BUILDING (SAFETY, HEALTH AND WELFARE) REGULATIONS, 1948, reg. 29 (3) (4), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 8, p. 222.

Cases referred to:

- (1) *Beal v. Gomme (E.), Ltd.*, (1949), 65 T.L.R. 543; 2nd Digest Supp.
- (2) *Vyner v. Waldenberg Bros., Ltd.*, [1945] 2 All E.R. 547; [1946] K.B. 50; 115 L.J.K.B. 119; 173 L.T. 330; 110 J.P. 76; 2nd Digest Supp.
- (3) *Groves v. Wimborne (Lord)*, [1898] 2 Q.B. 402; 67 L.J.Q.B. 862; 79 L.T. 284; 42 Digest 759, 1858.
- (4) *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; [1940] A.C. 152; 108 L.J.K.B. 779; 161 L.T. 374; 2nd Digest Supp.
- (5) *Stapley v. Gypsum Mines, Ltd.*, [1952] 1 All E.R. 1092; [1952] 2 Q.B. 575.
- (6) *Smith v. Baveystock & Co., Ltd.*, [1945] 1 All E.R. 278; *affd.* C.A., [1945] 1 All E.R. 531; 2nd Digest Supp.

APPEAL by the plaintiff from an order of McNAIR, J., dated Apr. 16, 1952, dismissing his claim for damages for personal injuries alleged to have been sustained through the defendant's breach of statutory duty.

Wooll, Q.C., and Pappworth for the plaintiff.

Brabin, Q.C., and Nicklin for the defendant.

SINGLETON, L.J., stated the facts as set out in the headnote and said, with regard to the instructions given by the defendant to the plaintiff: The defendant said:

"Well, on the commencement of this particular job I told them that because of the conditions we were working under there, they must not in any circumstances go up a ladder without there was something underneath the foot to stop it slipping, and to see that the ladders were tied at the top before they made any attempt to go up them at all."

He added that the plaintiff was told that along with the other men, and he said later that he told him on the day that he commenced work. Another answer given by the defendant in evidence was:

"Well, all I can say is that he had been told like all the others, both by myself and the foreman, which, in my opinion, was enough."

[HIS LORDSHIP continued:] It is said that the plaintiff is entitled to succeed in his action, wholly or in part, because there was a breach by the defendant of reg. 29 (3) and (4) of the Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145). The duty of complying with reg. 29 is on the employer, though it is also, under reg. 4, the duty of every person employed to comply with the regulation. The judgment of McNAIR, J., is attacked by counsel for the plaintiff in more ways than one. It is pointed out with force that the learned judge based his judgment very largely on the thesis that there had been a delegation of the performance of the statutory duty by the defendant to the plaintiff, and counsel submitted that there was nothing amounting to delegation, and that that part of the judgment clearly could not stand.

If I may say so, I agree to a very large extent with the submission of counsel for the plaintiff on this question of delegation. I do not think that there was delegation, in my understanding of the word. It is not a case in which the employer says to the workman: "Now, it is my duty under a statute to do such-and-such a thing. I am delegating that duty to you." There is nothing here in the way of delegation. It is rather, I would think, a conversation in which the workman is reminded of his duties under the regulations, and it is pointed out to him that the employer cannot do everything himself, and so he (the workman) must see that certain things are done. Having to use a ladder more than ten feet long, he must see that it is guarded at the top and at the foot in the way provided by the regulations. I do not regard that as delegation, and, although I say it with respect to others who have much more experience than I have, I am inclined to think that sometimes there has been a tendency to treat the question of delegation a little lightly, which might decrease the beneficial effect of the Factories Acts and the regulations made under them. In one of the authorities to which we were referred it was said that delegation is more than employment, and there must be something definite in regard to it, a definite delegation. There is nothing such as that here, in my view. In one of the old cases the words used were that the plaintiff was entrusted with certain work. That is what happened in the present case. The plaintiff was employed by the defendant. He was told what was expected of him in regard to this kind of thing. In other words, he was entrusted with it. I do not think there was a delegation to him of the performance of the statutory duty, and in that regard I agree with counsel's submission. [HIS LORDSHIP dealt with the finding of McNAIR, J. (with which he agreed), that the cause of the accident was attributable solely to the plaintiff, and dismissed the appeal on that ground.]

BIRKETT, L.J.: I agree that this appeal should be dismissed. It is plain that one of the main matters which affected the learned judge's mind was the question of delegation, and it is equally plain that he formed the view that there had been delegation. He had in mind that in an appropriate case the employer could escape his civil liability by saying that he had properly delegated to the person employed the task of complying with the statutory requirements. The learned judge said:

"How does the matter stand on the evidence? The evidence on this point really consists in this case of three matters. First, the defendant, as I have found, gave definite instructions to the plaintiff, among other employees, to lash and secure ladders. Secondly, the defendant establishes, as I find, that he provided the necessary lashings and himself placed the lashings and sacking at the foot of the ladder ready for the men to use. Finally, he says categorically in his evidence—and repeated it on more than one occasion—that he left it to Wood and Manwaring as experienced men to see that their ladder was lashed at the top and was resting on the matting. Now, if it in law be possible for the delegation of this duty of lashing ladders to be carried out, it seems to me to be difficult to find more

concrete evidence of delegation than those three matters which I have mentioned."

With great respect to the learned judge, I take the view that has been expressed by my Lord, that in this case there is no proved delegation.

I would first like to cite the judgment of *EVERSHED, L.J.*, which he delivered in *Beal v. E. Gomme, Ltd.* (1) (65 T.L.R. 547) and in which he said:

A "But since the later case of *Vyner v. Waldenberg Bros., Ltd.* (2) it is, in my judgment, made plain that the onus of establishing delegation does lie, and lies heavily, on the employer."

A little later he said, dealing with the special facts of that case (*ibid.*):

B "It seems to me that the proper inference in this case, bearing in mind where the onus lies, is that the defendants have failed to establish delegation."

Then comes a most important passage (*ibid.*):

C "I have no doubt that it is the fact, that, since the plaintiff and his colleagues were experienced and competent, and since they understood perfectly the working of the machine and the purpose and means of adjusting the guards, the defendants assumed that the workmen would so adjust the guards as to make the work free from unnecessary risk; but, as I read the evidence, they made that assumption believing that the men would act with ordinary prudence and regard for their own safety as competent and thinking human beings. I can find no trace of any evidence which would justify a conclusion that the men did that in an appreciation that a duty imposed by statute had been delegated to them so to do . . ."

D While many matters, I think, still remain obscure on the doctrine of delegation, I think it ought to be borne in mind at all times that there is a very great distinction between the instructions by an employer to a workman as to how a particular task is to be performed and the delegation of a statutory duty imposed on the employer. The regulation in this case which is material is reg. 29 (3) and (4) of the Building (Safety, Health and Welfare) Regulations, 1948. Regulation 29 (3) provides:

"Ladders or step-ladders shall not stand on loose bricks or other loose packing, but shall have a level and firm footing."

E By reg. 29 (4):

F "Every ladder shall so far as practicable be securely fixed so that it can move neither from its top nor from its bottom points of rest. If it cannot be so securely fixed it shall where practicable be securely fixed at the base or if such fixing at the base is impracticable a person shall be stationed at the base of the ladder to prevent slipping."

G Counsel for the defendant asked his client: "Q.—Did you say anything to the plaintiff when you first employed him on ladders?" The defendant replied:

H "A.—I said 'Now, when you are here be careful because these floors are very slippery. Be sure your ladder is tight at the top and something is at the foot of the ladder before you attempt to go up it'. He [the plaintiff] was also warned to put something under the ladder and someone to stay at the bottom while someone, his mate or somebody else, went up the ladder to secure it at the top. All the men employed on that job were told the same."

Later, in cross-examination by counsel for the plaintiff, the defendant said:

"Well, all I can say is that he had been told like all the others, both by myself and the foreman, which, in my opinion, was enough."

Then, a little later:

"Q.—They were all told at the same time? A.—Manwaring was told when he first started for me. Q.—I think he had only been with you before the accident for about a fortnight, had he not? A.—Yes, Q.—Was he in time for this lecture? A.—I told him on the morning he started."

The learned judge has not made any express finding whether the employer did refer to the Building Regulations. It was a matter of great contest whether these words were, in fact, said, and also whether there was any reference to the Building Regulations. It was admitted that the regulations were not posted, and when one compares the language which the defendant used with the terms of the statutory duty imposed on an employer, I would be inclined to take the view which my Lord has taken, and which seems to me to be implicit in the observations of **EVERSHED, L.J.**, which I have quoted, that there was here no clear evidence of a delegation of the statutory duty, but there was an instruction common to all the men employed by the defendant of the necessity of taking care in these matters when they were undertaking work of the nature in question. My own view is that for there to be a delegation of a statutory duty it must be made clear that it is a statutory duty that is being delegated, and that what is being said is not mere instruction common to all workmen as to how the workmen should carry out the work. [His Lordship examined the question of causation, and agreed with **SINGLETON, L.J.**, that the appeal should be dismissed.]

MORRIS, L.J., in a concurring judgment, said that **McNAIR, J.**, had come to the conclusion that the cause of the accident should be attributed solely to the plaintiff. He held that the plaintiff was instructed to lash and secure the ladders, but that, though supplied with a sufficiency of lashings and sacking, he failed to carry out his instructions, and, with appreciation of his own omissions, he proceeded to climb the ladder, which then slipped. He (His Lordship) saw no reason to differ from the findings of the learned judge that the injuries of the plaintiff were caused solely by the plaintiff himself. [His Lordship continued:] The mere fact that the employer must be held to have been in breach of the Building Regulations would not in this case by itself warrant our concluding that the judge's holding was wrong. Particularly is this so when it is remembered that the employer only became in breach of the regulations because of the omissions of the plaintiff to perform duties which were properly and reasonably assigned to him. This employer could not be expected personally to fix every ladder used by his men during painting operations, nor personally to supervise every operation in the course of which the use of ladders was necessary. If he gave clear and adequate directions as to lashing and securing ladders, he was doing what a reasonable employer was entitled to do. I would deem it incongruous and irrational if, on the facts as found by the learned judge, the plaintiff could, in effect, successfully say to his employer: "Because of my disregard of your reasonable instructions I have brought about the position that you are in breach of your statutory obligations, and so I claim damages from you because of such breach."

Appeal dismissed.

Solicitors: *Mawby, Barrie & Letts*, agents for *Raymond A. Hipkins*, Southport (for the plaintiff); *Herbert J. Davis, Berthen & Munro*, Liverpool, and *Fred Hollis*, Manchester and London (for the defendant).

[Reported by **C. N. BEATTIE, Esq.**, Barrister-at-Law.]

Re JOHN SMITH'S TADCASTER BREWERY CO., LTD. THE
COMPANY v. GRESHAM LIFE ASSURANCE SOCIETY, LTD.
AND ANOTHER.

[CHANCERY DIVISION (Danckwerts, J.), October 9, 1952.]

*Company—Winding-up—Rights of preference stockholders—Surplus assets—
Articles silent as to distribution.*

The articles of association of a company limited by shares provided by art. 47: "(A) The holders of the preference stock in the capital of the company shall have the right to receive a fixed cumulative preferential dividend at the rate of five per cent. per annum on the amount of stock held by them respectively in priority to the holders of any other class of stock or shares in the company. (B) The preference stock shall on a winding-up of the company rank for repayment of capital, together with all arrears of the fixed preferential dividend thereon, whether declared or earned or not, up to the commencement of the winding-up in priority to all other stock or shares in the capital of the company. (C) The holders of the ordinary shares in the capital of the company shall be entitled between them to the surplus profits of the company which it shall from time to time be determined to distribute by way of dividend and in a winding-up shall rank for repayment of capital after payment off of the capital and arrears of dividend represented by the said preference stock." There was no other provision for the distribution of assets as between the preference stockholders and the holders of ordinary shares on a winding-up of the company.

HELD: the onus was on the preference stockholders to show that their rights were not exhaustively defined in the articles and to prove that on a winding-up they were entitled to share in the surplus assets after the ordinary capital had been repaid; they had not discharged that onus; and, therefore, they were not entitled to participate in the surplus assets.

Scottish Insurance Corpn., Ltd. v. Wilsons & Clyde Coal Co., Ltd. ([1949] 1 All E.R. 1068) and *Re Isle of Thanet Electricity Supply Co., Ltd.* ([1949] 2 All E.R. 1060), applied.

Company—Alteration of members' rights—Proposal to increase capital—Increase of ordinary share capital "affecting" rights of preference stockholders.

Article 54 of the articles of association of a company limited by shares provided: "Subject to the provisions of [the Companies Act, 1929, s. 61, later replaced by the Companies Act, 1948, s. 72] all or any of the rights or privileges attached to any class of shares forming part of the capital for the time being of the company may be affected, modified, dealt with or abrogated in any manner with the sanction of an extraordinary resolution passed at a separate meeting of the members of that class." The directors of the company proposed to increase the capital of the company by the creation of two hundred and eighty thousand ordinary shares of £1 each, to capitalise an amount standing to the credit of the company's reserve account, and to apply the same in paying up the new ordinary shares which would then be distributed among ordinary shareholders credited as fully paid.

HELD: the transactions proposed by the directors would affect the rights of the preference stockholders, and, therefore, could only be carried out with their sanction expressed in an extraordinary resolution as provided in art. 54.

Dicta of LORD GREENE, M.R., and of VAISEY, J., in *Greenhalgh v. Arderne Cinemas, Ltd.* ([1946] 1 All E.R. 518, [1945] 2 All E.R. 723), applied.

AS TO RIGHTS OF PREFERENCE SHAREHOLDERS, see HALSBURY, 1949 Edn., Vol. 5, p. 156, para. 282; and FOR CASES, see DIGEST, Vol. 10, pp. 1002-1009, Nos. 6961-6993.

Cases referred to:

- (1) *Birch v. Cropper. Re Bridgewater Navigation Co., Ltd.*, (1889), 14 App. Cas. 525; 59 L.J.Ch. 122; 61 L.T. 621; 10 Digest 1003, 6965.
- (2) *Scottish Insurance Corp., Ltd. v. Wilsons & Clyde Coal Co., Ltd.*, [1949] 1 All E.R. 1068; [1949] A.C. 462; [1949] L.J.R. 1190; 2nd Digest Supp.
- (3) *Re Metcalfe (William) & Sons, Ltd.*, [1933] Ch. 142; 102 L.J.Ch. 121; 148 L.T. 82; Digest Supp.
- (4) *Re Isle of Thanet Electricity Supply Co., Ltd.*, [1949] 2 All E.R. 1060; [1950] Ch. 161; 2nd Digest Supp.
- (5) *National Trust for Places of Historic Interest or Natural Beauty v. Midlands Electricity Board*, [1952] 1 All E.R. 298; [1952] Ch. 380.
- (6) *Re Mackenzie & Co., Ltd.*, [1916] 2 Ch. 450; 85 L.J.Ch. 804; 115 L.T. 440; 9 Digest 563, 3734.
- (7) *Greenhalgh v. Arderne Cinemas, Ltd.*, [1945] 2 All E.R. 719; *affd.* C.A., [1946] 1 All E.R. 512; 2nd Digest Supp.

ADJOURNED SUMMONS to determine (i) whether, on the true construction of the memorandum and articles of association of John Smith's Tadcaster Brewery Co., Ltd., in the event of the winding-up of the company the surplus assets remaining after payment and discharge of all its liabilities and the costs of the winding-up and the repayment of the capital of the preference stock together with all arrears of the fixed preferential dividend thereon whether earned or declared or not up to the commencement of the winding-up and the capital paid up on the ordinary shares should be distributed (a) among the holders of the ordinary shares *pari passu* in proportion to the number of ordinary shares held by them respectively at the commencement of the winding-up or (b) among the holders of the preference stock and the ordinary shares *pari passu* in proportion to the nominal amount of the preference stock and the ordinary shares held by them at the commencement of the winding-up or (c) in any other, and if so what, manner; and (ii) whether, on the true construction of the memorandum and articles of association, the company in general meeting could, without the sanction of an extraordinary resolution passed at a separate meeting of the holders of the preference stock held in accordance with art. 54, increase its capital by the creation of new ordinary shares, and, under art. 115, capitalise profits available for the purpose and apply them in paying up in full new ordinary shares for issue to the holders of the ordinary shares in accordance with the said art. 115 or not. The provisions of the relevant articles in the articles of association of the company are set out in the judgment.

K. W. Mackinnon for the company.

Raymond Walton for the first defendant, a holder of preference stock.

M. M. Wheeler for the second defendant, a holder of ordinary shares.

DANCKWERTS, J.: The question which I have to decide affects the rights of the holders of preference stock in the capital of a company known as John Smith's Tadcaster Brewery Co., Ltd., to share in the surplus of assets on a winding-up of the company after all preferential dividends have been paid and the amount of the nominal capital of the shares or stock (both preference stock and ordinary shares) has been repaid. The company was formed on Aug. 8, 1892, and the original preference shares (as they then were, and not stock) were issued on Mar. 21, 1895. The capital has been increased from time to time since then, but in substance, as it appears to me, there has been no effective change in the rights of the preference shares or the rights of the preference stock into which the preference shares were converted.

The last articles of association of the company were adopted on July 23, 1943. In substance they provided in exactly the same way as did the earlier articles

of association of the company in respect of the matters which are relevant. Article 47 (which is the most important one) provides:

"The following provisions shall have effect: (A) The holders of the preference stock in the capital of the company shall have the right to receive a fixed cumulative preferential dividend at the rate of five per cent. per annum on the amount of stock held by them respectively in priority to the holders of any other class of stock or shares in the company. (B) The preference stock shall on a winding-up of the company rank for repayment of capital, together with all arrears of the fixed preferential dividend thereon, whether declared or earned or not, up to the commencement of the winding-up in priority to all other stock or shares in the capital of the company. (C) The holders of the ordinary shares in the capital of the company shall be entitled between them to the surplus profits of the company which it shall from time to time be determined to distribute by way of dividend and in a winding-up shall rank for repayment of capital after payment off of the capital and arrears of dividend represented by the said preference stock. (D) The right of the holders of the preference stock to receive notice of or attend or vote at general meetings of the company shall be restricted in manner hereinafter mentioned."

It is to be noticed that that article provides, as it appears to me, completely for the division of profits, and it also provides for the repayment of the capital of the preference stock in priority to the repayment of the capital of the ordinary shares of the company. Paragraph (C) of the article (which deals with the rights of ordinary shareholders) provides that the surplus profits of the company shall go to the ordinary shareholders, and, as regards a winding-up, it simply provides that the ordinary shares shall rank for repayment of capital after payment off of the capital and arrears of dividend represented by the preference stock. That introduces nothing new as regards the repayment of capital. As has been pointed out, it is merely the corollary of the provisions for the repayment of the capital of the preference stockholders in para. (B) of the same article.

There are a few other articles which should be mentioned. Article 48 confers on the company power to increase its capital. Article 54 deals with the modification of rights and provides:

"Subject to the provisions of s. 61 of the [Companies Act, 1929] all or any of the rights or privileges attached to any class of shares forming part of the capital for the time being of the company may be affected, modified, dealt with or abrogated in any manner with the sanction of an extraordinary resolution passed at a separate meeting of the members of that class."

Article 69 provides that every member personally present shall have one vote and on a poll (subject as thereafter provided) every member shall have one vote for every share held by him. It further provides:

"The holders of the preference stock shall not as such be entitled to receive notice of or to attend or vote at any general meeting of the company unless (A) the fixed cumulative preferential dividend on the preference stock is in arrears or unpaid for six months prior to the date of the meeting; or (B) a resolution is proposed to be passed at such meeting for the sale of the company's undertaking, or for the winding-up or reduction of the capital of the company, or for altering the regulations of the company so as directly to interfere with or affect the rights and privileges of the said holders. For the purposes of this article the said preferential dividend shall be deemed to accrue due and be payable half-yearly on Apr. 1 and Oct. 1."

By art. 115, the company is given power to capitalise reserves:

"The company in general meeting may at any time and from time to time pass a resolution that any sum not required for the payment or provision of any fixed preferential dividend, and (A) for the time being standing

to the credit of any reserve fund or reserve account of the company, including premiums received on the issue of any shares, debentures or debenture stock of the company, or (B) being undivided net profits in the hands of the company, be capitalised, and that such sum be appropriated as capital to and amongst the ordinary shareholders in the shares and proportions in which they would have been entitled thereto if the same had been distributed by way of dividend on the ordinary shares, and in such manner as the resolution may direct, and such resolution shall be effective . . .”

The directors of the company recently proposed to increase the capital of the company to £3,940,000 from its present amount (which is £1,740,000 of preference stock and £1,920,000 of ordinary shares) by the creation of 280,000 ordinary shares of £1 each, to capitalise an amount standing to the credit of the company's reserve account, and to apply the same in paying up the said ordinary shares for distribution, credited as fully paid, among the ordinary shareholders. It was proposed that subsequently these new ordinary shares together with some of the ordinary shares already issued should be offered for sale publicly and that the company should apply for leave to deal in and a quotation for the ordinary shares on the Stock Exchange, London. Doubts have been raised whether the preference stockholders are entitled to share in surplus assets after the ordinary capital has been repaid, and whether the creation and issue aforesaid of further ordinary shares affects the rights of the preference stockholders so that their consent will be necessary under art. 54.

Counsel for the preference stockholders relied on *Birch v. Cropper. Re Bridge-water Navigation Co., Ltd.* (1), where there is a very clear statement by LORD MACNAGHTEN (14 App. Cas. 546) in which he points out that preference shareholders are holders of shares in the company and entitled to the capital of the company accordingly, just as much as the holders of ordinary shares. That is a statement which seems to me to be of the greatest force, and if there were nothing further one might well think that the holders of preference stock should be entitled, if there were any surplus assets in a winding-up, to share equally with the other persons who had a share in the capital of the company, i.e., the ordinary shareholders in the present case. Unfortunately for the preference stockholders, that decision of the House of Lords has been criticised to some extent as regards the language, and different rules have lately been laid down and applied from the simple statement which is contained in that case. In 1949, in *Scottish Insurance Corpn., Ltd. v. Wilsons & Clyde Coal Co., Ltd.* (2) the House of Lords by a majority of three to one laid down that normally the statement of the rights of preference shareholders (which, of course, includes preference stockholders) is to be found exhaustively defined by the rights which are given them by the articles of association of the company, and that, if they wish to show that they are not so exhaustively defined, the onus is on those persons so to prove. That case overruled the decision of the Court of Appeal in *Re William Metcalfe & Sons, Ltd.* (3), which was decided in 1933. Since then the matter has been considered by the Court of Appeal in *Re Isle of Thanet Electricity Supply Co., Ltd.* (4). As it seems to me, the rule which was suggested by the House of Lords in the *Scottish Insurance Corpn.* case (2) has been adopted by the Court of Appeal, and they have treated their earlier decision in *Re William Metcalfe & Sons, Ltd.* (3) as having been overruled by the House of Lords.

Counsel for the preference shareholders attempted to distinguish the present case from the decisions mentioned by pointing out that in the present case (as, I think, he says with some force) there was no provision at all as to surplus assets. Therefore, he argued that the matter was at large and there was no more favourable provision in favour of the ordinary shareholders than there was in favour of the holders of preference stock. I, however, find it impossible to distinguish this case from those decisions of the House of Lords and the Court of Appeal to which I have referred (*Scottish Insurance Corpn., Ltd. v. Wilsons &*

Clyde Coal Co., Ltd. (2) and *Re Isle of Thanet Electricity Supply Co., Ltd.* (4)). I am, of course, bound by those decisions, and it seems to me that I am bound to hold that it is for the preferential stockholders to establish that they are given any further rights on the winding-up of the company than the right to recover the amount of the capital which they subscribed. In my view, it is impossible to find any such provisions which give them such further rights in the present case.

There was a further and subsidiary argument which was mentioned by counsel for the preference stockholders—that I should construe the articles of association and the provisions affecting the preference stockholders according to the law which was in force at the time when their rights were defined, which was, he says, on Mar. 21, 1895, or at the latest on July 23, 1943, when the latest articles of association of the company were adopted by the company. Both of those dates are, of course, before the decision of the House of Lords in *Scottish Insurance Corpn., Ltd. v. Wilsons & Clyde Coal Co., Ltd.* (2) and the decision of the Court of Appeal in *Re Isle of Thanet Electricity Supply Co., Ltd.* (4), and *Re William Metcalfe & Sons, Ltd.* (3) was still a decision which had not been upset. I find it very difficult to see much force in that argument because the law was, at any rate, only at the best temporarily defined by the Court of Appeal in *Re William Metcalfe & Sons, Ltd.* (3). It seems to me that I must take the effect of the articles of association to be such as the latest cases give to them. Accordingly, on the winding-up of this company, when the preference stockholders have received repayment of the full amount of their nominal capital, they will not have any right to participate in the distribution of surplus assets.

[HIS LORDSHIP heard argument on the question relating to art. 54 of the company's articles of association.]

DANCKWERTS, J.: Article 54 provides:

“Subject to the provisions of s. 61 of the [Companies Act, 1929] all or any of the rights or privileges attached to any class of shares forming part of the capital for the time being of the company may be affected, modified, dealt with or abrogated in any manner with the sanction of an extraordinary resolution passed at a separate meeting of the members of that class.”

The question which I have to decide is whether that article requires the sanction of an extraordinary resolution to the transaction which it is desired to carry out, viz., the creation of 280,000 more ordinary shares.

It has been argued (and, plainly, correctly argued) that the creation of further ordinary shares will not modify or vary the rights of the preference stockholders because they will still have one vote for every £1 of stock as they had before the issue of the additional shares. Therefore, their rights to that extent are not varied. On the other hand, when 280,000 more voters are brought in, the rights which the existing voters already have are affected because their vote becomes less telling and less important. It seems to me, therefore, from the language of the article that it is plain that the rights and privileges of the preference stockholders are affected by the proposal to issue further ordinary shares.

I have been referred to certain authorities and I can dispose of one of them quite simply—*National Trust for Places of Historic Interest or Natural Beauty v. Midlands Electricity Board* (5). In that case VAISEY, J., had to consider certain restrictive agreements in which the words prohibited anything which would “injure prejudice affect or destroy the natural aspect and condition” of certain land, and he said ([1952] 1 All E.R. 301):

“‘Affect’ following the word ‘prejudice’ cannot, I think, mean ‘prejudicially affect’ and must, therefore, mean ‘affect whether prejudicially or otherwise’ . . .”

He was, I think, explaining the effect of that provision in that case, but it does not seem to me that the language that he there used has anything to do with the question which I have to decide in the present case.

There are, however, two decisions which might well have some relevance. There is that of *ASTBURY, J.*, in *Re Mackenzie & Co., Ltd.* (6). In that case there was an article in these words:

"Subject to any express provision to the contrary made upon the creation of any class of shares, all or any of the special rights, privileges and advantages attached to any class may, with the sanction in writing of the holders of two-thirds of the issued shares of the class (but shall not without such sanction), be altered, modified, dealt with or affected in any manner whatsoever . . ."

Be it observed that the words "dealt with or affected" are to be found as well as the word "altered". This was a case concerning a reduction of capital. So far as I can see, the argument and the judgment were entirely based on the words "altered" and "modified", and I cannot see anywhere in the case any reference whatever to the word "affected". It seems to me that the decision cannot be treated as of any assistance to me with regard to the meaning of the word "affected".

Re Mackenzie & Co., Ltd. (6) was referred to by LORD GREENE, M.R., in *Greenhalgh v. Arderne Cinemas, Ltd.* (7). In that case a gentleman had, as he thought, control of the company through the voting rights on certain shares which he held or which were held by people who had agreed to act in combination with him. The proposal was to issue additional shares which would produce further votes so that he would have lost control of the company. The material provision was art. 3 of Table A in the Act of 1929:

"If at any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may be varied with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of the class."

The material word in that case was the word "varied". VAISEY, J., who heard the case at first instance, said ([1945] 2 All E.R. 723):

"It is admitted by counsel for the company that the subdivision of the other 10s. shares, the 1943 subdivision, has most materially affected the rights attached to the 1941 2s. ordinary shares, but he says they are being affected but not being varied. He says that you do not vary the rights of a class of shares by the operations effected upon other classes of shares; and so, for instance, if you have an equal number of preference and ordinary shares in a company, with equal voting rights, assuming each class to have one vote per share, you would not vary the rights of the preference shareholders by issuing additional ordinary shares; in substance you would materially affect those rights, but you would not vary them. In my judgment, that argument must prevail."

It seems to me that in that case VAISEY, J., was saying in the clearest possible words that the issue of further ordinary shares did affect the rights of the existing shareholders, although it did not vary them. The noteworthy thing about that case in the Court of Appeal is that LORD GREENE, M.R., refers to *Re Mackenzie & Co., Ltd.* (6), in a way which shows that he did not realise that in *Re Mackenzie & Co., Ltd.* (6) the word "affected" was used, because he says ([1946] 1 All E.R. 517):

"Several authorities have been cited, but the only one, I think, which throws any light on the matter is *Re Mackenzie & Co., Ltd.* (6), a decision

of ASTBURY, J., which I do find, up to a point, helpful. It was a case of a petition for reduction of capital, and under the memorandum and articles the only right of the preference shareholders was to have a fixed cumulative preferential dividend of a certain amount. A rateable reduction of all the shares, preference and ordinary, was proposed to be carried out, subject to the sanction of the court. All the shares, preference and ordinary, suffered the rateable reduction, and the result of that was that the dividend rights of the preference shareholders were substantially affected because, by reducing their capital, as they were only entitled to a fixed cumulative preferential dividend on the nominal amount of their capital for the time being paid up, it reduced the dividend accordingly, although the dividend still remained at four per cent. That reduction operated in a certain way to the benefit of the ordinary shareholders, who were entitled to what is commonly called the equity. The argument for the preference shareholders was this: 'The reduction decreases our fixed dividend. The bargain was that we should have a fixed dividend notwithstanding reduction from loss of capital.' ASTBURY, J., pointed out that the only dividend right was a right to four per cent. per annum on the nominal amount of the capital from time to time paid up or credited as paid up, and that, under the articles, the company had power to reduce its capital."

He quotes ASTBURY, J., and continues (*ibid.*):

"There, I think, the judge was applying the principle which (as I have just said) must be remembered in construing these provisions, viz., that a provision dealing with class rights is only one clause in the company's constitution, which must be construed as a whole."

In view of the language that he uses, it is plain that the Master of the Rolls was giving his approval of *Re Mackenzie & Co., Ltd.* (6), in regard to the question of rights being affected on the footing that the word which had to be construed was "varied" or "modified" and not "affected". This becomes still plainer when I find this passage in his judgment (*ibid.*, 518):

"Instead of Greenhalgh finding himself in a position of control, he finds himself in a position where the control has gone, and to that extent the rights of the 1941 2s. shareholders are affected, as a matter of business. As a matter of law, I am quite unable to hold that, as a result of the transaction, the rights are varied; they remain what they always were—a right to have one vote per share *pari passu* with the ordinary shares for the time being issued which include the new 2s. ordinary shares resulting from the subdivision."

Counsel for the ordinary shareholders tried to derive some comfort from that passage by suggesting that the question of the shareholders' rights being affected was only a matter of business and the variation was a matter of law. It seems to me that the explanation of that is quite simple. The only provision in law which fell for consideration in *Greenhalgh's* case (7) was the provision that their rights should not be varied. Therefore, while as a matter of business the rights were affected, that matter of business was not material to the consideration of the legal effect of the article which used only the word "varied". Accordingly, it seems to me that that passage very strongly supports the conclusion which I have reached in this case. It seems to me that the issue of the two hundred and eighty thousand additional ordinary shares will affect the rights of the preference stockholders.

Order accordingly.

Solicitors: *Slaughter & May*, agents for *Middletons*, Leeds (for the company); *Slaughter & May* (for the defendants).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

JAMES v. DAVIES.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Finnmere and McNair, JJ.),
October 21, 1952.]

Street Traffic—Licence—Rate of duty—Goods vehicle—"Used for conveyance of goods"—Vehicle containing no goods—Trailer containing goods—Vehicles (Excise) Act, 1949 (c. 89), s. 27 (1).

A
A mechanically propelled vehicle, which was constructed for the carriage of goods, but was licensed as a private vehicle, when in use on a road carried no goods, but it was drawing a trailer loaded with goods.

HELD: the vehicle was being "used for the conveyance of goods", and was, therefore, "a goods vehicle" within the meaning of s. 27 (1) of the Vehicles (Excise) Act, 1949, and subject to the higher rate of duty applicable to such a vehicle.

B
Carrimore Six Wheelers, Ltd. v. Arnold ([1949] 2 All E.R. 416), applied.

FOR THE VEHICLES (EXCISE) ACT, 1949, s. 27 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 21, p. 1453.

Case referred to:

(1) *Carrimore Six Wheelers, Ltd. v. Arnold*, [1949] 2 All E.R. 416; 113 J.P. 456; 2nd Digest Supp.

CASE STATED by Pembroke justices.

D
At a court of summary jurisdiction sitting at Haverfordwest an information was preferred by the appellant, a superintendent of police, under the Vehicles (Excise) Act, 1949, charging the respondent with having, on Feb. 29, 1952, in the parish of St. Martin, Pembrokeshire, used on Perrott's Road, Haverfordwest, a motor vehicle, namely, a land rover, licensed under the Vehicles (Excise) Act, 1949, for a purpose which brought it within a class or description of vehicles to which a higher rate of duty was applicable, such higher rate not having been paid before the vehicle was so used, contrary to s. 13 (2) of the Act.

E
At the hearing on May 19, 1952, it was proved that the respondent was the owner of the land rover which was constructed for the carriage of goods, but was licensed as a private vehicle, duty having been paid at the rate of £10 per annum. On Feb. 29, 1952, the vehicle was standing on Perrott's Road, Haverfordwest, and was not carrying any goods, but attached to it was a trailer containing potato trays. The appellant contended that, as the vehicle was constructed for the carriage of goods and was drawing a trailer loaded with goods, it was a goods vehicle and was liable to pay duty as such, including trailer duty. The respondent contended that the vehicle was not being used for the carriage of goods, and, therefore, was not a goods vehicle and was properly licensed as a private vehicle.

F
G
The justices held that there was no evidence that the vehicle was being used for the conveyance of goods, and that it was, therefore, not a goods vehicle within the meaning of s. 27 (1) of the Vehicles (Excise) Act, 1949 (the trailer not being part of the vehicle), and that it was properly licensed as a private vehicle and could legally draw a trailer without further duty being chargeable. They, accordingly, dismissed the information and the appellant appealed.

J. P. Ashworth for the appellant.

Skelhorn for the respondent.

H
LORD GODDARD, C.J.: This case raises the question: What is meant by "the conveyance of goods"? In my opinion, it is really concluded by the decision in *Carrimore Six Wheelers, Ltd. v. Arnold* (1), because, although that case was under different regulations the ratio decidendi was that, for similar purposes to these, "carry" and "convey" are interchangeable terms. The definition of "goods vehicle" under the Vehicles (Excise) Act, 1949, s. 27 (1), is:

"'goods vehicle' means a mechanically propelled vehicle (including a tricycle weighing more than eight hundredweight unladen) constructed

or adapted for use and used for the conveyance of goods or burden of any description, whether in the course of trade or otherwise."

It is found by the justices that the vehicle in question here was constructed for the carriage of goods. Was it being then used for the conveyance of goods? If it was being used to convey goods from one place to another, it seems to me not to matter in the least whether the goods were laden on the vehicle itself or laden in a trailer which the vehicle was drawing. If the view which commended itself to the justices was right, it would follow that furniture removers could move furniture in large pantechinon trailers, and if they drew them by a vehicle which, though constructed to carry goods, had no furniture in it, it could be said that they were not liable to pay the heavier rate of duty for goods vehicles. I think that once a mechanically propelled vehicle is conveying goods, as this vehicle was conveying the goods, although by means of a trailer, the question becomes easy. The vehicle was adapted for use, and it was being used, for the conveying of goods or burden because it was moving potato trays from one place to another. Accordingly, I think this case must go back to the justices with an intimation that the case was proved.

FINNEMORE, J.: I agree.

McNAIR, J.: I agree.

Appeal allowed.

Solicitors: *Treasury Solicitor* (for the appellant); *A. J. A. Hanhart*, agents for *J. C. Williams & Roberts*, Carmarthen (for the respondent).

[Reported by F. A. AMIES, Esq., *Barrister-at-Law*.]

HAWKINS (INSPECTOR OF TAXES) v. LEAHY (et contra).

[CHANCERY DIVISION (Harman, J.), October 16, 17, 1952.]

Income Tax—Profits—Profession—Medical practitioner—Annual payments—Payments made by Minister of Health towards maintenance of policy of assurance—Income Tax Act, 1918 (c. 40), sched. D, para. 1 (a) (ii), Case II—Sched. D, Rules Applicable to Case III, r. 1 (a)—National Health Service (Superannuation) Regulations, 1947 (S.R. & O., 1947, No. 1755), reg. 38 (3) (m).

The taxpayer, a medical practitioner who had entered the National Health Service scheme, exercised the option given to him by reg. 38 (3) (m) of the National Health Service (Superannuation) Regulations, 1947, in lieu of entering the contributory superannuation scheme under the regulations, to request that the Minister of Health should agree to make payments to him equal to eight per cent. of his remuneration as a contribution towards the maintenance of a policy of assurance which he held. The Minister agreed and the payments were made. The taxpayer was assessed to income tax on the footing that the payments were profits of his profession under Case II of sched. D to the Income Tax Act, 1918, or, alternatively, that they were annual payments under Case III.

HELD: (i) the receipts did not represent profits of the taxpayer's profession, as they came to him by virtue of an agreement which he had made with the Minister and not by virtue of his profession, and, accordingly, they were not assessable under Case II of sched. D.

(ii) the receipts represented annual payments within Case III of sched. D, as being payable as a personal debt or obligation by virtue of a contract, and were assessable accordingly.

AS TO ANNUAL PAYMENTS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 180-183, paras. 377-380; and FOR CASES, see DIGEST, Vol. 28, pp. 63, 64, Nos. 322-324.

Case referred to:

(1) *Re Hanbury*, (1939), 20 Annotated Tax Cases 333.

CASE STATED by the Special Commissioners of Income Tax.

The Special Commissioners found that the payments made to the taxpayer by the Minister of Health as contributions towards the premiums payable with regard to the taxpayer's assurance policy did not accrue to him as profits from his profession, and so were not assessable under Case II of sched. D to the Income Tax Act, 1918, but that they were assessable as annual payments within Case III of sched. D. The Crown appealed against the finding that the receipts were not assessable under Case II, and the taxpayer cross-appealed against the finding that they were assessable under Case III. The Crown also raised the further contention that they were assessable under Case VI of sched. D.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.), and Sir Reginald Hills for the Crown.

Borneman, Q.C., and Creese for the taxpayer.

HARMAN, J.: These are appeals and cross-appeals arising out of the provisions of the National Health Service Act, 1946. By s. 33 of that Act the appropriate executive council was under a duty to make arrangements with medical practitioners "in accordance with regulations . . ." and "regulations" are by s. 79 defined as regulations made by the Minister under the Act. Section 67 of the Act states that regulations may provide for the granting out of moneys provided by Parliament of "superannuation benefits to officers". There are two sets of regulations, one under which the remuneration of doctors is to be settled between them and the appropriate executive council, and the other providing for setting up superannuation schemes. The National Health Service (General Medical and Pharmaceutical Services) Regulations, 1948 (S.I., 1948, No. 506) (which I will call the general regulations), are statutory regulations whereby, under reg. 22 (1), the remuneration of practitioners is laid down to be that referred to in para. 1 of Part II of sched. I. Under that paragraph, every practitioner—this word meaning by definition a doctor who comes into the scheme—gets a fixed annual payment, a capitation fee, and sundry other payments, all of which are described as "remuneration of practitioners". The National Health Service (Superannuation) Regulations, 1947 (S.R. & O., 1947, No. 1755), provide contributory superannuation benefits for the various types of officers in the service. Regulation 4 provides for the contributions to be made by officers who come into this scheme. Medical and dental practitioners are brought in by reg. 38 which applies the general regulations to every practitioner, subject, as it says, "to the provisions of this regulation." Doctors are not employed by the executive council, but they are brought in as if they were so employed. Then there are elaborate rules about the contributions to be made and the rate of pension to be received by a practitioner. The practitioner's contribution is the same as the other officers, namely, six per cent. of the amount of his remuneration for the time being. The contribution of the Minister is eight per cent. of the same remuneration.

There is, however, a large class of doctors who, being doctors in active practice, have followed the ordinary and prudent course of providing for their own old age. That class of man had one or more policies outstanding on which, perhaps, he had paid premiums for many years which it would not be fair to ask him to surrender, nor would it be fair, it was thought, to insist on his coming into the superannuation scheme so as to be protected twice over. To attract that class of doctor, probably the most experienced in the profession, provision was made by reg. 38 (3) (m) in these terms:

"Where any person holding a contract or policy of insurance with any of the life assurance companies becomes a practitioner on the appointed day, then, if he so requests the executive council in writing within three

months after the appointed day, the Minister may agree that the practitioner shall not, so long as he continues to be a practitioner, become subject to any provisions of these regulations except this provision, and in that event the Minister shall, subject to such terms and conditions as the Minister may determine, pay to him as a contribution towards the maintenance of the contract or policy an amount equal to eight per cent. of his remuneration as a practitioner as defined in para. (2) of this regulation."

- A Therefore, the scheme was this. Subject to "such terms and conditions" as the Minister might lay down by administrative regulation, a practitioner might within three months give notice that he did not desire to come into the superannuation scheme. The result would be that he would not have six per cent. of his remuneration deducted during his practice, nor would he become entitled to a State pension when he ceased to practise. However, it was realised that, if that were all that were offered, he would be worse off than the man who came under the scheme, because the latter was receiving, or was being credited by the State with, assistance towards his pension measured by eight per cent. of remuneration. Therefore, it was thought right to say that, if a practitioner elected to stay outside the scheme and could satisfy the Minister's terms and conditions, the Minister would become bound to pay him eight per cent. of his remuneration.

- B Dr. Leahy, the taxpayer in this case, was a doctor who entered the service, but who, having insurance policies of his own, exercised the right to give notice that he did not wish to be bound by the pension scheme. The Minister agreed that he should not be bound by the scheme, and, therefore, the Minister became
- D bound to pay him eight per cent. of his remuneration. The question is whether that eight per cent. is subject to tax.

- I ought to mention that the terms and conditions which the Minister was entitled to impose under para. (m) were advertised to the profession in a leaflet issued by the Ministry of Health called: "National Health Service (Superannuation) Regulations, 1947". This does not appear to be a statutory instrument,
- E nor, indeed, are its contents, nor should they be called, "regulations." The leaflet advertised to the profession what are the "terms and conditions" that the Minister had decided to impose before he would agree to anybody "opting out", as it is called. There are various conditions. For instance, there is the condition that the optant must have a policy or policies under which premiums of not less than £150 per annum are paid. The policies must not mature before
- F the practitioner is sixty, and they must be kept up year by year thereafter. The Minister is entitled to see either the receipt for the premium, or a statement by the insurance company as to the nature of the policy. The eight per cent. payable to the doctor under these conditions bears no relation to the amount of premium. No doubt, it was considered, broadly speaking, as the leaflet assumes, that the cover provided would be roughly the same, but, in the case
- G of any given doctor, the cover might be much more or it might be a great deal less. A doctor making a large income and paying premiums of only £150 would receive as the eight per cent. a great deal more than £150 a year. On the other hand, a doctor not making a large income might receive less than £150 a year. Dr. Leahy has received from the Minister certain sums in implementation of the obligation imposed by the regulations. He has been assessed to
- H tax on those sums and has appealed against the assessment. The Special Commissioners have found that he is not liable under Case II of sched. D to the Income Tax Act, 1918, under which he was first assessed, but that he is liable under Case III of sched. D. In effect, the two assessments come to much the same thing. Both sides appealed, the taxpayer alleging that the commissioners were right in respect of Case II and wrong in respect of Case III, and the Crown alleging the converse, but also adding that, if neither Case II nor Case III caught the taxpayer, he was embraced in what is called the "sweeping

up" provisions of Case VI of sched. D. The commissioners, in dealing with Case II, state their reasons in these terms:

"The option exercised by the taxpayer, although related to an insurance policy which he had taken out as a prudent individual, was a benefit to which he was entitled as a doctor. But, in our opinion, it cannot be said that the consequent payments which he received year by year from the Minister accrued to him in virtue of his profession. An agreement with the Minister was interposed, and the payments to the taxpayer simply accrued in virtue of that agreement. We, therefore, hold the payments are not profits or gains of his profession so as to be within the charge of Case II of sched. D."

It appears from sched. D that for the case to come within Case II, these words must be satisfied:

"Tax under this schedule shall be charged in respect of—(a) The annual profits or gains arising or accruing . . . (ii) to any person residing in the United Kingdom from any . . . profession . . ."

Do these annual profits or gains, assuming them to be that for the moment, arise to the taxpayer from any profession? It is said that they are part of his remuneration under the National Health Service Act, because it is as a practitioner under that Act that he receives this money, which is measured by the amount of his remuneration under the Act and not by relation to his outside income as a doctor. Therefore, it is said that there are profits arising to him from his profession. On the other hand, it is said that the payments are nothing to do with his profession. True, they only go on so long as the profession is practised. True, they are measured by the remuneration that the taxpayer receives for the exercise of his professional skill in the service of the executive council, but they are not in any way, it is contended, part of his remuneration as a doctor. For instance, they are not on a par with the payments made to him by his private patients. In my judgment, the commissioners are right in this respect. I think this is not a part of the taxpayer's professional remuneration. It is a sum paid to him by the Minister as part of the bargain to keep him out of the benefits given by the National Health Service pension scheme. Also, no doubt, it is paid to him in order to make the coming into the service attractive to him. But, in my judgment, it is not professional remuneration. As it seems to me, it is something paid to him by virtue of a bargain between himself and the Minister of Health. That is what the Special Commissioners have found, and I find them to be right in that respect.

Turning to Case III, the commissioners deal with that in this way:

"It is said for the taxpayer that the payments in question made by the Minister were in origin of a voluntary nature made on personal grounds, and that the Minister was not purporting to make an 'annual payment'. We find ourselves unable to accept these contentions. It is not contested that, once the taxpayer had exercised the option, the Minister was bound to make him a payment which in the ordinary course would recur annually. The fact that the occasion for the agreement had reference to personal circumstances does not, in our view, in any way affect its character. We, therefore, hold that the payment made by the Minister in each of the years before us under reg. 38 (3) (m) falls within the words of r. 1 (a) of the Rules Applicable to Case III of sched. D as an 'annual payment' payable 'as a personal debt or obligation by virtue of any contract'."

When one looks at Case III, it is clear that the commissioners are right in the words which they chose. If this case is to come within Case III, it must be because it falls under sched. D, 1 (b), being

" . . . annual profits or gains not charged under sched. A, B, C, or E, and not specially exempted from tax . . ."

When one looks at the wording of Case III one sees that it is:

“Tax in respect of profits of an uncertain value and of other income described in the rules applicable to this Case.”

In the Rules Applicable to Case III there appears r. 1 (a), which provides:

A “. . . any . . . annual payment . . . as a personal debt or obligation by virtue of any contract . . . ”

That is what the commissioners have found, and it seems to me that it is the only way that it could be brought in under this Case.

B Counsel for the taxpayer would have me say that this is not income at all in the sense in which that word is used in this Case, because it is not something which is “pure income profit”, a phrase apparently first coined by SIR WILFRID GREENE, M.R., in *Re Hanbury* (1). I hesitate to follow other judges along the slippery slope of trying to define what these words mean. It does not seem to me that I shall get any help from speculating what exactly, in other circumstances, “pure income profit” may be. In my view, it cannot mean that every piece of income, to be taxable under this Case, must be income in respect of which no consideration has been given, because, *ex concessis*, one of the things described is a contract, and every contract imports in English law a consideration on both sides. Therefore, it is asking too much to say that the pureness of the profit must mean that there is nothing to set against it. Counsel’s argument, if I understood it—I am not sure that I did—was to the effect that, because the taxpayer had to show that he had paid the premiums on his own policies before he received the eight per cent. from the Minister, the eight per cent. which he received was not a pure income profit. For one thing, although, no doubt, in practice the eight per cent. paid to him was described as a contribution towards his liability to the insurance company, that is a very rough and ready way of putting it, for the two things bear absolutely no relation to one another. As I pointed out during the argument, it is not necessary that the doctor himself should pay the premiums at all. He might get his father-in-law or his uncle or his cousin or his aunt to pay them. He might have paid a lump sum when the policy was taken out. So long as the lump sum, actuarially speaking, was of the right amount, he would not have an annual premium to pay at all. The obligation to pay, such as it was, was an obligation entered into, as the Solicitor-General reminded me, before the contract with the Minister was made. The contract with the Minister did not add in any way to the taxpayer’s obligation. True it is, if he had let the policy lapse, he would not get the eight per cent., but his obligation to pay on the policy was entered into long before the option, and I cannot see that one can tie up the eight per cent. and the premium paid or payable under any policy as being things one of which can be set off against the other so as to produce what was described to me as a notional profit and loss account. It seems to me that this is an annual payment which the Minister made to the taxpayer because the Minister thought it worth while to do so as it excused the State from paying a pension, and, at the same time, induced the taxpayer to come into the National Health Service scheme. Consequently, it seems to me that the Special Commissioners were right, not, perhaps, for exactly the reasons which they gave, but because, broadly speaking, this payment does come within the Case. It is an annual payment in the nature of income, made by the Minister by agreement. It seems to me, therefore, that what is here in question is income arising out of that agreement, and I think that Case III is the appropriate Case under which it can be charged and that that is the right result to arrive at.

Appeal and cross-appeal dismissed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Hempsons* (for the taxpayer).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

R. v. MINISTER OF LABOUR AND NATIONAL SERVICE AND ANOTHER. *Ex parte* ROAD HAULAGE EXECUTIVE.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Finnemore and McNair, J.J.), October 14, 21, 1952.]

British Transport Commission—Transferred undertaking—Compensation to discharged employee—"Right to payment of compensation"—Right to damages for wrongful dismissal—Transferred Undertakings (Compensation to Employees) Regulations, 1950 (S.I., 1950, No. 1083), sched. II, para. 4 (1) (i). A

A "right to payment of compensation" in sched. II, para. 4 (1) (i), of the Transferred Undertakings (Compensation to Employees) Regulations, 1950, includes a right to claim damages for wrongful dismissal.

The respondent was the managing director of certain transport undertakings under a service agreement due to expire on Feb. 28, 1950. On Apr. 12, 1949, the undertakings were taken over by the applicants, and the respondent's employment was terminated. It was admitted that the respondent had a right to claim damages for wrongful dismissal, and on Apr. 7, 1952, the tribunal appointed by the Minister of Labour and National Service assessed compensation on the basis that the respondent had a "right . . . to the payment of compensation" within the meaning of the Transferred Undertakings (Compensation to Employees) Regulations, 1950, sched. II, para. 4 (1) (i). On a motion for an order of certiorari to quash the award, B C

HELD: "compensation" in para. 4 (1) (i) included compensation by way of damages, and, therefore, the award was correct.

Joyce v. Australasian United Steam Navigation Co., Ltd. (1939) (62 C.L.R. 160), applied. D

Cases referred to:

- (1) *Joyce v. Australasian United Steam Navigation Co., Ltd.*, (1939) (62 C.L.R. 160).
- (2) *Skinnners' Co. v. Knight*, [1891] 2 Q.B. 542; 60 L.J.Q.B. 629; 65 L.T. 240; 56 J.P. 36; 31 Digest, Replacement, 547, 6685. E
- (3) *Re Newman, Ltd., Raphael's Claim*, [1916] 2 Ch. 309; 85 L.J.Ch. 625; 115 L.T. 134; 1 Digest 543, 1957.

MOTION for an order of certiorari.

On Apr. 7, 1952, the second respondent, George James Sell, was awarded by the tribunal appointed by the Minister of Labour and National Service compensation for the loss of emoluments suffered by him when transport undertakings of which he was an employee were taken over by the applicants, the Road Haulage Executive, under the Transport Act, 1947, the amount being determined in accordance with the provisions of the Transferred Undertakings (Compensation to Employees) Regulations, 1950, sched. II, para. 5 (2), on the ground that the respondent had a "right . . . to the payment of compensation in the event of discharge" within the meaning of para. 4 (1) (i) of the schedule. The applicants admitted that the respondent had a right to claim damages for wrongful dismissal, but they contended that such a right was not comprised within the aforesaid phrase, and they asked for an order of certiorari to quash the award. F G

Southall for the applicants. H

Leonard Caplan for the respondent.

Cur. adv. vult.

Oct. 21. MCNAIR, J., read the following judgment of the court. In this case the applicants, Road Haulage Executive, move for an order of certiorari to bring up and quash an award of compensation in favour of the second respondent, George James Sell, made on Apr. 7, 1952, by the tribunal appointed by

the Minister of Labour and National Service under the Transferred Undertakings (Compensation to Employees) Regulations, 1950, made pursuant to the Transport Act, 1947, s. 101 (1) and (3).

In order that the nature of the complaint made by the applicants may be understood the following facts which were proved or admitted must be stated. The second respondent, at the material date, viz., Apr. 12, 1949 (when certain transport undertakings in which he was interested were nationalised), held the position of managing director of a company known as Hauliers, Ltd., the holding company of one or more subsidiary companies owning road transport undertakings of which the respondent was also managing director. This position he held under a service agreement with Hauliers, Ltd., under which he was entitled to a salary and allowances which produced for him total emoluments which have been agreed at £3,250 per annum. Pursuant to the Transport Act, 1947, the applicants acquired the entire shareholding of Hauliers, Ltd., in their subsidiary companies and also acquired the whole of the undertakings of the subsidiary companies from Apr. 12, 1949. Hauliers, Ltd., thereupon went into voluntary liquidation, the respondent being appointed liquidator and ceasing to be a managing director of either Hauliers, Ltd., or any of the subsidiary companies. He was not taken over by the applicants, and, accordingly, he claimed against them compensation for loss of emoluments, alleging, in effect, that, if the service agreement had run its course until Feb. 28, 1950, he would have received net emoluments at the rate of £3,250 per annum. Being dissatisfied with the amount of compensation offered by the applicants, the respondent in due form appealed to the tribunal under the Transferred Undertakings (Compensation to Employees) Regulations, 1950, reg. 3 (3).

On behalf of the applicants it was, and is, admitted that the respondent is entitled to some compensation for loss of emoluments, but it is contended that the award itself shows that the compensation in fact awarded was assessed on the wrong basis, and was, accordingly, wrong in law. By reg. 3 (3) the tribunal in such a case is required to

“ . . . consider the case in accordance with sched. II to these regulations and determine whether any, and if so what, compensation ought to be granted to the claimant . . . ”

The material provisions of this schedule are paras. 4 and 5 which can be summarised as follows: Three different standards of compensation for loss of emoluments in a descending order of value are prescribed. If there exists in the case of a claimant “any right or expectation under customary practice to the payment of compensation in the event of discharge”, then the measure of compensation is that prescribed by para. 5 (1) or (2) depending on whether or not the right or expectation to the payment of compensation is to the payment of compensation up to the maximum normal retiring age, viz., sixty-five years of age, or not. In all other cases the measure of compensation is that prescribed by para. 5 (3). The tribunal have assessed the compensation in accordance with para. 5 (2) on the footing that the respondent did enjoy a right to payment of compensation in the event of discharge otherwise than up to the normal retiring age, and it is not disputed that, if the assessment was properly made under this sub-paragraph, the figure awarded is correct. The applicants contend that compensation should be assessed under para. 5 (3). Such assessment would result in a substantially lower figure of compensation. It being admitted that the respondent is entitled to some compensation for loss of emoluments, the critical question is whether there existed in his case “any right or expectation under customary practice to the payment of compensation in the event of discharge.”

The main point urged on behalf of the applicants was that a right to claim damages for breach of a service agreement based on a wrongful dismissal cannot be comprised within the phrase “any right to the payment of compensation

in the event of discharge " and in support of this contention reliance was placed on para. 17 which provides that

" There shall be set off against . . . the compensation award made to a claimant any payments for breach of contract to which he may be entitled arising out of any service agreement or contract."

It seems to be clear that by virtue of the service agreement the respondent, at the material date, held a right to claim damages in the event of his being discharged before Feb. 28, 1950, and in the judgment of the court there is no justification either in the scheme of the regulations as a whole or in particular language used for giving to the term " compensation " in the relevant regulation any narrow or restricted meaning. While it is true that in certain contexts compensation is contrasted with damages, it is equally true that both in common parlance and in legal phraseology the word " compensation " is often used as the equivalent of, or, at least as including, damages *stricto sensu*. For example, in the Workmen's Compensation Act, 1925, s. 29, the term " compensation " was used by the legislature as including damages at common law. We were referred to an Australian case—*Joyce v. Australasian United Steam Navigation Co., Ltd.* (1)—in which LATHAM, C.J., in considering the meaning of the word " compensation " in the Seamen's Compensation Act, 1911, held (62 C.L.R. 166) that

" The word is wide enough in its ordinary significance to include compensation by way of damages . . . "

See, too, *Skinner's Co. v. Knight* (2) ([1891] 2 Q.B. 545), and *Re Newman, Ltd., Raphael's Claim* (3).

The court sees no reason why a similar construction should not be applied to the word in its present context, especially as the narrower construction contended for by the applicants would have the effect of denying to the respondent the advantages of his service agreement. Further, the court considers there is great force in the submission advanced by counsel for the respondent that para. 17 is dealing only with the case of an officer who (unlike the respondent) was in fact taken over by the applicants. It is sufficient to say that, putting the best construction which the court can on the material regulations, which are admittedly difficult to understand, the court is not satisfied that the tribunal, in assessing the respondent's compensation under para. 5 (2), were wrong in law. The motion for certiorari, accordingly, fails.

Motion dismissed.

Solicitors: *M. H. B. Gilmour* (for the applicants); *Carr, Sandelson & Co.* (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

SANDERS (orse. SAUNDERS) v. SANDERS (orse. SAUNDERS).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Davies, J.), October 6, 7, 8, 1952.]

Estoppel—Estoppel by record—Previous findings on same subject-matter when not directly in issue—Plea of estoppel raised on appeal—Need for plea to have been raised in court below.

Justices—Husband and wife—Desertion—Decision inconsistent with previous High Court finding—Justices ignorant of previous finding—Order for re-hearing.

On Jan. 23, 1950, the husband and wife parted, and on Feb. 21, 1950, the husband filed a petition for divorce on the ground of the wife's cruelty. The wife filed an answer merely denying the charge. The case was heard by a commissioner who, on June 28, 1951, held that the charge of cruelty had not been proved, but that, in any event, if it had been proved, it would have been condoned, and that it would not have been revived on Jan. 23, 1950, since on that date the wife had been ejected from the matrimonial home, and, therefore, was not then guilty of desertion. The petition was, therefore, dismissed. On Mar. 10, 1952, justices heard two summonses issued by the wife alleging against the husband desertion and wilful neglect to maintain. The justices were not informed of the previous High Court finding on the question of desertion and dismissed the summonses on the ground that the wife had been guilty of desertion on Jan. 23, 1950. On appeal by the wife,

HELD: (i) since the charge of cruelty had not been proved, the commissioner's findings on condonation and the absence of the revival of the offence by the wife's desertion were findings on matters not directly in issue before him, and, therefore, they could not operate as an estoppel binding the justices;

(ii) in any event, when there was an assertion of estoppel it should be brought to the notice of the tribunal alleged to be affected by it and supported by evidence of the matters from which the estoppel was said to arise, and neither of those steps had been taken;

(iii) since there was a previous contrary finding of the High Court on the same subject-matter, of which the justices had not been informed, the case should be sent back to them for re-hearing.

AS TO ESTOPPEL IN MATRIMONIAL CAUSES, see HALSBURY, Hailsham Edn., Vol. 10, pp. 670-673, paras. 990-994; and **FOR CASES,** see DIGEST, Vol. 27, pp. 324-326, Nos. 3026-3051, and Digest Supps.

AS TO ESTOPPEL BY MATTER OF RECORD, see HALSBURY, Hailsham Edn., Vol. 13, pp. 402-449, paras. 456-505; and **FOR CASES,** see DIGEST, Vol. 21, pp. 140-236, Nos. 39-657, and Digest Supps.

Cases referred to:

- (1) *James v. James*, [1948] 1 All E.R. 214; 112 J.P. 156; 2nd Digest Supp.
- (2) *Winnan v. Winnan*, [1948] 2 All E.R. 862; [1949] P. 174; [1949] L.J.R. 345; 2nd Digest Supp.
- (3) *Watt (or Thomas) v. Thomas*, [1947] 1 All E.R. 582; [1947] A.C. 484; [1947] L.J.R. 515; 176 L.T. 498; 2nd Digest Supp.

APPEAL by the wife against the dismissal, on Mar. 10, 1952, by justices for the Edmonton petty sessional division of summonses by her alleging against her husband desertion and wilful neglect to maintain.

The justices found that on Jan. 23, 1950, when the parties separated, the wife was guilty of desertion. This finding was inconsistent with a previous finding of Mr. Commissioner BLANCO WHITE, K.C., in divorce proceedings on June 28,

1951, that the wife had been ejected from the matrimonial home, and the wife now appealed.

Ellenbogen for the wife.

McKinnon for the husband.

LORD MERRIMAN, P.: This is a wife's appeal from the dismissal on Mar. 10, 1952, by justices for the petty sessional division of Edmonton sitting at Enfield of her summons alleging that her husband had deserted her and wilfully neglected to provide reasonable maintenance for her, the ground for the dismissal being that it was the wife who, on Jan. 23, 1950, the date of separation, had left the matrimonial home without any reasonable excuse—in other words, that she, and not the husband, was the deserter—and that, being the deserter, she could neither charge him with desertion nor obtain maintenance.

It is now said that the justices were precluded from making this finding by a decision of the High Court, which arose in this way. After the parting on Jan. 23, 1950, the husband, on Feb. 21, 1950, filed a petition for divorce on the ground of the wife's cruelty. To that petition there was a mere denial, no other issue being raised. There was no cross-charge of desertion, either as a plea in bar or otherwise, nor was there any suggestion of condonation on the pleadings. That petition was heard by Mr. Commissioner BLANCO WHITE on June 26, 27, 28, 1951. The learned commissioner, in his judgment on June 28, found that the charge of cruelty was not made out to his satisfaction. Although the issue of condonation was not raised on the pleadings, that, of course, was not the end of the matter, for, if there was any indication in the evidence that the cruelty might have been condoned, it was the duty of the learned commissioner, under the Matrimonial Causes Act, 1950, s. 4 (1), to inquire into it, and it is clear that this issue was considered by him. It was, however, said on the other side: "If there was condonation, that does not avail the wife because she wrongfully left the matrimonial home, and by her desertion she revived the offence thus alleged to have been condoned."

It is a commonplace that the question of condonation cannot arise unless there is an offence to be condoned. It is obviously right that if, while the main issue is still in doubt, there is a suggestion that the offence may have been condoned, that must be investigated by the judge at the trial. Any question of cancellation of the condonation by the revival of the original offence must also be investigated. But in the end that is all completely academic unless the main issue is decided in favour of the petitioner. That does not mean that there is anything unwise or indiscreet in the judge expressing an opinion, for what it is worth, about all the issues that have been debated. That is one thing. Whether his opinion and his finding operate as an estoppel if in fact the issue does not arise at the moment when he is giving his judgment is another matter.

Without my reading the learned commissioner's judgment in full, he having, as I say, in detail and as a whole rejected the husband's charge of cruelty against the wife, he goes on to examine the evidence relating to condonation and concludes:

"I think if there had been cruelty in this case it would have been condoned. Mr. Barnard [counsel for the husband] says that, even so, that would not matter because it was the wife who deserted the husband, and that would have revived the cruelty. I do not accept that contention on the facts of the case . . . As to what happened on Jan. 23 [the day of the parting] I accept the wife's story that she was ejected from the matrimonial home by her father-in-law and the marriage thereby terminated."

It will be seen, therefore, that this finding that it was the wife who was ejected from the matrimonial home on the day of the parting was, so to speak, an issue at second remove from the issue which was being decided in such a way that

this subsidiary issue could not arise at all. Yet it is said that that effects an estoppel in this case, binding the justices in such a way as to preclude their finding that the wife had left the matrimonial home without reasonable cause, and dismissing the summonses for desertion and wilful neglect to maintain.

A I will come back in a moment to the point of law, but there is one other comment which falls to be made about this subject. When an estoppel is asserted it should, whether by the formality of pleading, as in the High Court, or in some other appropriate way, be brought to the notice of the tribunal alleged to be affected by it, and, having been brought to the notice of the court, it should be supported by specific evidence of the matters from which the estoppel is said to arise. Neither of these things happened in this case. The point was never even mentioned or hinted at before the justices. In my opinion, B plain as was the learned commissioner's statement on this topic of a possible revival after a possible condonation of an offence which had not been committed, that does not constitute an estoppel on the question which of these two parties, if either of them, was the deserter on Jan. 23, 1950.

C I come to what, in my opinion, is the more difficult point—the proper solution of the difficult situation which has arisen owing to the way in which this case was presented to the justices. Counsel for the husband, in addition to resisting the alleged estoppel, says that this case can be decided simply by looking at the finding of the justices, by looking at the notes of the evidence, by our holding that the ordinary principles guiding appellate tribunals which have not seen and heard the witnesses should be applied, and by our refusing to interfere with the decision of the justices, supported as it is on the face of the notes of the evidence. On the other side it is argued, alternatively to the question of estoppel, D that this is a case in which there is no evidence to support the finding of the justices, and that, apart altogether from their being precluded by the earlier finding of the High Court, they ought not, on the merits as presented to them, to have found that the wife was disentitled to charge the husband with desertion or wilful neglect to maintain because she herself had been the deserter. Again, E without going through all the details, I am satisfied that, if that were the sole issue in this case, it would be impossible for this court to reverse the finding of the justices.

[HIS LORDSHIP considered the evidence and continued:] It would, in my opinion, be impossible on any known principle for us, not having seen either of the parties or their witnesses, to say that the justices were wrong in deciding F as they did.

G It is, of course, impossible to speak—I am not now on the issue of estoppel, regarded as a point of law—of their having ignored the decision of the High Court, because they were not even told what it was or given any indication that their minds ought to be swayed by it in any way. In that respect it is unlike *James v. James* (1), a decision of this court, to which we have been referred. There, without deciding the issue of estoppel, though it is clear from a subsequent H decision of the Court of Appeal in *Winnan v. Winnan* (2) that we ought to have done so, we expressed an extremely unfavourable opinion of a bench of justices having found a charge of adultery proved against a wife when a judge of the High Court, in respect of the same alleged act of adultery, on substantially the same evidence, and after a full trial, had held that the charge was insufficiently proved. That reproach, of course, cannot be made against these justices because, as I have said, they were not given a chance to deal with the matter. We now sit in the place of the justices, with power to draw any inference which they ought to have drawn. We are now the judges of fact, to be guided, no doubt, by certain principles, but the position at the present moment is not that it is impossible for us to interfere with the finding of the justices because, seeing the paper record but not seeing the witnesses, we happen to take a different view from that taken by them, for we have seen two sets of papers. It is true that

we have not seen a transcript of the evidence which was submitted to the learned commissioner, but we have seen his findings, and it is indubitable that, for whatever purpose it was expressed, he arrived at a diametrically opposite conclusion on the question which of the two broke up the matrimonial home on Jan. 23, 1950, from that arrived at by the justices.

So the question really is: What, in these peculiar circumstances, is it our duty to do? In my opinion, it is impossible for us to content ourselves simply by looking at the proceedings before the justices in isolation and saying that, guided by *Watt (or Thomas) v. Thomas* (3) we cannot interfere. On the other hand, I think it is equally impossible for us, not having seen or heard the witnesses, to decide for ourselves which is the true inference of fact about the occurrences of Jan. 23, 1950, and thereafter. It seems to me, therefore, that only one course is left open, and that is to have a fresh hearing by those who can see and hear the witnesses. It must be remembered that there is a provision in the Summary Jurisdiction (Married Women) Act, 1895, s. 10, which enables justices to decide not to make an order in a case if, in their opinion, the issue would be more conveniently determined by the High Court, saving certain rights of the High Court to send it back to the justices for determination. At one time I thought that, perhaps, the simplest solution would be for us to exercise that discretion, for we are entitled to make any decision or order, or draw any inference, which the justices could make or draw, but, unfortunately, that does not carry the matter any farther because the justices, though entitled to express that opinion, which is not appealable, cannot enforce the hearing of the matter by the High Court, nor can we. But it now appears, as the result of discussion, that the husband, on the one hand, is anxious, as soon as the three-years period expires next January 23, to charge his wife in the High Court with desertion, and, on the other hand, the wife appears to be equally eager to bring her complaint of wilful neglect to provide reasonable maintenance in the High Court under the Matrimonial Causes Act, 1950, s. 23. That being so, even though we sent the case back to the only tribunal whom we have power to order to re-hear it, namely, a fresh panel of the justices for the Edmonton petty sessional division, as soon as they became apprised of the immediate likelihood of the issue being raised in the High Court in one form or another they would naturally adjourn the case to avoid the expense of a further hearing before them of a matter which was about to be litigated in the High Court.

DAVIES, J.: I entirely agree. The first two grounds in the wife's notice of appeal are as follows:—(i) That there was no evidence on which the justices could find that the wife had without reasonable cause left the matrimonial home, and (ii) that the decision of the justices was against the weight of the evidence. With regard to those two grounds of appeal it is, in my opinion, sufficient to say that, on any sort of reading of the full note which has been before us of the evidence given before the justices, it is impossible for any appellate court to say that the decision was against the weight of the evidence or that it was one at which on the evidence the justices could not reasonably and properly arrive.

It, therefore, becomes necessary to examine whether or not there is any substance in the contention that at the hearing before the justices the husband was estopped by the decision of the High Court from contending that he had not deserted his wife. The principle applying to such cases, about which much has been said and more written, is set out in two passages in *HALSBURY'S LAWS OF ENGLAND*, Hailsham ed., vol. 13. It is sufficient, I think, to quote only two sentences. The first is p. 409, para. 464:

“A party is precluded from contending the contrary of any precise point which, having been once distinctly put in issue, has been solemnly found against him.”

The second is (*ibid.*, p. 421, para. 474):

“It is a fundamental rule that a judgment is not conclusive as to anything but the point decided, nor of any matter which came collaterally in question, or of any matter incidentally cognisable . . .”

We, therefore, have to consider what was in issue before the learned commissioner, and whether his opinion—for in the circumstances it was, in my judgment, no more than an opinion—that the wife was not guilty of desertion comes within the definition which I have quoted. As I understand the case before the learned commissioner, in the events that happened the only issue before him was: Aye or No, had the wife been guilty of cruelty? If the answer had been “Yes”, then, of course, condonation, revival and other matters would have been issues in the case. The learned commissioner found, however, that the charge of cruelty had not been made out. That was an end of the case. As my Lord has said, nobody could dream of suggesting that the observations he thought proper to go on to make thereafter were wrong or should not have been made, but, so far as the issues in the case and any question of estoppel by *res judicata* are concerned, those observations were obiter, and, in my opinion, no sort of estoppel can arise from them. In my judgment, therefore, on this ground the appeal also fails.

With regard to the further matters raised in the notice of appeal, we have here two courts of competent jurisdiction—the High Court, on the one hand, and the Edmonton justices, on the other hand—having come on substantially the same questions of fact—I avoid the word “issues”—and on the evidence of, at any rate, some of the same witnesses, to diametrically opposite conclusions.

That is a situation that, if it can be avoided, ought not to be allowed to persist. The crux of the whole case, as it seems to me, is that when the justices were asked to hear this summons, they were put into an impossible and intolerable position because they did not have placed before them for their consideration the vital matters which had been decided by Mr. Commissioner BLANCO WHITE. In view of the fact that none of the information which we now have was before them, the hearing was, in my judgment, most unsatisfactory, and their adjudication, owing to no fault of their own, ought not to be allowed to stand. I, therefore, agree with the order proposed by my Lord, and I should think that if and when this case comes before the justices again, they will almost certainly take the view that it is a case for the application of their discretionary powers under the Summary Jurisdiction (Married Women) Act, 1895, s. 10.

Appeal allowed.

Solicitors: *Asher Fishman & Co.* (for the wife); *Nash & Co.* (for the husband).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

Re A JUDGMENT SUMMONS (No. 25 of 1952).

Ex parte HENLYS, LTD.

[CHANCERY DIVISION (Harman, J.), October 20, 1952.]

Debt—Committal—Bar to committal order—Extortion—Creditor requiring payment of costs of bankruptcy notice—Debtors Act, 1869 (c. 62), s. 5.

Creditors served a bankruptcy notice on the debtor in respect of a judgment debt amounting, with taxed costs, to £449. Negotiations ensued on the terms on which the notice should be withdrawn, and it was agreed *inter alia* that the debt should be repaid by instalments. At the time when the initial instalment was paid, the solicitors for the creditors insisted that in addition the debtor should bear certain costs, which they described as "additional costs of the bankruptcy notice", and also the costs of the arrangement under which payment by instalments was being made, and, therefore, they claimed that £12 12s. be added to the debt. The debtor's solicitors reluctantly paid that amount in addition to the instalment. The debtor failed to maintain payment of the instalments and the creditors presented a bankruptcy petition against him. The petition was dismissed on the ground that the demand and payment of the additional £12 12s. was extortion. The creditors now applied for an order under the Debtors Act, 1869, s. 5, committing the debtor to prison for his failure to pay the debt.

HELD: the doctrine under which extortion operated as a bar to a bankruptcy petition applied equally in an application under s. 5, and, the applicants having been guilty of extortion, the court, in the exercise of its discretion, would dismiss the application.

DICTUM OF LORD HANWORTH, M.R., in *Re Debtor (No. 883 of 1927)* ([1928] Ch. 206), applied.

AS TO COMMITTAL FOR NON-PAYMENT OF JUDGMENT DEBT, see HALSBURY, *Hailsham Edn.*, Vol. 2, pp. 448-450, paras. 615-619; and FOR CASES, see DIGEST, Vol. 5, pp. 1032-1043, Nos. 8436-8514.

Cases referred to:

- (1) *Re Debtor (No. 883 of 1927)*, [1928] Ch. 199; 97 L.J.Ch. 120; 138 L.T. 440; Digest Supp.
- (2) *Re Otway. Ex p. Otway*, [1895] 1 Q.B. 812; 64 L.J.Q.B. 521; 72 L.T. 452; 4 Digest 156, 1467.

JUDGMENT SUMMONS whereby the creditors applied for an order under the Debtors Act, 1869, s. 5, committing the debtor to prison for non-payment of a judgment debt.

P. M. O'Connor for the creditors.

C. H. Duveen for the debtor.

HARMAN, J.: This is a judgment summons by creditors for the balance of a judgment debt, dated Apr. 25, 1951. The total debt, when the costs had been taxed, amounted to some £449, and in November, 1951, a bankruptcy notice was served in respect of that debt. After the service of that bankruptcy notice, there were negotiations as to the terms on which it should be withdrawn, and it was withdrawn on certain terms which included the payment of the debt by instalments. Subsequently, there was correspondence between the solicitors, and an additional term was imposed at the time when the first instalment was paid on Nov. 22, 1951, in these terms:

"We must also insist that our additional costs of the bankruptcy notice and these arrangements be paid by your client, and as we have had to instruct Messrs. Flowerdews to serve and we have incurred expense thereby in addition to the expense of preparing and issuing the bankruptcy notice

and the subsequent correspondence with you, our costs will be £12 12s. which must be added to the amount of the debt."

The debtor's solicitors replied that, with great reluctance, they enclosed that sum. In answer, the creditors' solicitors said that they could not see why there should be any protest because they had incurred a good deal of expense, among other things, in connection with some winding-up order in respect of a company which was controlled by the debtor.

The debtor failed to keep up his instalments, and a petition was presented against him. The petition was filed on Mar. 31, 1952, for the balance of the debt then outstanding, amounting to £290 3s. The petition came before the registrar on May 2, 1952, when the point was taken that the demand and payment of the £12 12s. in respect of costs, which were not justified by the bankruptcy notice, was an impropriety amounting to what in bankruptcy law is called an extortion. The registrar took that view, and on May 5 on that ground dismissed the petition. There was no appeal against that order and nothing, as I understand, has been paid since. In July, 1952, leave was given to issue a judgment summons in respect of the same debt, £290 3s. The point is now taken that, in cases where no bankruptcy petition can succeed, no judgment summons ought to be allowed to issue, because the two things are intimately connected. It is said that there is more than one way in which the court may assist a creditor to collect his just dues, but if he may not have the assistance of the court in one way, so he may not in another.

The point is a novel one and there is no reported authority on the subject. First, therefore, am I to look behind the order of the registrar in any way? The registrar dismissed the petition. The order, on its face, gives no reason for the dismissal. I am, therefore, I think, bound to look behind it, because otherwise I cannot say that there is any connection between the dismissal of the petition, which might be for any of a dozen reasons, and the vice which is said to taint this debt. I have to look and see what it is that induced the registrar to come to the conclusion which he reached, and there is no dispute between the parties that it was this successful demand for £12 12s. in respect of costs.

I am referred to *Re Debtor (No. 883 of 1927)* (1) as showing that a demand for costs of this sort is fatal to the presentation of a second petition. In that case there was a petition presented and terms were reached under which sums of money were to be paid by way of instalments to the petitioners, but also a sum of costs which included £15, the difference between party and party and solicitor and client costs which they were not entitled to demand. The petitioners also demanded, but did not obtain, payment of some costs owing by other parties, viz., underwriters, which they had no title to demand. The court came to the conclusion that the second petition which they subsequently presented was, therefore, a petition on which the court would make no order. It is true that that petition was for £15 more than it should have been, by reason of the fact that the petitioners' solicitors had appropriated to themselves for costs £15 which they should have attributed to their clients' debt, so that the petition was in that sense for an excessive amount, but the judgments seem to me to make it clear enough that the result would have been the same even though the payment of that sum had been refused, because it was said in the judgments, and I think quite clearly, that the unsuccessful demand for the costs of underwriters was enough by itself to vitiate the second petition arising out of the same transaction. LORD HANWORTH, M.R., in his judgment says ([1928] Ch. 206):

"... there is a principle which must be jealously guarded—namely, that the process of the bankruptcy court must not be abused. A number of cases have established that. In *Re Otway, Ex p. Otway* (2) the petitioning creditor endeavoured to obtain £25 from a debtor as a condition for agreeing

to adjournment of the petition. The attempt failed; but although the petitioning creditor did not succeed the court held that he had attempted to extort money from the debtor for his own purposes, and it declined to allow him to have the advantage of using the process of the court in bankruptcy against the debtor. That is a case where an unsuccessful attempt was made, and yet the creditor was debarred from making use of bankruptcy proceedings."

He then cites other authorities, and comes to the conclusion that the subsequent petition is vitiated because it arises out of the same transaction as the first petition and it would have been an attempt as he said, at extortion.

If that be right, I think it does justify the statement which I find in WILLIAMS ON BANKRUPTCY, 16th ed., p. 68, in the notes to s. 5 of the Bankruptcy Act, 1914, in these words:

"It seems, therefore, that a creditor once guilty of even attempted extortion is precluded from taking bankruptcy proceedings in respect of the same debt."

I am not saying this by way of reviewing the registrar's decision, but because it seems to me that I have to consider whether, from a bankruptcy point of view, there was what is called extortion. Of course, in many cases there is extortion in the ordinary sense—unconscionable demands of various kinds—but in bankruptcy the term has a much wider meaning and includes matters in which very little, if any, moral obloquy is involved. In the present case the solicitors demanding the sum of costs did so, I think, because they were ignorant of bankruptcy rules or bankruptcy practice, and I do not accuse them or their clients of any moral obloquy. Nobody pretends there is. Nevertheless, the principle does exist that the threat of the penal sanction of bankruptcy must not be used to obtain a collateral advantage of any kind. The payment of this £12 12s. was such an advantage, and the result seems to be the same whether the attempt to obtain it was successful or no.

It follows, then, that this debt cannot be enforced by a bankruptcy petition. The creditor seems to have recognised that. He did not appeal against the registrar's decision, but he now calls in aid the other jurisdiction, viz., the Debtors Act, 1869, s. 5, which enables the court, as a discretionary matter, to commit to prison a person who makes default in payment of a debt. Under s. 5 (2) the jurisdiction is only to be exercised when it is proved to the satisfaction of the court that the person making default either has, or has had since the date of the judgment, means to pay the sum. That jurisdiction was originally committed to the Court of Queen's Bench under the Act of 1869, but by an order dated Jan. 1, 1884, the Lord Chancellor assigned the jurisdiction under s. 5 to the bankruptcy judge, and there it remains except in respect of orders of the Divorce Court, which, by the Debtors Act (Matrimonial Causes) Jurisdiction Order, 1932, were reserved to that court itself. It is, therefore, in a sense an accident that the court sitting in bankruptcy deals with these judgment summonses. Nevertheless, they are a form of execution which requires the sanction of the court. They are obviously first cousins to the procedure by way of bankruptcy notice and petition. That is very much emphasised, as counsel for the debtor pointed out to me, by s. 107 of the Bankruptcy Act, 1914, which continues the authority to the Lord Chancellor to direct that jurisdiction under the Act be vested in the bankruptcy judge, and by sub-s. (4) empowers the court, where the judgment creditor consents to it, to refuse to make a committal order and to make a receiving order instead. Section 107 (4) further provides:

"In such case the judgment debtor shall be deemed to have committed an act of bankruptcy at the time the order is made, and the provisions of this Act except Part VII thereof shall apply . . ."

A

That means that, as it were by a side-wind, a bankruptcy petition could arise out of this transaction under the jurisdiction so exercised, although by the direct route no bankruptcy petition could avail this creditor. The suggestion is that the decisions of the court relating to the process in bankruptcy must apply equally well to process by judgment summons, so that the threat of committing a man to prison by means of a judgment summons must not be used to put pressure on him to pay more than he is bound to pay, and, once such a threat has been used to a man, the court will not give its assistance by judgment summons any more than it will by adjudicating in favour of a creditor on a bankruptcy petition.

B

It seems to me that I am bound to hold that this act is one of which the court of bankruptcy, in its bankruptcy jurisdiction, would disapprove. It seems to me that I ought logically to exercise the jurisdiction under s. 5 of the Debtors Act, 1869, in the same sense and to hold that the vice which would debar a petition in bankruptcy also bars a judgment summons. In that case, it is not, I think, that I have no jurisdiction to make this order, as it was submitted to me, but that, in the exercise of my discretion, guided by the analogy of the bankruptcy authorities which are binding on me, I ought to hold that this is a relief to which the creditors have disentitled themselves, and I so hold. I, therefore, dismiss the summons.

C

Summons dismissed.

Solicitors: *Hewitt, Woollacott & Chown* (for the creditors); *Isadore Goldman & Son* (for the debtor).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

D

ATTORNEY-GENERAL OF CEYLON v. MACKIE AND ANOTHER.

E

[PRIVY COUNCIL (Viscount Simon, Lord Normand, Lord Morton of Henryton, Lord Reid and Sir Lionel Leach), July 7, 8, 9, October 6, 1952.]

Estate Duty—Company—Shares—Valuation—Valuation according to value of company's assets as a going concern.

F

M. was the director of a company incorporated in Ceylon in 1922. The capital of the company consisted of 19,800 eight per cent. cumulative preference shares and five thousand management shares. From the date of its incorporation up to 1940 the profits and losses of the company fluctuated, considerable profits being made in 1939 and 1940. No dividend had been paid on the preference shares since 1930 and on the management shares since 1926. In 1940, owing to war conditions, the future of the rubber trade was unpredictable and it was difficult to find anyone willing to invest large sums of money on speculation. On Sept. 7, 1940, M. died possessed of 9,201 preference shares and all the management shares. By s. 20 (1) of the Ceylon Estate Duty Ordinance, 1938, the value of any property for the purpose of estate duty should be estimated to be the price which such property would fetch if sold in the open market at the time of the death of the deceased. On a question as to the valuation of the management shares on the death of M.,

G

H

HELD: where the past history of a business showed consistent results or a steady trend and where there had been no disruption of general business conditions, it might be possible to reach a fair valuation by theoretical calculation; here, neither condition was satisfied, and it was not possible to derive by arithmetical calculation from past results anything which could have been regarded in 1940 as an average maintainable profit; valuation of the shares should be arrived at by reference to the balance sheet valuation of the company's business as a going concern, and, although the

value of an established business as a going concern generally exceeded the total value of its tangible assets, that could not be assumed to be universally true; in the circumstances, it had been proved that the shares held by M. at the date of his death could not have been sold at a price based on any higher figure than the value of the tangible assets of the company; and, therefore, that value should be adopted in the valuation of the shares for the purpose of estate duty.

AS TO VALUE OF PROPERTY CHARGEABLE TO ESTATE DUTY, see HALSBURY, Hailsham Edn., Vol. 13, pp. 269-276, paras. 272-285; and FOR CASES, see DIGEST, Vol. 21, pp. 24-26, Nos. 133-145.

Case referred to:

- (1) *Inland Revenue Comrs. v. Crossman. Inland Revenue Comrs. v. Mann*, [1936] 1 All E.R. 762; [1937] A.C. 26; *sub nom. Re Crossman, Re Paulin*, 105 L.J.K.B. 450; 154 L.T. 570; Digest Supp.

APPEAL by the Attorney-General of Ceylon from a decree of the Supreme Court of Ceylon, dated May 25, 1950, allowing an appeal by the respondents from an order of the District Court of Colombo, made on Aug. 31, 1949, relating to the value for assessment to estate duty of five thousand management shares of C. W. Mackie & Co., Ltd., which formed part of the estate in Ceylon of Charles William Mackie, who died on Sept. 7, 1940.

The company was incorporated in 1922 and it carried on the business as a dealer in rubber. The business, which was highly speculative, was conducted on narrow margins and the market price of rubber was subject to violent fluctuations. At the date of his death the estate of the deceased included 9,201 eight per cent. cumulative preference shares in the company and five thousand management shares. The appellant contended that the valuation of the management shares should be based on a capitalisation of the average profits of the company (calculated after deducting an eight per cent. dividend on the preference shares, but before placing anything to reserve or making any deduction for taxation) over the four and two-thirds years immediately preceding the death of the deceased at fifteen per cent., or, alternatively, a capitalisation of a weighted average of the profits of the company for each of the five years immediately preceding the death (calculated after deducting income tax each year and after deducting from the average an eight per cent. dividend on the preference shares and an appropriation to reserve) at sixteen per cent. The respondents, the executors of the deceased, contended that the value of the shares should be based on the net value of the company's assets at the date of death after providing for the value of the preference shares. The District Court accepted the methods of valuation for which the appellant contended and held that the value of the shares was Rs.250 each. The Supreme Court, in allowing the appeal, held that neither of the methods of valuation relied on by the appellant was appropriate when applied to a speculative business such as the company's where there was no steady trend of profits, and that the balance sheet method adopted by the respondents was the correct method to adopt. The court, accordingly, fixed the value of the shares at Rs.40.6188 per share.

Quass, Q.C., J. H. Stamp and Ashbrooke for the appellant.

Grant, Q.C., E. I. Goulding and Raymond Walton for the respondents.

Oct. 6. **LORD REID:** This is an appeal from a decree of the Supreme Court of Ceylon dated May 25, 1950, which allowed an appeal from an order of the District Court of Colombo dated Aug. 31, 1949. The question at issue is the valuation for the purpose of estate duty of five thousand management shares of C. W. Mackie & Co., Ltd. (hereinafter called "the company") which belonged to the late Mr. C. W. Mackie (hereinafter called "the deceased") at his death on Sept. 7, 1940. The respondents are his executors. The District Court of Colombo held that the value of these shares at that date was Rs.250 per share. On appeal

the Supreme Court reduced that valuation to Rs.40.6188 per share. The appellant maintains that the valuation of the District Court should be restored.

A The deceased had carried on business in Ceylon as a rubber merchant since about 1908, and his business was acquired by the company as a going concern on its incorporation in Ceylon in 1922. The capital of the company, which remained unchanged throughout, was Rs.1,000,000 divided into 19,800 eight per. cent. cumulative preference shares of Rs.50 each and five thousand management shares of Rs.2 each. The deceased was life director of the company with extensive powers, and from the beginning he had held a large part of the share capital and taken the leading part in the management of the company. He left Ceylon about 1930, but continued thereafter to exercise some supervision. At his death he held 9,201 preference shares and all the management shares. The practice of the company was to buy rubber and grade it for re-sale. Its graded rubber, B known as Mackie standard, had a high reputation in important foreign markets, and it appears that some twenty per cent. or thirty per cent. of the whole of the rubber exported from Ceylon was handled by the company. The policy of the company was to hold large stocks, and, as the price of rubber has for long been subject to large and rapid fluctuations, the company's profits varied C to an extreme degree. During its first five years very large profits were made amounting in all to over Rs.3,000,000. During the next six years to 1932 large losses were incurred amounting to over Rs.1,800,000. During the next six years there were profits in four years and losses in two, the figures varying from a profit of Rs.443,161 in 1933 to a loss of Rs.281,907 in 1935. Finally in 1939 and 1940 there were profits of Rs.787,641 and Rs.501,878. No dividend had been paid on the preference shares since 1930 and no dividend had been paid on the management shares since 1926, the company having found it necessary D to borrow large sums from time to time on overdraft. The leading witness for the appellant admitted that he did not know of a more speculative business in Ceylon.

E The statute in force at the time of the deceased's death was the Estate Duty Ordinance, 1938. By s. 20 of that ordinance it was provided that the value of any property should be estimated to be the price which, in the opinion of an assessor, such property would fetch if sold in the open market at the time of the death of the deceased. Section 20 contains a proviso to the effect that if the value of the property has been depreciated by the death of the deceased such depreciation is to be taken into account. The respondents originally F sought to rely on this proviso, but they do not now do so. It is now common ground that the shares must be valued at the price which they would have fetched if sold in the open market on Sept. 7, 1940. The articles of association of the company contained restrictions on transfer of a type often found in private companies, but it is admitted that the decision in *Inland Revenue Comrs. v. Crossman* (1) applies to this case. So the shares must be valued on the footing G that the highest bidder in the open market would have been registered as a shareholder, but that he would then have become subject to the restrictions in the articles. In addition to restrictions of a usual character, the articles also contained a provision to the effect that holders of not less than nine-tenths of the share capital could at any time call for a transfer of any other shares at a fair value to be fixed by the auditors of the company. It was admitted for H the appellant that no purchaser would have paid anything like Rs.250 per share for the management shares in face of the company's articles unless he could buy at the same time a large block of the preference shares and so have a majority of votes. But the appellant contends that the respondents must be supposed to have taken the course which would get the largest price for the combined holding of management and preference shares and to have offered for sale together with the management shares the whole or at least the greater part of the preference shares owned by the deceased. In their Lordships'

judgment this contention is correct. But it means that the valuation for which the appellant contends depends on the possibility of having been able to find in September, 1940, a single purchaser prepared to venture a very large sum of money. The agreed valuation of the deceased's preference shares is Rs.806,017 and the valuation of the management shares for which the appellant now contends is Rs.1,250,000. So a purchaser who wished to acquire a sufficiently large holding to be in a dominant position would have had, on this valuation, to pay some Rs.2,000,000 in all.

Evidence was given in the District Court as to the value of the shares. The leading witness for the respondents was Mr. Lander, a chartered accountant, who had experience of rubber companies. The gist of his evidence was that a buyer would first ask what was the last dividend and when was it paid, but, as no dividend had been paid for many years, it was impossible to value the shares on a yield basis. He then pointed out that in 1940 the future was unpredictable and it was difficult to find anyone who was willing to invest large sums of money on speculation. He valued the shares on a balance sheet basis because, in his view, no one would have paid more than that at the time. When asked in cross-examination whether a buyer would not have taken into account the probability that the high profits of 1940 would last for some time, he said that the buyer "would have needed to know precisely what was going to happen in the world which was devastated by a war the length of which could not be guessed by the man in the street. In other words, if a purchaser could have guessed that there was going to be a long war, no government interference, no form of increased taxation, and that he was not going to have competition from others, he might take that view. He would be a brave man. It would possibly be a gamble." In his view, no goodwill attached to the business. Similar evidence was given by other witnesses for the respondents.

There was really no contradictory evidence for the appellant on what their Lordships regard as some of the most important points. Neither of the appellant's witnesses professed to have been familiar with the market for shares of rubber companies or to have any direct knowledge about the possibility in 1940 of finding a purchaser for this large block of shares although they admitted that no one would pay the price on their valuation without acquiring such an interest. The respondents' case was that if the shares had been offered at prices corresponding to the value of the tangible assets held by the company they might have been sold. A purchaser would not then have been gambling on a continuance of the high rate of profit at the beginning of the war. But a purchaser could not have been found to venture Rs.2,000,000 on a speculation. The appellant's witnesses hardly dealt with these matters. Their approach was more theoretical. They assumed that it was possible to estimate the future average maintainable profit by means of an arithmetical calculation from past profits and losses, and that a purchaser could have been found who would have paid a price for the shares determined by a further arithmetical calculation from that average maintainable profit. One witness said that "a buyer would concentrate on the last five years' profits because that is most likely to represent what would happen in the future"; and the other witness went so far as to say that a prudent buyer would take it for granted that conditions would remain the same. It may be that these assumptions would be justified in many cases. Where the past history of a business shows consistent results or a steady trend and where there has been no disruption of general business conditions it may well be possible to reach a fair valuation by a theoretical calculation. But in this case neither condition was satisfied. The profits and losses of the company had fluctuated so violently in the past that, as the second witness for the appellant admitted, it is impossible to choose any five consecutive years in the company's history the result of which would be reflected in the next year's profits. It is, therefore, in their Lordships' judgment, not possible in this case to derive by

an arithmetical calculation from past results anything which could properly have been regarded in 1940 as an average maintainable profit, and in addition there were extremely uncertain conditions in 1940. The appellant's witnesses made no allowance for these facts, and were not able to give informed evidence on the question whether a purchaser could have been found in 1940 willing to lay out the large sum required on their valuation.

A The learned judge of the District Court founded on two lists of rubber companies' shares quoted in 1939 and 1940 as showing that in 1940 the investing public were not pessimistic. Their Lordships are unable to draw any conclusion from these lists. No evidence was given about them by the appellant's witnesses. A few questions about them were put to one of the respondents' witnesses, Mr. Cuming, in cross-examination. He said:

B "There was business in buying rubber shares in 1940, but not considerable business. There was a feeling that government was going to take over the buying of rubber and as a result there was a certain amount of business."

As the company's business depended on its ability to buy rubber, any such feeling could not have helped the sale of its shares. It may be that these share

C lists show that there were more buyers in the market in 1940 than in 1939, but they do not show whether those buyers were prepared to buy large blocks of shares or whether the prices offered exceeded the break-up value of the shares. Their Lordships cannot agree with the district judge that these lists diminish the value of the evidence of the respondents' witnesses. And there are other matters where the learned judge appears to have gone beyond the evidence. For example, he said that it was quite evident to the other directors at the death of the deceased that large profits were to be made in the near future, and that there is always a goodwill attached to a company of this character.

D In their Lordships' judgment the value of these shares at the date of the deceased's death is a question of fact which must be decided on the evidence which was led. That evidence has been very fully considered by the learned judges of the Supreme Court, and their Lordships cannot find that these learned judges have in any way misdirected themselves. It was argued for the appellant that the Supreme Court erred in law in accepting the balance sheet method of valuation because that can only give break-up value and in this case it is necessary to find the value of the business as a going concern. It is true that a purchaser of the shares held by the deceased could have obtained a controlling interest in the company as a going concern, and in their Lordships' judgment it is right to value these shares by reference to the value of the company's business as a going concern. No doubt, the value of an established business as a going concern generally exceeds and often greatly exceeds the total value of its tangible assets. But that cannot be assumed to be universally true. If it is proved in a particular case that at the relevant date the business could not have been sold for more than the value of its tangible assets, then that must be taken to be its value as a going concern. In their Lordships' judgment it has been proved in this case that the deceased's holding could not have been sold in September, 1940, at a price based on any higher figure than the value of the tangible assets of the company. Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Burchells* (for the appellant); *Farrer & Co.* (for the respondents).

[*Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.*]

BRITISH NYLON SPINNERS, LTD. v. IMPERIAL CHEMICAL INDUSTRIES, LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.), October 15, 16, 1952.]

Conflict of Laws—Foreign judgment—Recognition by English courts—Judgment of American court affecting rights of English company in regard to English patents—English company neither subject to jurisdiction of American court nor party to proceedings therein.

By an agreement, dated Dec. 31, 1946, the defendant company, which was incorporated and domiciled in England, acquired from a company incorporated in the United States of America certain English patents relating to the manufacture of nylon. By a contract made in March, 1947, the defendant company agreed to grant exclusive licences under the patents to the plaintiff company, which was incorporated and domiciled in England. In reliance on this agreement, and without any objection on the part of the defendant company, the plaintiff company carried on the manufacture of nylon as though the licences had been granted, and on July 24, 1952, it issued a writ in an action for specific performance of the agreement of March, 1947. On July 30, 1952, in an action brought in the United States of America against the American company, the defendant company, and others, at the suit of the government of the United States under the anti-trust laws, a federal judge of a district court of New York made an order whereby, inter alia, the agreement of Dec. 31, 1946, was to be cancelled and the defendant company was to re-convey to the American company, within ninety days, all the patent rights assigned to the defendant company under the agreement. Pending the hearing of its action against the defendant company, the plaintiff company, which was not a party to the American proceedings, sought an interlocutory injunction to restrain the defendant company from parting with any of the patent rights acquired by it under the agreement.

HELD: the contract of March, 1947, being an English contract, made between English nationals and to be performed in England, was subject to the jurisdiction of the English courts; prima facie, the plaintiff company had acquired under the contract an enforceable right to licences under the English patents acquired by the defendant company under the agreement of Dec. 31, 1946, and this right, being in respect of English patents, was in the nature of a proprietary interest which it was the duty of English courts to protect; an order of an American court which would destroy or qualify the statutory rights of an English national who was not subject to its jurisdiction was an assertion of extra-territorial jurisdiction which English courts did not recognise; and, therefore, the plaintiff company was entitled to the interlocutory injunction which it sought.

AS TO RECOGNITION OF FOREIGN JUDGMENTS, see HALSBURY, Hailsham Edn., Vol. 6, pp. 324-333, paras. 380-388; and FOR CASES, see DIGEST, Vol. 11, pp. 444-452, Nos. 1029-1098.

INTERLOCUTORY APPEAL by the defendant company, Imperial Chemical Industries, Ltd., from an order of UPJOHN, J., dated Aug. 13, 1952, whereby he granted an injunction restraining the defendant company until judgment in the action between the parties, or further order, from assigning or parting with any patent rights acquired by it from E.I. du Pont de Nemours and Company (a corporation incorporated in the United States of America) under an agreement dated Dec. 31, 1946.

The American company had from time to time obtained patents in the United States of America and other countries covering inventions relating to the manufacture of nylon. By an agreement, dated Mar. 30, 1939, and made between

the American company and the defendant company, the American company granted to the defendant company licences to exercise and practise all such inventions in certain specified countries, the licences for England and certain other parts of the British Commonwealth being exclusive. Under the agreement the defendant company had the right to grant sub-licences to persons within the licensed territory, and, by an agreement, dated Jan. 5, 1940, between the defendant company and the plaintiff company, British Nylon Spinners, Ltd., the defendant company granted exclusive sub-licences to the plaintiff company to practise the inventions, subject to a certain limitation, in England and the other Commonwealth countries in respect of which the defendant company had the exclusive licences. By an agreement, dated Dec. 31, 1946, and made between the American company and the defendant company, the agreement of Mar. 30, 1939, was cancelled, and a new agreement was made whereby the defendant company, instead of being licensees, became the owner of the patents set out in the schedule to the agreement, which included the English and certain Commonwealth patents in regard to the inventions. By a letter, dated Mar. 5, 1947, the defendant company informed the plaintiff company of the new arrangement and stated that in future the plaintiff company would be direct licensees of the defendant company under these patents. For the purpose of the present interlocutory proceedings it was conceded by the defendant company that there was a new enforceable contract between the parties, based on the letter of Mar. 5, 1947, whereby the defendant company agreed to assign to the plaintiff company exclusive licences for certain specified territories. No licences were, in fact, granted, but the plaintiff company carried on the manufacture of nylon without any objection on the part of the defendant company. On July 24, 1952, the plaintiff company commenced an action against the defendant company in the Chancery Division of the High Court for (inter alia) specific performance of the contract constituted by the letter of Mar. 5, 1947. By an order of His Honour SYLVESTER J. RYAN, district judge, made in the United States District Court for the Southern District of New York on July 30, 1952, in an action brought by the United States of America, under the Sherman Anti-Trust Act, against the defendant company, the American company, and others (but not including the plaintiff company), it was ordered, inter alia, that the agreement of Dec. 31, 1946, should be cancelled and that the defendant company should re-convey to the American company within ninety days all the patent rights assigned to the defendant company thereunder. To restrain the defendant company from parting with the patents before the hearing of the action in the High Court, counsel for the plaintiff company moved for an interlocutory injunction, which was granted by UPJOHN, J.

Winn for the defendant company.

T. G. Roche for the plaintiff company.

SIR RAYMOND EVERSLED, M.R.: The agreement of December 31, 1946, was an agreement whereby the defendant company acquired outright from du Pont de Nemours the patents (among others) which are specified in the schedule to the order, and one of the terms of the final judgment of the district judge, was that this agreement was thereby cancelled and terminated. That, however, was not all, for in a later part of the same judgment, Imperial Chemical Industries, Ltd. (the defendant company) was forbidden to make, among other things, "any disposition of foreign patents" (i.e., patents foreign to the United States of America and including the patents now in suit) unless it required, as a condition of the grant, that the grantee agreed in writing to hold its licence subject to certain rights of immunity, viz., the rights of American manufacturers of these nylon products freely to import and vend in the United Kingdom articles manufactured in accordance with the patents or with comparable patents. The effect of any such condition, if insisted on, would, obviously, be to derogate in a most serious way from the value of the exclusive licences which the defendant company

was under contract to grant to the plaintiff company. Further, if the defendant company were to re-assign these various patents to du Pont de Nemours, as directed by the judgment of the district judge, it would, in fact, disable itself altogether thenceforward from granting licences in the terms which it had contracted to grant. The present proceedings have, therefore, been brought by the plaintiff company, in effect, to enforce what it claims to be its contractual rights under the contract of March, 1947, and by way of interim relief (seeing that the ninety days specified in the order of the district judge, are about to expire) the plaintiff company seeks to restrain the defendant company from executing an assignment in obedience to that order. UPJOHN, J., granted an injunction, pending the trial, restraining the defendant company from so doing.

This is an interlocutory matter, and, therefore, it is inappropriate for the court to say more about the case or its merits than is necessary to make clear the grounds of the conclusion which it reaches. It is plain from what I have said that there is here a question of what is sometimes called the comity which subsists between civilised nations. In other words, it involves the extent to which the courts of one country will pay regard and give effect to the decisions and orders of another country. I certainly should be the last to indicate any lack of respect for any decision of the district courts of the United States, but I think that in this case there is raised a somewhat serious question whether the order, in the form that it takes, does not assert an extra-territorial jurisdiction which the courts of this country cannot recognise, notwithstanding any such comity. Applied conversely, I conceive that the American courts would likewise be slow (to say the least) to recognise an assertion on the part of the British courts of jurisdiction extending, in effect, to the business affairs of persons and corporations in the United States. In a judgment which the district judge delivered in May, 1952 (the second of his opinions in the proceedings to which I have referred), it is plain that the learned judge carefully considered this matter, and, indeed, as UPJOHN, J., pointed out, expressed his own doubts whether, in giving effect, as he felt it his duty to do, to the implications of the Sherman Act, he might not be going beyond the normally recognised limits of territorial jurisdiction. But he said:

"It is not an intrusion on the authority of a foreign sovereign for this court to direct that steps be taken to remove the harmful effects on the trade of the United States."

If by that passage the learned judge intended to say (as it seems to me that he did) that it was not an intrusion on the authority of a foreign sovereign to make directions addressed to that foreign sovereign, or to its courts, or to nationals of that foreign power, effective to remove (as he says) "harmful effects on the trade of the United States", I am bound to say that, as at present advised, I find myself unable to agree with it. Questions affecting the trade of one country may well be matters proper to be considered by the government of another country. Tariffs are sometimes imposed by one country which obviously affect the trade of another country, and the imposition of such tariffs, as it seems to me, is a matter for the government of the particular country which imposes them. And if that observation of the learned judge were conversely applied to directions designed to remove harmful effects on the trade, say, of Great Britain or British nationals in America, I should be surprised to find that it was accepted as not being an intrusion on the rights and sovereign authority of the United States. On the other hand, there is no doubt that it is competent for the courts of a particular country, in a suit between persons who are either nationals or subjects of that country or are otherwise subject to its jurisdiction, to make orders in personam against one such party, directing it, for example, to do something or to refrain from doing something in another country affecting the other party to the action. As a general proposition, that would not be open to doubt, but the plaintiff in this case is neither a subject nor a national of the United States, nor (unlike the

defendant company) was it a party to the proceedings before the district judge, nor is it otherwise subject to his jurisdiction.

What the precise relationship, commercially or otherwise, is between the plaintiff company and the defendant company we have not at this stage of the proceedings considered, and I proceed on the assumption (and I am not to be taken as hinting that the contrary is the fact) that the plaintiff is an independent trade corporation and entitled to be treated as independent of the defendant company. Being so independent, it has beyond question, according to the laws of England, certain rights, certain choses in action, by virtue of the contract of 1947, which the courts of this country, in exercise of the laws which they claim to be entitled to administer, will in this country protect and enforce. Broadly speaking, the contract of March, 1947, being an English contract, made between English nationals and to be performed in England, the right which the plaintiff company has may be described as its right, under the contract, to have it performed and, if necessary, to have an order made by the courts of this country for its specific performance. That is a right, or, in other words, a species of property (seeing, particularly, that it is related to patents) which is English in character and is subject to the jurisdiction of the English courts, and it seems to me that the plaintiff company has, at least, established a *prima facie* case for saying that it is not competent for the courts of the United States, or of any other country, to interfere with those rights or to make orders, the observance of which by our courts would require that our courts should not exercise the jurisdiction which they have and which it is their duty to exercise in regard to those rights.

I think, however, that the matter goes somewhat further. I have said that the subject-matter of the contract of December, 1946, is a number of English and Commonwealth patents. An English patent is a species of English property of the nature of a chose in action and peculiar in character. By English law it confers on its proprietor certain monopoly rights, exercisable in England. A person who has an enforceable right to a licence under an English patent appears, therefore, to me to have, at least, some kind of proprietary interest which it is the duty of our courts to protect. And, certainly, so far as the English patents are concerned, it seems to me, with all deference to the judgment of the district judge, to be an assertion of an extra-territorial jurisdiction which we do not recognise for the American courts to make orders which would destroy or qualify those statutory rights belonging to an English national who is not subject to the jurisdiction of the American courts.

As regards the patents other than the English patents, viz., Australian, Indian, New Zealand, South African, Irish or other patents, a possible distinction can, of course, be drawn, since the patents in those countries are a species of property in those countries, and an effective right to use those patents would, if necessary, have to be asserted in those countries. But no special point has been made before us as regards the Australian and other non-English patents, and, for present purposes, I do not understand that it is suggested, if the injunction goes as regards the English patents, that it should not go to the full extent of the patents specified in the schedule to the order of UPJOHN, J. We must, in the absence of some evidence to the contrary, assume that the law in these other countries is the same as it is here, and, apart from what I might call the particular rights quoad the particular non-English patents, there remains the general contractual right which relates to all the patents and is derived from the English contract of March, 1947.

I think it undesirable that I should say more, except to re-affirm the proposition that the courts of this country will, in the natural course, pay great respect and attention to the superior courts of the United States of America, but I conceive that it is none the less the proper province of English courts, when their jurisdiction is invoked, not to refrain from exercising that jurisdiction if they think

that it is their duty so to do for the protection of rights which are peculiarly subject to their protection. In so saying, I do not conceive that I am offending in any way against the principles of comity which apply between the two countries, and, like UPJOHN, J., I take some comfort from the doubts which the district judge himself entertained about the extent to which his order might go, if carried to its logical conclusion.

DENNING, L.J.: I agree. It would be a serious matter if there was a conflict between the orders of the courts of the United States and the orders of the courts of this country. The writ of the United States does not run in this country, and, if due regard is had to the comity of nations, it will not seek to run here. But, as I read this judgment of the United States court, there is a saving clause which prevents any conflict, because, although the defendant company has been ordered to do certain acts by the United States court, nevertheless there is a provision which says that nothing in the judgment shall operate against the company for action taken in complying with the law of any foreign government or instrumentality thereof to which the defendant company is for the time being subject. In view of that saving clause I hope that there will be no conflict between the orders. I agree that the appeal should be dismissed.

ROMER, L.J.: I also agree.

Appeal dismissed.

Solicitors: *J. W. Ridsdale* (for the defendant company); *Bristows, Cooke & Carmichael* (for the plaintiff company).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

ENGLAND v. ENGLAND.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Davies, J.), October 13, 14, 1952.]

Divorce — Adultery — Evidence — Presumption — Inclination and opportunity — Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 7.

There is no rule of law that evidence of the conjunction of strong inclination with opportunity raises an irrebuttable presumption that adultery has been committed.

After November, 1951, the wife and M. became attracted to each other. M. was a constant visitor to the room occupied by the wife, and on Apr. 20, 1952, he spent the night with her there because, the parties stated in evidence, she was ill. They admitted having discussed committing adultery, but said that they had decided not to do so, and they denied having committed adultery on Apr. 20, or at any other time. On a summons by the husband, under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, to discharge, on the ground of the wife's adultery, a maintenance order made against him on July 31, 1946,

HELD: although there was sufficient evidence to establish adultery, that evidence could be contradicted, e.g., by the sworn testimony of the wife and M., and in the circumstances the summons would be dismissed.

AS TO ADULTERY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 660-665, paras. 972-978; and FOR CASES, see DIGEST, Vol. 27, pp. 293-304, Nos. 2695-2813, and Digest Supp.

FOR THE SUMMARY JURISDICTION (MARRIED WOMEN) ACT, 1895, s. 7, see HALSBURY'S STATUTES, Second Edn., Vol. 11, p. 852.

Cases referred to:

- (1) *Woolf v. Woolf*, [1931] P. 134; 100 L.J.P. 73; 145 L.T. 36; Digest Supp.
- (2) *Gower v. Gower*, [1950] 1 All E.R. 804; 114 J.P. 221; 2nd Digest Supp.
- (3) *Preston-Jones v. Preston-Jones*, [1951] 1 All E.R. 124; [1951] A.C. 391; 2nd Digest Supp.
- (4) *Watt (or Thomas) v. Thomas*, [1947] 1 All E.R. 582; [1947] A.C. 484; [1947] L.J.R. 515; 176 L.T. 498; 2nd Digest Supp.

APPEAL by the husband against the dismissal by the justices for the Gore petty sessional division of Middlesex, on June 11, 1952, of his summons claiming, under the Summary Jurisdiction (Married Women) Act, 1895, s. 7, a discharge, on the ground of the wife's adultery, of an order made against him on July 31, 1946, on the ground of his desertion..

A It was admitted by the wife and one Moorcroft that from about November, 1951, the latter was a frequent visitor to the wife at the room which she occupied, and that on Apr. 20, 1952, he had spent the night with her in her room because she was ill. He had not got into bed with her, but had slept on two chairs. They further admitted that they were very fond of each other and that on another occasion they had discussed whether they should commit adultery, but, being very anxious to marry if they could be divorced from their respective spouses, they decided that it would spoil their future if they tainted their relationship by committing adultery. The justices dismissed the summons and the husband appealed.

B He contended that the admitted inclination and opportunity to commit adultery raised an irrebuttable presumption that adultery had been committed; alternatively, that the wife and Moorcroft were estopped from giving evidence in denial; alternatively, that the wife must be deemed to have committed "an act of adultery" within the meaning of s. 7 of the Act of 1895.

C *Seuffert* for the husband.

C. D. E. Rich for the wife.

D LORD MERRIMAN, P.: This is a husband's appeal from the dismissal by the justices for the Gore petty sessional division of Middlesex, sitting at Hendon, of his summons claiming the discharge of an order made against him on July 31, 1946, on the ground of desertion. The application was based on the Summary Jurisdiction (Married Women) Act, 1895, s. 7, the last sentence of which reads:

E "If any married woman upon whose application an order shall have been made under this Act . . . shall commit an act of adultery, such order shall upon proof thereof be discharged".

It is said that it was proved that the wife had committed an act of adultery, and that the finding of the justices to the contrary cannot stand.

[His Lordship stated the facts and continued:] I approach this case not only with regard to the facts of the night of Apr. 20, but adding to them the admission, about which there was no doubt, that the wife and Moorcroft were frequently in each other's company in the house in which she had a room. In other words, the evidence that they were alone together in that room throughout the whole of that night is only an instance, albeit a very strong example, of a combination of inclination and opportunity which manifestly existed on many other occasions than that about which the evidence was given. The justices found that, although the wife and this man were exceedingly indiscreet on Apr. 20, 1952, in that they spent the night together, they did not commit adultery. This case was argued, not on the indisputable proposition that, uncontradicted, there was ample evidence to support a conclusion of adultery, but on the basis that it could not be contradicted, and that the admitted fact that these people were in that room alone together during the night of Apr. 20, coupled with the admitted fact that they were attracted by each other, raised what was at one moment called an irrebuttable presumption that they had committed adultery, or, alternatively, that they were estopped from giving evidence that they had not committed adultery, or that they must be deemed within s. 7 (which does not say anything about "deeming") to have committed an act of adultery, and, therefore, that this decision cannot stand.

H The argument was based on the decision of the Court of Appeal in *Woolf v. Woolf* (1), and it is no doubt the fact that there are some isolated passages,

particularly in the judgment of LORD HANWORTH, M.R., which support the view that from the evidence adduced about the events of the night of Apr. 20 "adultery must be inferred", to use one phrase which occurs ([1931] P. 144), but, in my opinion, it is vital to bear in mind what were the circumstances of that case. It was a decision of LORD MERRIVALE, P., at a time when the class of undefended divorce suit which depended on evidence of a single night at a hotel with a woman unknown was very prevalent. No doubt, my predecessor expressed himself very strongly about the unsatisfactory nature of that class of case, but it is right to say that one has only to look back at some of the older reports to see that similar opinions are to be found in earlier cases. The point which was attracting attention was not only whether adultery had or had not been committed, but whether the circumstances suggested that the suit was tainted by either collusion or connivance. The significant fact about *Woolf v. Woolf* (1) was that the learned President had expressed himself as not being in any doubt on that matter, but as completely satisfied of the good faith of the petitioner. Therefore, no question of collusion or connivance in connection with the visit of the husband to a hotel arose. Moreover, at an earlier stage of the case HILL, J., had directed inquiries by the King's Proctor because the woman with whom adultery was alleged was unnamed. The King's Proctor reported that he was unable to throw any further light on the matter, and it was after these inquiries that the learned President said that he saw no reason whatever to assume that the petitioner had not acted in good faith. He was inclined to hold that adultery had not been committed, and suggested that, the woman being unnamed, some relative of the husband might have been masquerading as his paramour so that he could obtain a divorce. It was with reference to such circumstances that the Court of Appeal expressed themselves, and ROMER, L.J., after saying that the husband refused to disclose the woman's name, said (*ibid.*, 146): -

"What possible difference it would have made had the name been disclosed I am at a loss to see; because the only thing that the court would have been able to discover from a disclosure of the name would have been that the lady was not, as the learned President suggests she might possibly have been, some near relative of the respondent. In my opinion, that possibility can be entirely ruled out; it is incredible, in the circumstances, that the lady was an aunt or a sister or any like near relation of the respondent."

In the absence of any defence and of any attempt to impose a fraud on the court the Court of Appeal said that the inference of adultery ought to have been drawn. That seems to me to be a very different thing from saying that where a case is contested parties who deny adultery are not allowed to be heard to say so, that they are estopped from denying it, that the presumption is irrebuttable, and that their evidence to the contrary is not to be listened to in spite of the fact that in one sense, on their own admission, their evidence, if believed, deprives both of them of the possibility that their respective spouses might make use of the circumstances to obtain divorces, which would enable them to bring their hopes of marriage to fruition.

I decline to hold that there is any rule of law that the conjunction of strong inclination with evidence of opportunity leads to an irrebuttable presumption that adultery has been committed. That it affords very strong *prima facie* evidence is indisputable, but that is quite another thing. I am reluctant to drag in my own experience as a judge—particularly as nobody has been able to cite any reported case—but I should say from my own recollection that I have known several cases where, although the circumstantial evidence from which an inference of adultery has been sought to be drawn has been very strong—at least as strong as in this case—nevertheless, one has been persuaded that the evidence of the parties denying that adultery had been committed must be accepted. I cannot believe that there is any law which obliges a court to decide

in a contested case, where there is strong prima facie evidence on the one side, and, maybe, strong circumstantial evidence supporting a denial on the other side, that, contrary to its own belief, adultery has been committed. I put to counsel, by way of testing how far this proposition went, the question whether, if a denial in the same terms as in this case was supported by the circumstantial evidence, supposing the alleged paramour to be a woman, that she was proved by medical evidence which left no doubt to be *virgo intacta*, it could still be said that the fact that the parties had spent a night alone in a room was not susceptible of an innocent explanation.

We were referred to the decision of the Court of Appeal in *Gower v. Gower* (2). I am not going to discuss the question of the burden of proof, for that, I think, has already been disposed of by the House of Lords in *Preston-Jones v. Preston-Jones* (3). It is not easy from the report to follow exactly what happened, but an issue had been directed whether or not adultery had been committed, and that was tried by BARNARD, J., who found that it had not. I will read the opening sentences of BUCKNILL, L.J.'s judgment ([1950] 1 All E.R. 805):

"The learned judge came to the conclusion that adultery was not made out, mainly on the ground that there was not a scrap of evidence of any inclination. I venture to think that the learned judge has misdirected himself there. The vital question is: Where were these people sleeping during the time that they were together? If the evidence points almost irresistibly to the fact that they were sleeping in the same room, one does not want any further evidence than that."

I pause there. If I may put my own paraphrase, that is simply saying, as has been said over and over again in this court, that the very same facts may be evidence both of the inclination and of the opportunity. Then the learned lord justice went on (*ibid.*):

"There is no need for evidence of kissing and that sort of thing. I ask myself this question: If Mr. Cockburn and the wife had not been called as witnesses, would there have been the slightest doubt on the evidence that adultery had been committed?"

Then he poses the question slightly differently, but, as I venture to suggest, more accurately (*ibid.*):

"Would not the evidence have been abundantly sufficient to establish adultery? I should have thought that there could be no doubt about that. Did these two witnesses remove that presumption?"

That is not saying that there was an irrebuttable presumption. It is saying exactly the opposite. It is saying that that class of evidence affords very strong prima facie proof, but that it is rebuttable. He then discusses whether it was, in fact, rebutted, and, without going into details, of which we have no knowledge because we have not sent for the papers in the case and it is not stated exactly in the report what the particular conflict was about, the learned lord justice then points to some letter which shows that the wife in that case was not a truthful witness. He observes that the judge had said that she was a very unsatisfactory witness, and added that the man was "tarred with the same brush". So that it was not a case of *demeanour*. In other words, it came within the third proposition in LORD THANKERTON'S opinion in the case of *Watt (or Thomas) v. Thomas* (4) ([1947] 1 All E.R. 587):

"The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

There was also the suggestion that there had been misdirection on the point that there was no evidence of inclination. In my view, that judgment does not support the proposition either that the evidence, which is abundantly sufficient to establish adultery, raises an irrebuttable presumption, or estops the parties charged from giving evidence to the contrary, or leads in law to the conclusion that they must be "deemed", notwithstanding evidence to the contrary, to have committed adultery.

I see no reason for differing from the view of justices who plainly understood the very strong nature of the evidence they had been given, but who, nevertheless, believed the two people concerned on their oath that adultery had not been committed at all, and, in particular, had not been committed in the circumstances which prevailed on the night of Apr. 20. In my opinion, this appeal fails.

DAVIES, J., stated the facts and continued: If the evidence stopped at the events of Apr. 20, 1952, and the inclination to commit adultery, it is plain, to use one phrase that occurs in the justices' reasons, that there was ample evidence to support a conclusion of adultery. Indeed, if the evidence stopped there, it might well be said that the case fell within the passage, which was so much pressed on this court, from the judgment of LORD HANWORTH, M.R., in *Woolf v. Woolf* (1):

" . . . human nature being what it is, adultery must be inferred here."

But the evidence did not stop there. Both the wife and the alleged paramour went into the witness-box and swore on oath that they had not, either on that night or on any other occasion, committed adultery. They supported that by reasons, and the justices believed them. This court is now asked to say that the justices had no right to believe them, but that on the facts of this case, on some suggested principle—whether it is called estoppel, irrebuttable presumption, assumed adultery, constructive adultery, or I know not what—any court must infer the commission of adultery despite the sworn testimony of the accused persons to the contrary. I know of no such principle. In my judgment, there is no such principle. *Woolf v. Woolf* (1), as my Lord has pointed out, deals with an entirely different set of facts. The evidence was all one way and was wholly uncontradicted, and the question was whether there was such a prima facie case that the court was bound to act on it. This case, a defended case, where the evidence is contradicted, is, in my opinion, wholly different. The second way in which this case is put by counsel for the husband, who never shrank from the propositions which he advanced to this court, however startling they might appear to be, was that the position of a wife who has obtained an order for maintenance on the ground of desertion, and knows, as I suppose she must be deemed to know, of the provisions of the Summary Jurisdiction (Married Women) Act, 1895, s. 7, is that, even if she has not actually committed adultery, she must not do anything which might entitle a court to make a finding of adultery against her, and, if she does do any such thing, then her order must be discharged. If that is the second proposition, there is no authority for it at all. Finally, if we are asked to substitute our own view, and I indicate no view of my own, on this evidence for that of the justices, in my judgment, this is clearly not a case in which an appellate court could take on itself the burden of doing any such thing. There is plainly here no misdirection of themselves by the justices. Clearly, as my Lord has already indicated, there is nothing unsatisfactory in the reasons which they have given. It is admitted by counsel for the husband that he is unable to point to a single factor, a single piece of evidence in which, as was the case in some of the authorities at which we have been invited to look, it could be said that either of the persons accused of adultery has given unsatisfactory or false evidence in some other, even collateral, matter, so that it could be said that the witness was an unsatisfactory witness, and that, therefore, this court should substitute its own view, whatever that might be, for that of

the justices who heard the evidence of these people and believed them. In my judgment, this is a case in which it is impossible for this court to do any such thing. For these reasons I agree with my Lord that this appeal fails.

Appeal dismissed.

Solicitors: *Ferris & Reed* (for the husband); *Pratt & Wegg-Prosser* (for the wife).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

WRIGHT v. CHESHIRE COUNTY COUNCIL.

[COURT OF APPEAL (Singleton, Birkett and Morris, L.J.J.), October 6, 7, 1952.]

Negligence—Schoolmaster—Physical training—Liability of education authority—Approved system of supervision—Regular and recognised practice.

The plaintiff, a boy aged twelve years, was taking part in gymnastic exercises at a school managed and controlled by the defendants. He was in a party of ten boys who were engaged in the exercise of vaulting the "buck". The ten boys, who had all had experience of the exercise, were vaulting one after the other, and it was the duty of the boy who was last over to wait at the receiving end of the buck to assist as necessary the next boy to come over. As the plaintiff was vaulting, the school bell denoting that play-time had arrived rang, and the boy at the receiving end of the buck ran off without waiting to receive the plaintiff, who fell and sustained injuries. At the time of the accident the instructor was a little distance away supervising the activities of other classes. Evidence was given that it was the approved practice in schools to leave boys who had had a little practice to carry out the exercise by themselves, so as to give them self-confidence, but evidence was also given by a physical training instructor that he considered the practice dangerous. The plaintiff sued for damages, alleging that the defendants were negligent in failing to exercise reasonable care in not having an adult present at the receiving end of the buck.

HELD: the test of what was reasonable care in ordinary everyday affairs might well be answered by experience arising from practices adopted generally and followed successfully for many years; the evidence in the present case was that the defendants had adopted a generally approved practice; taking into account the nature of the activity in question, they had not been shown to have been negligent; and, accordingly, they were not liable in damages to the plaintiff.

AS TO DUTY TO TAKE CARE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 568-571, paras. 823, 824; and FOR CASES, see DIGEST, Vol. 36, pp. 12-21, Nos. 33-101.

Cases referred to:

- (1) *Harnett v. Bond*, [1924] 2 K.B. 517; 93 L.J.K.B. 946; 131 L.T. 782; *affd.* H.L., [1925] A.C. 669; 94 L.J.K.B. 569; 133 L.T. 482; 89 J.P. 182; 33 Digest 268, 1869.
- (2) *Glasgow Corpn. v. Muir*, [1943] 2 All E.R. 44; [1943] A.C. 448; 112 L.J.P.C. 1; 169 L.T. 53; 107 J.P. 140; 2nd Digest Supp.
- (3) *Gibbs v. Barking Corpn.*, [1936] 1 All E.R. 115; Digest Supp.

APPEAL by defendants from an order of McNAIR, J., dated Apr. 4, 1952, whereby he held that the defendants had been negligent in the performance of their duty to exercise reasonable care towards the plaintiff while he was vaulting in the course of physical exercises at the school managed and controlled by the defendants as the education authority. The defendants appealed.

Nelson, Q.C., and *G. B. H. Currie* for the defendants.

Sir Noel Goldie, Q.C., and *Youds* for the plaintiff.

SINGLETON, L.J.: In March, 1949, Roger Neill Wright, a boy of the age of twelve years, was a pupil at the Grange Secondary School, Ellesmere Port, in the county of Chester. The Cheshire County Council, the defendants in this action, who are the education authority for the county, are responsible for the management and control of that school. On Mar. 25 the boy was injured in an accident in the gymnasium of the school. He sustained an injury to his right arm—in particular, to the elbow joint—and in due course he, through his father, commenced an action against the defendant county council, alleging that they were negligent in the control and management of the school and that by that negligence the injury to the infant plaintiff was caused. The county council denied any negligence. The action came on for trial before McNAIR, J., on Apr. 4, 1952, and he held that the defendants had been guilty of negligence and were responsible in damages to the plaintiff. Against that judgment the defendants appeal to this court.

On the afternoon of Mar. 25, 1949, the class to which the boy belonged had gone to the gymnasium. There were forty in the class, and it was in charge of a master and instructor, Mr. George. He split up the class into four parts, and the infant plaintiff was one of a party of ten who were vaulting over what is called a "buck". The case for the plaintiff was that there ought to have been an adult at the end, or near the end, of the buck, to receive the plaintiff and see that he came to no harm, that there was no adult there, and that thereby, when the plaintiff slipped, he was deprived of having the assistance which he would have had if there had been some competent person there to help him in case he needed help. The defendants' case was that it was not necessary to have an adult there to take charge of this particular squad.

The infant plaintiff, in the course of his evidence, said the boys vaulted the buck in turn, and that just before this accident he heard the bell ring, a bell which was a signal that play-time had arrived, and that that was the end of the gymnastic activities of the class. He said that he was on the buck when the bell went, that a boy who ought to have been at the receiving end of the buck disappeared, that there was no one to help him, and he fell on his elbow and damaged it. The plaintiff relied on the evidence of Mr. Charles Lord, who was a fellow and also an examiner of the British Association of Physical Training, and an organiser of physical training for the Y.M.C.A. on Merseyside, and who had had a long experience of gymnastics and of physical drill. He was asked by counsel whether he considered that the system adopted at this school was a safe system, and his answer was:

"In over fifty years' teaching I have never allowed a boy to stand in at the buck or the box. I think it is for an adult. It is a very precarious practice. I think the buck is the most useless piece of apparatus in the gymnasium."

The learned judge then asked him how high the buck was, and he said: "Three feet roughly, but it can go to six." Then the learned judge said to him:

"Q.—You say it is dangerous for boys to go over a buck three feet high ?

A.—Not having an adult to catch him, I do. Q.—What age of boy ?

A.—Any boy aged from nine upwards. Q.—A boy of eighteen ? A.—Well,

yes, I would not even allow boys of eighteen to go over a buck by themselves. Q.—Three feet high ? A.—There is always a danger of a boy who is

rather tight in the muscles not being able to do an astride position to get over

and falling backwards, and then he goes on the floor, because there is no

mat where he takes off. Q.—I suppose you have seen leapfrog played ?

A.—Yes. I teach leapfrog in my own classes. Q.—And I suppose you have

seen it played in the playground ? A.—Yes, but then they are doing it at their

own risk. Q.—Do you think it is an unsafe sport ? A.—I do really, but boys

will be boys. In the gymnasium it is up to the teacher to see that there is

no danger. If I have the buck I do not have the box. I do something

else like long jump, balance walking and mat work. I had one or two slips in my early teaching career on the buck and decided to abandon it."

When that witness was cross-examined he was asked by counsel for the defendants whether or not the exercise, as performed in the gymnasium in the school on the day in question, was a regular exercise, and he answered:

A "Yes. Q.—And one of the purposes of that is to inspire the boys with a little self-confidence and courage, is it not? A.—Yes. Q.—And provided the boy stays and does his job there is no risk involved, is there? A.—I think there is. There are very few boys I would allow to stand in at a buck. There are only certain boys gifted with what I call the courage to grip that boy. I have seen them when I have gone round examining. The British Association— Q.—I am not challenging what your personal view is, but the point is that right throughout the educational service there are thousands of teachers teaching p.t.? A.—Yes. Q.—And they all teach this method? A.—Yes. Q.—It is the recognised method? (No reply). (McNAIR, J.): Do you agree with that? A.—I do not. Q.—Do you agree that it is the recognised method? A.—I have heard of it, but I myself do not approve of it. A lot of things the Board of Education recommend I do not stick up for. (Mr. Nelson): My Lord is asking you this: You know that is what they do? A.—They do, I know. Q.—But you say you do not approve of it, but you know from the reference books that is the recognised method? A.—They do. They recommend the boys for standing in."

D In re-examination by counsel for the plaintiff the witness was asked:

"Q.—Therefore what you are saying, as I understand it, is that you do not approve of it. You say an adult ought to be there, and you say the Board of Education allow lads to be there? A.—Yes, I know they do by the reference books."

E Evidence was given by several of the boys, and there was a question of fact on that which had to be decided, and was decided, by the learned judge. Evidence was given, too, by the master, Mr. George, a trained and experienced physical trainer and gymnastic instructor. He said he followed the ordinary practice, the practice in which he had been trained, and he considered it good practice after the boys had been under him and directly supervised by him for a while. They only had to clear a three foot buck lengthwise, and it was about one foot six inches, or, perhaps, a shade more, long. It was good practice that they should be left to themselves, one of the ten in turn being at the receiving end of the buck where there was a mat. He said that, apart from the fact that it was found to be good in practice, it was good training for the boys that one should rely on the other, and that one should be there to help the other in case of need. That was the recognised practice followed everywhere so far as he could find, although the plaintiff's expert witness said he did not approve of it.

G The class of forty, all boys about twelve years of age, was split up into four parts or squads. Each of the squads was on a different form of exercise from the others. The master in charge, Mr. George, supervised the work. The members of the squad, of which the plaintiff was one, had to vault in turn over the buck three feet high and one foot six inches long. That would not appear to be a particularly hazardous operation, as there was a mat at the end at which the boy landed. The plaintiff himself had been some seven months at the school. He had done this exercise on many occasions before, and he had cleared the buck on four occasions on this very day without anything untoward happening. H Mr. George had had this squad under his care until they were accustomed to vaulting the buck, and when he thought they were fit to carry on without an adult in immediate proximity he left them to do that which they were doing

on the day of this accident. One of the ten boys went to the receiving end, and the other nine were in a queue. The first of the queue went over the buck with the one waiting to receive him and to aid him if necessary. Then the receiver went to the end of the queue, and the remainder of the boys followed over the buck in turn, one always standing at the receiving end. As I have said, this was the regular and the recognised practice not only in this school, but in other such schools, as the expert witness called on behalf of the plaintiff admitted. The boys were all the time within the view of Mr. George, though he himself was giving his first attention to a more advanced exercise in which the boys went over a higher and more difficult obstacle. A

The case for the plaintiff alleging negligence was based almost wholly on the evidence of Mr. Lord, who gave the answers to which I have referred already. The learned counsel were agreed on the law to be applied. The measure of duty owed by the defendants, as the education authority, is that which a reasonable parent should exercise towards his child. It is a duty to take reasonable care, no more and no less. McNAIR, J., held that the defendants were responsible, and he said: B

“ Though I hope I am the last to express the view that boys of ten or twelve require mollycoddling or nursing, it does seem to me that this particular operation, which is admittedly unsafe for these boys unless there is someone to receive them, ought to have demanded that there should be some adult ready to receive the boys or support them on landing, and that it was not a proper discharge of the defendants’ duty to exercise the care of a reasonably careful parent to allow that duty of supporting the boys on landing to be discharged solely by a small boy of the age of these boys. It seems to me that the circumstances of the case as disclosed to me in the evidence require that an adult should be physically present at any time when boys of this age are performing this particular operation.” C D

With all respect, I do not think that that can be right on the evidence which was before the court. I recognise that this is largely a question of fact, but the proper test must be applied. The evidence on both sides showed that the ordinary and recognised practice was being followed, and the plaintiff’s expert witness agreed that it was the practice recommended in books on the subject, and one which gave boys a sense of responsibility. He said, however, that he did not like it and would not recommend that even boys of eighteen should vault over a three foot buck without an adult to aid them. I find it difficult to appreciate the view of that witness. Entirely apart from that, I cannot see how it can be said that the defendants were negligent if they adopted the well-recognised practice in a matter of this kind. The view of the plaintiff’s witness would seem to indicate the necessity of having four adult instructors in the gymnasium for a class of forty boys. I cannot accept that. There may well be some risk in everything one does or in every step one takes, but in ordinary everyday affairs the test of what is reasonable care may well be answered by experience from which arises a practice adopted generally, and followed successfully over the years so far as the evidence in this case goes. Indeed, it would appear from the judge’s findings of fact that the cause, or a cause, of the accident to the plaintiff was that the boy who ought to have been standing by the mat left his post when the bell sounded. The bell was an indication of a break for play-time. In the ordinary course the boys, on the sound of the bell, would receive an order to go to the corner at which their squad paraded before being dismissed. Why should the defendants apprehend that on this, or on any, occasion the boy would run away when the plaintiff was in the act of vaulting? So far as we know, that sort of thing had never happened before. The boys all had experience, seven months, in this school, and the plaintiff (and no doubt the other boys) had been in a junior school before and had taken part in physical exercise and drill. In my opinion, the judgment in favour E F G H

of the plaintiff cannot stand on the evidence which was before the court, and I would allow this appeal.

BIRKETT, L.J.: I am of the same opinion. The question before the learned judge in the court below was: Was there evidence of negligence on the part of the defendants which occasioned the accident to this small boy, and the answer of the learned judge, if I may put it in a sentence, was: I think they were negligent, and they were negligent in this, that while this exercise was being performed by the boys, it was negligent not to have an adult present during the exercise. Two passages only from the judgment will I cite on that. The first is:

"... the chief question it seems to me is whether it was the duty of the defendants to ensure that when this exercise was being performed there was always in attendance at the buck an adult, both to give adequate supervision of the exercise and see that it was properly carried out, and more particularly to stand by himself so as to support the small boys as they came over."

The second passage is:

"In those circumstances, the question upon which I have to make up my mind is whether this was an operation of such potential danger to these lads as to require the actual presence of the instructor at the buck at the time."

It seems to me to be quite clear that the ground on which the learned judge found against the defendants was that they had failed in their duty because they did not have an adult to supervise this exercise. Counsel for the plaintiff naturally laid great stress on the fact that this was a question of fact. In considering a question of fact, what amounts to reasonable care in any given set of circumstances depends entirely on the circumstances known to the defendant whose conduct is the subject of inquiry. That was the statement of BANKES, L.J., in *Harnett v. Bond* (1). It is clear that whether, in the circumstances known to the defendant, the instructor used due care—that is, whether he exercised the care a reasonable and prudent man would exercise—is a mere question of fact as to which, of course, no legal rules can be laid down. I would like to refer to an observation which LORD MACMILLAN made in *Glasgow Corpn. v. Muir* (2) ([1943] 2 All E.R. 48):

"... the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what in the circumstances of the particular case the reasonable man would have had in contemplation and what accordingly the party sought to be made liable ought to have foreseen."

With regard to *Gibbs v. Barking Corpn.* (3), it is clear that that was a decision by the learned county court judge on a question of fact whether in the particular circumstances of that case the master in charge was negligent. The learned county court judge having found that he was, the Court of Appeal refused to disturb that finding of fact. I say that because counsel for the plaintiff stressed the fact that MCNAIR, J., had made a finding of fact in this case. I think myself that everything turns on the nature of the exercise which was being performed at the moment the accident occurred. I do not think it was in any sense a dangerous exercise, but it was, of course, an exercise that needed care in its performance. Here was a boy of twelve years of age who had had seven months' training, and it was clear from the answers which he gave in the case that he himself did not regard this exercise as one involving any great risk. Counsel for the plaintiff asked the boy to explain the nature of the exercise, and the boy said:

"You would form a line, and then the first one would go over and stand there and support the next one over and when the next one came over the

boy that had supported before ran round to the back of the queue and so on."

Observe the word "support". The judge then said:

"You leapfrog over the buck, do you, as you might do in the playground over another boy?"

and he answered "Yes." A little later counsel for the plaintiff introduced a new word, "catch", and he put these questions to the plaintiff:

"Q.—Was the system which you have told us about one boy waiting to catch another—do you follow? A.—Yes. Q.—Was that the ordinary everyday system they had in the school? A.—Yes. Q.—Did they ever have a master or grown-up present standing beside the buck to catch you as you came over? A.—He used to come round at regular intervals to see how the boys were getting on and sometimes he stood there. Q.—He used to come round and see how the boys were getting on and stood there sometimes? A.—Yes. Q.—But on this occasion, as you have said, the ordinary system was going on, one boy waiting until the next one came. Is that right? A.—Yes."

Later, counsel for the defendants said:

"Q.—On every occasion Mr. George would divide the classes up into four groups. A.—Yes. Q.—He would look after the group doing the most difficult exercises? A.—He would walk round them all. Q.—If one group was doing a very difficult job he would go and watch? A.—Yes. Q.—What you were doing on this occasion was one of the simplest, was it not? A.—Well, the second hardest. We throw balls to one another in one group and toss about sticks in the other. Q.—It is a very simple job to vault the buck? A.—Yes. Q.—You had done it many times before this day, had you not? A.—Yes. Q.—And you were quite proficient at it? A.—Yes. (McNAIR, J.): Was this the first time you had gone over the buck without a boy at the other side to receive you? A.—Yes."

I have quoted those passages from the boy's evidence to emphasise what I think is always of first importance in cases of this kind. In assessing the reasonableness of the care that should be taken, the nature of the activity is an essential factor in determining whether the act of the defendant was tortious or not, and here it would appear from the evidence of the boy that this was an exercise which was being performed (subject to what my Lord has said and to what I shall say in one moment) in the ordinary way in which it had been done many times before, at which the boy was proficient, and it was regarded as a simple exercise. I do not think it is of very great help to compare other activities of boys, like climbing trees, or taking part in a hurdle race, or playing rugby football, all of which obviously entail risk. The sole question in this case is: Having regard to the nature of the exercise, has it been proved that the defendants were negligent, so that their negligence is shown to be the cause of this accident?

I do not propose to deal at any length with the evidence. Mr. George, who was the responsible instructor in the gymnasium, gave evidence before the judge, and in a sentence he said: This exercise does require care, and I give it in this way. When the boys are beginners, I supervise them personally. Then, as they progress and become more proficient, they pass on to more difficult things, and when they are doing the more difficult things I stand by to see that they are properly done, but all this is preparatory to the ideas which we have before us of making the boys self-reliant, giving them initiative, so that, when it is quite safe, they may do it by themselves. The evidence of Mr. George was that, that preparatory training and instruction having been given, the boys (as the infant plaintiff himself said) followed this system of one boy waiting to support, not to catch, the other boy as he vaulted over the buck.

A The only difficulty in the case was the evidence of Mr. Lord on the other side, and it would be quite wrong for me sitting here, not having seen Mr. Lord, to make anything in the nature of any adverse comment on his evidence. He was a man of seventy-two years of age who had had very many years' experience, and his answers made it perfectly plain that he did not approve of the buck being there at all, to start with, and he would not have had any exercise performed with the buck if he had had his own way, but he made it abundantly plain also, when pressed in cross-examination, that there were thousands of physical training instructors carrying out similar duties to Mr. George, who were adopting this self-same system, and when further pressed he said he knew that it was the recognised system. Indeed, the learned judge in his judgment goes the length of saying (although I do not think there is any precise evidence on this matter) B that the training manual as put forward by the Ministry of Education recommended that that process be adopted. I mention that to emphasise what I think my Lord has already emphasised, and that is that the general rule that a defendant charged with negligence can clear himself if he has shown he has acted in accordance with the general and approved practice has some application at least. It is true that the general practice may not conform to the standard of care required by a reasonable and prudent man, but in the ordinary C circumstances where you find a general standard in the medical profession followed by general practitioners, or a general standard in the educational profession followed by physical training instructors, and a defendant can come and say: "In all that I did I followed the approved practice generally adopted throughout the land", at any rate he is in a position of considerable strength to answer a charge of negligence.

D On the second point, if it be said the general system does not accord with the standard of a reasonable and prudent man, all I desire to say is this, that when you have, as a fact in this case, a system in general use which had been adopted in this school and followed with perfect safety, so far as we know, until this day, it is a very strong thing indeed to say that the authorities were negligent. E I observe that the learned judge, who attached some importance to this case, said:

"If the authorities had really applied their minds to this problem, it ought to have been within the range of reasonable foreseeability that these small boys, however well trained and however obedient, might not adequately perform their function of supporting."

F So the authorities are being blamed because they allowed this system, with the boys operating in the way they did, to be the system in vogue. For my own part, if I were asked what would a reasonable and prudent man do, I think, first of all, he would have regard to the nature of the exercise, and the nature of the exercise, as I see it, requires care, but it is not in itself a dangerous operation, and I think, further, that, if there had been a system in vogue, as there was here, whereby a boy waited to support the boy vaulting, a reasonable and G prudent man would say: "If the boy has been made proficient by his training, there was no negligence in not having an adult there." It is, I think, impossible to avoid the conclusion that it was a most unfortunate, unforeseeable, and quite unpredictable thing which occasioned the accident on this day. There was, of course, a great contest about how the accident happened; it was said that the boy himself disobediently made the leap after the bell had sounded. The H judge found conclusively against that, and so it goes out of this case, but it was the ringing of that bell which occasioned the trouble, because the supporting boy, answering the bell and the cry of "fall in", was not there. It appears that this was the first time such a thing had happened. In those circumstances, I feel it is impossible to say on the facts that any negligence was shown on the part of the defendants, and for these reasons, and for the reasons which have already been given by my Lord, I agree with the conclusion that this appeal ought to be allowed.

MORRIS, L.J.: I am of the same opinion. The question raised in the action was whether the defendants, through their servant, had adopted a system which ensured that reasonable care was taken of the safety of a pupil. The defendants' servant was under an obligation to take that measure of care and to adopt those standards that would be taken, or adopted, by a reasonably careful parent. That does not involve that the adopted system would have to be such that in no foreseeable circumstance or situation could there be any possible or conceivable contingency or some slight mishap. If that were so, the activities of the young would be unduly circumscribed and only inactivity and inaction could be planned. The learned judge recorded that Mr. George, the physical training officer of the school, was a man of experience, and that he followed the practice of educating his boys in vaulting the buck. He took them along a progressive course of training. At first the boys only had to jump on to the buck and Mr. George helped them down. Then by degrees they were put through the whole operation, which consisted in running up to the buck, putting their hands on it and leapfrogging over it on to the mat on the floor. The learned judge said in his judgment, in regard to the course followed by Mr. George, as follows:

"During the first part of the training, until the whole class was proficient, Mr. George himself would stand by the buck either to steady these boys on the buck as they came up to it or steady them as they came to land. The final stage, and obviously a very desirable part of the training, was that the boys themselves were trained to act as supporters, in this way, that the first over the buck would be met and supported by the last boy in the team, and as they came over one after the other the boy who had safely cleared the buck stood by as supporter for the next one coming over. The process of training was obviously right and proper, because it developed self-reliance in the boys and educated them in co-operative exercises."

I do not propose to refer to the facts, which have been so fully recited by my Lords, but it appears that this boy of twelve had been trained in the way described by the learned judge and had made progress which the physical training officer considered entitled him to take part in the later stage of the exercise. The passages cited by **BIRKETT, L.J.**, show that the boy himself regarded the operation of vaulting the buck as very simple, and he himself considered that he was quite proficient at it. He had been at the school seven months; he did gymnastic training three times a week for about thirty-five minutes. The process of vaulting the buck was done in the gymnasium where Mr. George, the physical training officer, was present. Mr. George was asked by counsel for the plaintiff the following question, and made the following answer:

"Q.—You have agreed that children need great supervision. Would you tell me how often that morning you went to see that your system, whether good or bad, was being carried out? A.—I could see quite clearly every few seconds that the system was being carried out. I could see from my position."

On the facts it does not seem to me that it was necessary that there should be an adult in immediate proximity to the buck over which this boy was vaulting, and I do not see that there was any failure to adopt the standard of care to be expected of a reasonably careful and solicitous parent. I, therefore, agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Percy Hughes & Roberts*, Birkenhead (for the defendants); *Helder, Roberts & Co.*, agents for *John A. Behn, Twyford & Reece*, Liverpool (for the plaintiff).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

WOOLLEY v. MOORE.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Finnemore and McNair, JJ.),
October 21, 1952.]

Street Traffic—Excessive speed—Goods vehicle—Vehicle capable of carrying passengers—Use solely for carrying passengers—Road Traffic Act, 1934 (c. 50), sched. I, para. 2 (1) (a).

A A motor van in respect of which a carrier's C licence was held contained seats in the front for the driver and one passenger, but no seats behind. While not carrying any goods it was driven along a road at more than thirty miles an hour, the maximum speed for goods vehicles of that class or description under the Road Traffic Act, 1934, sched. I, para. 2, as amended by the
B Motor Vehicles (Variation of Speed Limit) Regulations, 1950.

HELD: when a vehicle constructed as a goods vehicle, but capable of carrying passengers, was not carrying goods, it was not subject to the conditions applicable to the carrier's C licence held in respect of it, and, therefore, the driver had not been guilty of the offence of exceeding the speed limit appropriate to that class of vehicle under s. 10 (1) of the Road
C Traffic Act, 1930.

Blenkin v. Bell ([1952] 1 All E.R. 1258), applied.

AS TO EXCEEDING SPEED LIMIT, see HALSBURY, Hailsham Edn., Vol. 31, pp. 666, 667, paras. 974, 975; and FOR CASES, see DIGEST Supps.

Case referred to:

D (1) *Blenkin v. Bell*, [1952] 1 All E.R. 1258; [1952] 2 Q.B. 620; 116 J.P. 317.

CASE STATED by Nottinghamshire justices.

At a court of summary jurisdiction sitting at Nottingham an information was preferred by the respondent under s. 10 (1) of the Road Traffic Act, 1930, charging the appellant with having on Apr. 12, 1952, at Bestwood, Nottinghamshire, unlawfully driven a motor van on the Nottingham-Mansfield Road at a
E speed greater than thirty miles an hour, the speed specified in the Road Traffic Act, 1934, sched. I, para. 2 (1) (a), as the maximum speed in relation to a vehicle of that class or description.

At the hearing of the information on May 13 and 16, 1952, it was proved or admitted that on Apr. 12, 1952, the appellant drove a Standard Vanguard motor van on the Nottingham-Mansfield Road, which was not subject to any speed
F limit, at a speed of between fifty and fifty-five miles an hour. The van was not carrying goods. Inside it at the front there were two seats, one for the driver and one for a passenger. There were no seats in the rear of the van, which was empty. There were windows in the back of the van, but no side windows apart from those beside the driver's and passenger's seats. The unladen weight of the van was one ton, two hundredweight, and all its wheels were equipped with
G pneumatic tyres. A goods carrier's C licence had been granted by the Traffic Commissioners under Part I of the Road and Rail Traffic Act, 1933, in respect of the van to the registered owners, a limited company of which the appellant was a director. The van was licensed as a goods vehicle under the Vehicles (Excise) Act, 1949, sched. IV, Part I, para. 7. At the material time it was being tested after receiving certain adjustments by the appellant.

H The appellant contended that, as the vehicle was not being used for carrying goods, no speed limit was applicable to it. The respondent contended that the van was a goods vehicle as defined in the Road Traffic Act, 1934, sched. I, para. 2 (1) (a), as amended by the Motor Vehicles (Variation of Speed Limit) Regulations, 1950 (S.I., 1950, No. 1705), and was subject to a speed limit of thirty miles an hour. The justices held that the vehicle was a goods vehicle as defined in the Road Traffic Act, 1934, sched. I, para. 2 (1) (a), and was not a shooting brake or utility van, the dual-purpose class of vehicle concerned in

Blenkin v. Bell (1). They held, therefore, that the vehicle was subject to a speed limit of thirty miles an hour and convicted the appellant.

Skelhorn for the appellant.

Cowley for the respondent.

LORD GODDARD, C.J.: I can well understand that the justices thought they must put some limit on the decision of this court in *Blenkin v. Bell* (1), but, in my opinion, that case dealt with this very point. In that case we had before us all the statutory provisions and statutory rules and orders which deal with delivery vans and so forth, and we decided, I think largely because of s. 9 (2) of the Road and Rail Traffic Act, 1933, that where a vehicle constructed as a goods vehicle was capable of carrying passengers, although it had a carrier's C licence, the conditions applicable to such a licence did not apply to it when it was not being used for the carriage of goods. In particular, we held that the speed limit of thirty miles an hour to which such a vehicle is subjected when carrying goods was not applicable, and we gave that decision after an examination of a tangle of sections and regulations. The decision did not turn on the fact that the vehicle with which we were dealing was a particular sort of dual-purpose vehicle called a shooting brake, such as is used for going to and from the station and for carrying goods or garden produce. I think I made that clear in the judgment of the court when I said ([1952] 1 All E.R. 1260):

"If a vehicle can be used for carrying either passengers or goods, and it is being used for carrying goods, as distinct from passengers' luggage, it requires a licence and certain restrictions are placed on its use on the road. If it were not used as a goods vehicle, it would not require a licence, and the speed limit is only applicable when it is carrying goods."

The Home Secretary has so far recognised that decision that several people convicted contrary to it have been granted free pardons and the fines have been returned. We are not, therefore, going now to entertain an argument that the decision was wrong. It can only be altered by legislation because the case is not appealable. It follows that the decision of the justices in this case was wrong and the conviction must be quashed because the case is governed by and indistinguishable from *Blenkin v. Bell* (1), by which this court is bound and to which it intends to adhere.

FINNEMORE, J.: I agree that this case is indistinguishable from *Blenkin v. Bell* (1), with the decision in which I respectfully agree. We are bound by that decision and this case falls within it, and, therefore, the appeal must be allowed.

McNAIR, J.: I agree. The case is clearly indistinguishable from *Blenkin v. Bell* (1).

Appeal allowed.

Solicitors: *A. J. A. Hanhart*, agent for *Clayton, Ellis & Massey*, Nottingham (for the appellant); *William Charles Crocker*, agent for *R. A. Young & Pearce*, Nottingham (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re WAR DAMAGE ACT, 1943: *Re* 56, DENTON ROAD,
TWICKENHAM, MIDDLESEX.

CHANCERY DIVISION (Vaisey, J.), October 9, 10, 13, 14, 21, 1952.]

War Damage—Payment in respect of damage—Notification by War Damage Commission of nature of payment—Notification binding on War Damage Commission—War Damage Act, 1943 (c. 21), s. 7 (1).

A On Nov. 19, 1940, the plaintiff's dwelling-house was severely damaged by enemy action, and, shortly afterwards, on the instructions of the appropriate local authority, it was demolished. By notifications dated Nov. 30, 1943, and Sept. 1, 1944, the War Damage Commission informed the plaintiff that a preliminary classification of "total loss" had been made in respect of the house. On Nov. 12, 1945, after some further correspondence, B the commission notified the plaintiff by letter that the preliminary classification had been reviewed and it had been decided to cancel the two previous notifications. The plaintiff was asked to say whether she agreed to the re-classification of her house as "not total loss" and, if so, to return certain forms to the commission. The plaintiff notified the commission of her agreement and returned the forms. On July 15, 1946, the commission C informed the plaintiff that it had been decided to revert to a "total loss" classification in respect of her house. On Feb. 10, 1947, the commission sent to the plaintiff a notice headed: "Notice of determination under the War Damage Act, 1943, of the kind of payment to be made in respect of war damage", and by it they informed the plaintiff that they had determined D that the war damage to her property involved total loss as defined in s. 7 of the Act of 1943.

HELD: although no question of estoppel arose, the classification as "not total loss" notified in the letter of Nov. 12, 1945, was not stated to be preliminary or provisional, and so must be regarded as a final and conclusive decision from which, in the absence of express statutory power or the consent of the plaintiff, neither of which existed, the commission were not E entitled to depart.

Livingstone v. Westminster Corpn. ([1904] 2 K.B. 109) and *Robertson v. Minister of Pensions* ([1948] 2 All E.R. 767), applied.

FOR THE WAR DAMAGE ACT, 1943, s. 7, see HALSBURY'S STATUTES, Second Edn., Vol. 26, p. 477.

F Cases referred to:

- (1) *A.-G. v. Hughes*, (1899), 81 L.T. 679; 8 Digest 393, 2150.
- (2) *Livingstone v. Westminster Corpn.*, [1904] 2 K.B. 109; 73 L.J.K.B. 434; 68 J.P. 276; 38 Digest 141, 1048.
- (3) *Robertson v. Minister of Pensions*, [1948] 2 All E.R. 767; [1949] 1 K.B. 227; [1949] L.J.R. 323; 2nd Digest Supp.

G ADJOURNED SUMMONS under R.S.C., Ord. 54A, r. 1 and r. 1A, for a declaration that, on the true construction of the War Damage Act, 1943, and of a letter dated Nov. 12, 1945, sent by the War Damage Commission to the plaintiff, the commission had determined, or must be deemed to have determined, finally and irrevocably that the damage which the plaintiff's property had suffered owing to H enemy action was damage for which a cost of works payment ought to be awarded.

Diplock, Q.C., and *W. G. H. Cook* for the plaintiff.

Denys B. Buckley for the War Damage Commission.

Cur. adv. vult.

Oct. 21. VAISEY, J., read the following judgment. These proceedings relate to a former building which, when it existed, was No. 56, Denton Road, Twickenham, Middlesex. The plaintiff, Mrs. Katherine Vizer, is the owner of the property, which is what the War Damage Act, 1943, describes as "a

developed hereditament". It was, in fact, a semi-detached residence, the adjoining house being No. 58, Denton Road, aforesaid. The defendants to the action are the War Damage Commission.

On Nov. 19, 1940, the building suffered serious war damage, and shortly afterwards, on the instructions of the appropriate local authority, the building was entirely demolished. The question arose and, in due course, was taken into consideration by the defendants, whether the payment to be made under Part I of the said Act in respect of such war damage was to be a "cost of works" payment or whether it was to be a "value payment". Section 7 of the Act provides that in the case of a developed hereditament the payment is to be a cost of works payment unless the war damage involves total loss. The difference between these alternative methods of computation is in this case a matter of importance to the plaintiff because, while the cost of works payment is estimated to amount to about £5,000, the value payment has been fixed by the defendants at a much smaller sum viz., £1,616 15s. It is relevant here to observe that, under the terms of a direction given by the Treasury pursuant to s. 20 of the Act, the defendants have power to make a cost of works payment in certain cases, notwithstanding that the war damage did, in fact, involve total loss, those being cases where a house satisfies certain conditions of structural stability, design, lay-out and amenities, to which it is not necessary for me to refer in greater particularity.

By notifications dated respectively Nov. 30, 1943, and Sept. 1, 1944, the defendants informed the plaintiff, on the appropriate standard forms, that a preliminary classification of "total loss" had been made in respect of her house. On Jan. 25, 1945, the defendants asked the architect who was acting for the plaintiff, a Mr. Jay Evans, for certain further information on the plea that it would help them in reviewing her case. This he gave them, and further correspondence passed between him and the defendants. Then, on Nov. 12, 1945, the defendants wrote to the plaintiff the letter which has given rise to the present proceedings. Before I read it I would observe that it is obviously a standard document in common use. It is nearly all in printed type, including the notional signature "R. G. Townend, Regional Manager," at the foot of it. Nothing is written in ink on it except the date, the dates of previous letters, the address of the house in question, and the name and address of the plaintiff, "care of Mr. Jay Evans". The contents of the letter, omitting formal parts, are as follows:

"Dear Sir (or Madam). Re 56, Denton Road, E. Twickenham. I have to advise you that the preliminary classification of 'total loss' in respect of this property has been reviewed, and it has been decided to cancel the notifications sent to you on 30/11/43 and 1/9/44. Will you be good enough, therefore, to inform me whether you agree to the re-classification and if you do please return to me forms Val 1 and Val 5. I would explain that when a property is classified 'Not total loss' the commission will make a cost of works payment when it is reinstated. Yours faithfully, R. G. Townend, Regional Manager."

To that letter on December 1, 1945, Mr. Jay Evans replied in the following terms:

"Dear Sir, re 56, Denton Road. Please accept my thanks for your letter stating that the above property has now been classified as a 'cost of works' claim. As requested I am returning herewith your form, Val 5. Yours faithfully, T. C. Jay Evans."

On Jan. 18, 1946, the other form, called Val 1, though it was in fact, Val 2, was returned by Mr. Jay Evans to the defendants.

Now, what did the letter of Nov. 12, 1945, mean? It is quite obvious what Mr. Jay Evans thought it meant when he said that it stated that the property had been classified as a "cost of works" claim. The defendants took no steps

to contradict him, and, indeed, I think that they would admit that it was such a classification, the real issue in this case being whether it was merely another conditional and preliminary classification, liable to be withdrawn or varied at the will of the defendants, or whether, the commission having come to a conclusion, and having notified it to the plaintiff by the said letter, they cannot now resile from it. The defendants' counsel asked me to hold that the letter was no more than an invitation to a re-opening of negotiations, but its terms do not to my mind suggest anything of the kind. However, on July 15, 1946, the defendants wrote again to the plaintiff, or her architect, telling her, without any explanation, excuse, or expression of regret, that "it has been decided to revert to the 'T' classification" (meaning the "total loss" classification), which, on July 20, 1946, produced the following letter to the regional manager from the plaintiff's architect:

"Re 56, Denton Road. I have received a letter from you dated July 15, respecting the above premises. I received a notification from you on Nov. 12, 1945, stating that the property was not classified as a 'total loss'. I agreed with this, and, as requested, returned forms Val 2 and Val 5. I have made no further application in this case and I am at a loss to understand the purport of this communication."

Mr. Jay Evans professes himself as being at a loss, and I am not surprised at his feelings of perplexity. However, after some further correspondence, to which I need not refer in detail, there was a letter from the architect, Mr. Jay Evans, to the defendants, dated Oct. 2, 1946, in the course of which the writer says:

"My contention is that the war damage did not involve total loss. The war damage was turned into a total loss by the local authority without referring to my client at all. In fact, she was in hospital at the time. Subject to legal advice, it seems clear to me that the classification as a total loss is a wrongful one."

Further letters passed between the parties, and ultimately, on Feb. 10, 1947, another printed form, headed by the royal arms, was issued by the defendants in the following terms:

"War Damage Commission. Notice of determination under the War Damage Act, 1943, of the kind of payment to be made in respect of war damage. Property: 56, Denton Road, Twickenham. The War Damage Commission have this Feb. 10, 1947, determined that the war damage to the property described above involves total loss as defined under s. 7 of the War Damage Act, 1943, and that the kind of payment to be made in respect of the war damage is a value payment."

In my judgment, this last-mentioned document does not differ in character from the letter of Nov. 12, 1945, or from the letter of July 15, 1946. It is not suggested that it derives any force or validity, either from the royal arms at the head of it or from its use of the words "determination" and "determined", which are, of course, the words used in s. 32 of the Act. Indeed, the defendants, by their counsel, claim that it is just as inconclusive and just as lacking in finality as, according to them, the letter of Nov. 12, 1945, is. They say that they have a perfect right to change their minds as their policy changes or as fresh evidence comes to light or further advice is given to them by their technical advisers, and that, unless a determination of theirs has been acted on in some way so as to raise a case of estoppel, they can go on altering it, as, and as often as, occasion arises. Why, if that is the position, was their first classification described as "preliminary" while the intimation given by the letter of Nov. 12, 1945, was not so described? The points seem to be, first, whether the letter of Nov. 12, 1945, is a determination within the meaning of that word as used in the Act, and, secondly, whether that letter is so devoid of finality that no reliance ought to be placed on it.

First, there is no magic in the word "determination". That, I think, is obvious. For, if any two words in such a context as this are synonymous, that is, in my judgment, true of the words "decide" and "determine". It is interesting to note that in *A.-G. v. Hughes* (1) a letter from the Charity Commissioners, expressing their opinion on a question submitted to them, was held to be a determination by them under the powers conferred on them by the Local Government Act, 1894, s. 70 (2). On the second point, the plaintiff's counsel offered for my acceptance the following proposition—that where Parliament confers on a body such as the War Damage Commission the duty of deciding or determining any question, the deciding or determining of which affects the rights of the subject, such decision or determination made and communicated in terms which are not expressly preliminary or provisional is final and conclusive, and cannot, in the absence of express statutory power or the consent of the person or persons affected, be altered or withdrawn by that body. I accept that proposition as well founded, and applicable to the present case. It is, I think, supported by *Livingstone v. Westminster Corpn.* (2) and *Robertson v. Minister of Pensions* (3). I think that the letter of Nov. 12, 1945, was one on which the plaintiff was invited to rely, and was and is entitled to rely. It is, I think, admitted that, if she had altered her position in reliance on it, a case of estoppel would have been raised against the defendants, but I cannot see that it ought to be denied its proper force and effect, quite apart from such a case. I think that the contrary view would introduce a lamentable measure of uncertainty and so much disturbance in the minds of those unfortunate persons who have suffered war damage that the Act cannot have contemplated the possibility of such vacillations as are claimed to be permissible in such a case as the present.

How does the evidence of the defendants affect the position? If it were discovered within a reasonable time that a "determination" had been reported by some order on the part of an official of the defendants which had never, in fact, been made, or that there had been some mistake or misconception on which I could find that the document did not accord with the facts which it purported to record, the position might have been different, but that is not what the defendants say. In the affidavit filed on their behalf they first refer to the Treasury direction given under s. 20 (1) of the Act. Next they say that, having received from Mr. Jay Evans the drawings of the plaintiff's house, they wrote the letter of Nov. 12, 1945, "in the light of" a report by an officer of theirs that, in his view, the plaintiff's house did satisfy the conditions laid down in the Treasury direction. The next thing that, apparently, happened was that the owner of the adjoining house, No. 58, Denton Road, already mentioned, got to hear of the defendants' decision and claimed to be entitled to be treated in a similar manner. That seems to have shown to the defendants that they had created an awkward precedent and to meet that predicament what did they do but call in someone whom they describe as "a superior officer" to re-consider the matter. He (the superior officer) appears to have differed from the opinion of the first officer and to have advised the defendants that the conditions of the Treasury direction had not been fulfilled, with the result that they recanted and reversed their previous decision and wrote the letter of July 15, 1946. I am entitled, I think, to suggest the possibility that a yet more superior officer (if his advice had been sought) might well have adopted the view of the first and not-so-superior officer, just as the House of Lords has occasionally reversed a decision of the Court of Appeal and restored that of the judge of first instance. Where, it may be asked, is this process to stop? Is the matter to be referred to a sequence of officers, each one superior to the one immediately before him? If an officer (superior or not) gives advice to the defendants which, having been reported to the person affected, turns out to be embarrassing, can the defendants, without any notice to such person, go on from officer to officer until they obtain advice which is more to their liking? I cannot think that this is what the War Damage Commission ought to do.

I think they should at least refrain from buoying up the hopes and expectations of those with whom they deal by reporting "determinations" in terms which make them appear to be, although they are not in fact, final, fixed, and conclusive. This judgment can do no harm to the defendants. Let them mark every intimation of a "determination" of theirs as "provisional", "subject to alteration", "not to be relied on" or words to that effect.

A On the question of procedure it is obvious that on this summons, which is issued under R.S.C., Ord. 54A, r. 1 and r. 1A, the relief which is asked could not possibly be given, but I have allowed the summons to be amended by asking in the alternative for the relief which I propose to give, viz., to declare that on the true construction of the War Damage Act, 1943, and of the said letter of Nov. 12, 1945, the defendants have determined, or must be deemed to have determined, B finally and irrevocably that the damage which the plaintiff's property has suffered is one for which a cost of works payment ought to be awarded on the ground that such damage either did not involve, or must in the circumstances be deemed not to have involved, total loss, or that the case falls, or must be deemed to fall, within the direction of the Treasury given under s. 20 of the Act, as mentioned in para. 7 of the affidavit of John French Greenwood, filed on Mar. C 22, 1951. The defendants must pay the plaintiff's costs of the action.

Order accordingly.

Solicitors: *Worrell, Fordyce & Lys* (for the plaintiff); *Treasury Solicitor*.

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

D LANGMAN v. VALENTINE AND ANOTHER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Finemore and McNair, JJ.), October 15, 1952.]

E *Street Traffic—Driving uninsured motor vehicle—Using and permitting vehicle to be used on road without policy of insurance being in force—Learner being taught to drive—Instructor holding steering wheel and handbrake—Learner not insured—Instructor and learner both "drivers"—Use of vehicle by learner covered by instructor's policy—Road Traffic Act, 1930 (c. 43), s. 35 (1).*

Street Traffic—Driving without licence—"Driving"—Learner being taught to drive—Sitting in driver's seat and using accelerator and footbrake—Instructor holding steering wheel and handbrake—Road Traffic Act, 1930 (c. 43), s. 4 (1).

F The second respondent, the owner of a motor car, while teaching the first respondent to drive on a public road, sat in the front passenger's seat and kept one hand on the handbrake and the other on the steering wheel. At all material times he was able to steer the car, stop it, or start it, the ignition switch being within his reach. The first respondent sat in the driver's seat and had her foot in position to use, and did use, the accelerator and the footbrake. The second respondent had an insurance policy in G force in respect of the user of the vehicle while he was driving it and while any other person was driving it with his permission, provided that such other person held or had held a driving licence and had not been disqualified for holding such a licence, but the first respondent was not insured and had never held a driving licence. The first respondent was charged with having unlawfully driven the car on a road without a driving licence, contrary to H s. 4 (1) of the Road Traffic Act, 1930, and with having unlawfully used the car on a road there not being in force in relation to such user by her such a policy of insurance or security in respect of third party risks as was required by Part II of the Act, contrary to s. 35 (1) of the Act. The second respondent was charged with unlawfully permitting such use, contrary to s. 35 (1). The justices found that the second respondent had sufficient control of the car to enable them to find that he was the driver, and they dismissed the informations.

HELD: both the respondents were "drivers" of the car, and, therefore, (i) the first respondent had been guilty of driving on a road without a licence, contrary to s. 4 (1) of the Act of 1930; (ii) (McNAIR, J., dissenting) since any person injured in an accident would have been able to sue the second respondent in respect of his user of the car, there was a policy of insurance in force in respect of its user at the material time although the first respondent was then also driving the car, and the respondents had not been guilty of using and permitting the use of the car on a road without there being in force such a policy of insurance.

FOR THE ROAD TRAFFIC ACT, 1930, s. 4 (1) and s. 35 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 24, pp. 575 and 602.

Cases referred to:

- (1) *John T. Ellis, Ltd. v. Hinds*, [1947] 1 All E.R. 337; [1947] K.B. 475; [1947] L.J.R. 488; 176 L.T. 424; 2nd Digest Supp.
- (2) *Reay v. Young*, [1949] 1 All E.R. 1102; [1949] L.J.R. 1265; 113 J.P. 336; 2nd Digest Supp.
- (3) *Marsh v. Moores*, [1949] 2 All E.R. 27; [1949] 2 K.B. 208; [1949] L.J.R. 1313; 113 J.P. 346; 2nd Digest Supp.

CASE STATED by Devon justices.

At a court of summary jurisdiction sitting at Plympton informations were preferred by the appellant, a police officer, charging the first respondent, Phyllis Lilian Valentine, with having on Mar. 9, 1952, at Plymstock unlawfully used a motor car on a public highway, there not being in force in relation to such user such a policy of insurance or such security in respect of third party risks as complied with the requirements of Part II of the Road Traffic Act, 1930, contrary to s. 35 (1) of the Act, and with having on the same day at Plymstock unlawfully driven a motor car on a road, she not being the holder of a licence, contrary to s. 4 (1) of the Act. Informations were also preferred by the appellant against the second respondent, Morgan, charging him with having, on Mar. 9, 1952, at Plymstock unlawfully permitted the first respondent to use a motor car on a road, there not being in force in relation to such user such a policy of insurance or such a security in respect of third party risks as complied with the requirements of Part II of the Road Traffic Act, 1930, contrary to s. 35 (1) of the Act, and with having on the same day unlawfully aided, abetted, counselled, and procured the first respondent unlawfully to drive a motor car without having a licence in force under s. 4 (1) of the Road Traffic Act, 1930, contrary to s. 5 (1) of the Summary Jurisdiction Act, 1848.

The informations were heard on Apr. 7, 1952, when the following facts were proved or admitted. The second respondent was the owner of a motor car and on Mar. 9, 1952, was teaching the first respondent to drive it on Billacombe Road, Plymstock. He held a licence to drive. The first respondent had no driving licence and had never held a driving licence. There was in force, in respect of the motor car, a policy of insurance, which covered the second respondent while he was driving and also while any other person was driving with his permission, provided that such other person held or had held a driving licence and had not been disqualified for holding such a licence. The first respondent was sitting in the driver's seat and was steering the motor car under the guidance of the second respondent. The second respondent was sitting in the seat next to that of the driver and had his left hand on the steering wheel and his right hand on the hand-brake. He was able to steer the car and to stop it or start it, the ignition switch being within his reach, and he had control of the handbrake. The first respondent had her foot in position to use, and did use, the accelerator and the footbrake.

The appellant contended that the first respondent was the driver of the car, and that the offences charged had been committed. The respondents contended that the second respondent was the driver of the car, and that no offences

had been committed. The justices held that the respondents' contention was correct and that the second respondent had sufficient control of the car to enable them to find that he was the driver thereof. They, therefore, dismissed the informations.

F. H. Lawton for the appellant.

Baerlein for the respondents.

A LORD GODDARD, C.J.: There is no question that the first respondent, by sitting in the driving seat and doing what she did, was at least a driver of the car, and, so far as the justices dismissed the summons against her for driving when she did not hold a licence, this case must go back to the justices with a direction to convict. It is important, and justices should remember and show by their decision that they recognise that it is important, that the provisions with regard to persons who are learning to drive motor vehicles should be rigidly complied with. The second respondent was charged with aiding and abetting, but as no evidence was given that he knew that she held no driving licence and as there is no finding about it we cannot reverse the decision of the justices on that.

B On the difficult question whether the first respondent was driving while uninsured, the justices find that the second respondent was sitting in the passenger's seat and had his left hand on the steering wheel and his right hand on the handbrake. Then:

C "He was able to steer the car, stop it or start it, the ignition switch being within his reach, and he had control of the handbrake. The first respondent had her foot in position to use, and did use, the accelerator and the footbrake."

D On those facts the justices came to the conclusion that the second respondent "had sufficient control of the car to enable us to find that he was the driver thereof."

E I do not think the justices were justified in finding that he was *the* driver, but I think on those facts that they could find, as they no doubt intended to find, that he was *a* driver. I do not think it is impossible either in law or in fact to say that there can be two drivers at the same time, two people controlling the car. One may be controlling the starting and one may be controlling the stopping, and they may both be controlling the steering, though that may be rather a perilous thing to do. I do not think that the definition section of the Road Traffic Act, 1930, helps in this case. Section 121 (1) provides:

F " 'Driver', where a separate person acts as steersman of a motor vehicle, includes that person as well as any other person engaged in the driving of the vehicle, and the expression 'drive' shall be construed accordingly."

That deals with steam-wagons and vehicles of that sort, where one person stokes the fire and controls the steam while another steers the wagon. In G the present case I think we must take it that the justices meant to find that the second respondent was *a* driver of the car. If they meant that he was the sole driver of the car, I should disagree with them, but I think it must be taken that they thought he had sufficient control of the car to be reasonably called *a* driver. So far, I should agree, or at least should not disagree, with them though whether I should have found that myself is another matter. It follows that H both the respondents were engaged in driving the car.

Counsel for the appellant argued that even in those circumstances an offence has been committed because there was no policy in force covering the user of the car by the first respondent, and he distinguished this case from several cases which have been before the court on the ground that those cases were master and servant cases. We held, for instance, that where a policy covered the use of a vehicle by a company's servant, subject to an exceptions clause excluding liability if the driver to the company's knowledge did not hold a

driving licence, if the person who drove the vehicle was prosecuted for driving it without there being in force in relation to his user a policy of insurance, he could show that there was such a policy in force which covered his driving although it did not give any indemnity to him: *John T. Ellis, Ltd. v. Hinds* (1). If his servant committed a negligent act, the master would be liable because his servant was driving the vehicle, and if the master was sued there was the policy in force. Anybody who chose to sue the driver could recover damages against him and there would not be a policy in force indemnifying the driver, but there would be a policy in force covering the use of the car by the driver. A

If an accident had happened when both respondents were driving, it seems to me that the injured person could have brought an action against the second respondent, and he would have been liable and his insurance company would have been bound to give him indemnity for the accident. It is true that the first respondent was also using the car, but there was in force at that time a policy which would cover the use of the car by the first respondent because the car was being driven by the second respondent. I agree it is a difficult point, and it is possible to take more than one view about it. I left this point expressly open in *Reay v. Young* (2) when I said ([1949] 1 All E.R. 1103): B

"I am not here concerned to consider—it may arise in another case—whether or not the husband was, in fact, the driver of the car (i.e., whether he was controlling the driving so that he was the driver), because both respondents pleaded Guilty." C

I have come to the conclusion that we cannot disturb the finding of the justices except on the point whether the first respondent was guilty of driving without a licence. D

FINNEMORE, J.: I agree. The justices came to the conclusion that the second respondent was using such control over the car that at the time he was the driver. I think that the probability is that both he and the first respondent were jointly driving the car at the time. She had, according to the justices' finding, her foot in a position to use, and did use, the accelerator and the foot-brake. The second respondent had one hand on the handbrake and the other hand on the steering wheel, and he had the ignition switch within his reach and was able to steer the car, and stop it or start it. In those circumstances it seems to me that the justices were entitled to find that he was driving the car. The difficulty arises as to what is the position under s. 35 (1) of the Road Traffic Act, 1930, when two people were driving the car. One of those people, the second respondent, had a policy of insurance in the usual terms, and I think it must follow that, had anybody been injured by that car through bad driving, the second respondent would have been responsible because he was driving. He would have been entitled to claim indemnity under his policy, and, therefore, I think there was in force a policy in relation to the user of the vehicle by either person at that time. The mere fact that the first respondent had no policy and was not herself insured seems to me to be immaterial if in fact the second respondent was driving simultaneously and he held a policy which was in force. E

I note that in *Marsh v. Moores* (3) **LYNSKEY, J.**, expressed his opinion on a somewhat similar point. In that case the driver was sitting in the passenger seat beside the person he allowed to drive and was ready to operate the handbrake. It is not so strong a case as this, where the second respondent had one hand on the handbrake and the other on the steering wheel. **LYNSKEY, J.**, said ([1949] 2 All E.R. 32): F

"In these circumstances, it seems to me that he still remained the driver of the car . . ." G

That was obiter, but a fortiori in this case where the second respondent had part of the control of the steering wheel and the handbrake. The justices were H

right in finding that the second respondent was driving this vehicle, and there was a policy of insurance which covered his user of the car. Accordingly, I agree with my Lord in both matters—that the justices must convict the first respondent on the information charging her with driving without a licence and that they were right in the conclusion to which they came on the other charge.

- A** **McNAIR, J.:** I agree that this case must go back to the justices with directions to convict the first respondent on the charge relating to the licence, and I also agree that the charge against the second respondent of aiding and abetting must fail. As regards the charge against the first respondent under s. 35 (1) of the Road Traffic Act, 1930, I am prepared to accept, though I have some difficulty in doing so, the finding of the justices that the second respondent
- B** had sufficient control of the car to enable them to find that he was *the* driver, or at least, as my Lord has interpreted it, *a* driver, although the more natural finding would seem to me to be that the first respondent was the driver driving under instructions. But, accepting this finding of the justices, I am unable to agree that within the meaning of s. 35 (1) of the Act there was in relation to the user of the vehicle by the first respondent in force either a policy of insurance
- C** or a security in respect of third party risks. It seems to me that there were two different users, first, a user of the car by the first respondent, and, secondly, a user of the car by the second respondent. In relation to the user of the car by the second respondent, there was clearly a policy in force, but I cannot see that this policy can in any sense of the word be said to be a policy in relation to the user of the car by the first respondent when by its terms it says that it is
- D** not to apply when the car is being driven by a person who is not holding and has not held a driving licence. The words of s. 35 (1) of the Act are not “while the car is being driven by that person”, but “in relation to the user of the vehicle by that person”. I cannot find any evidence that there was in force in relation to the user of the car by the first respondent such a policy of insurance as is required by the Act. My brothers, however, have taken a different view, and I
- E** merely record my respectful disagreement.

Orders accordingly.

Solicitors: *Wontner & Sons*, agents for the prosecuting solicitor for the county of Devon (for the appellant); *Amery-Parkes & Co.*, agents for *Goodman & Emerson*, Plymouth (for the respondents).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

CROWHURST v. MAIDMENT.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Romer, L.J., and Harman, J.), October 21, 1952.]

Rent Restriction—Separate dwelling—Two floors sub-let by contractual tenant—Not “self-contained” flats—Expiration of contractual tenancy—Claim by landlord for possession of floors sub-let—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 15 (1).

A
A contractual tenant of a dwelling-house within the Rent Restrictions Acts, which comprised three floors, sub-let the first and second floors and himself occupied only the ground floor. The rooms on each of the upper floors were not structurally segregated so as to constitute “self-contained” flats. At all material times the tenant had not occupied either of the upper floors and he had no intention of occupying them. On the termination of the contractual tenancy, the tenant remained in possession under the Rent Acts. On a claim by the landlord for possession of the two upper floors, B

C
HELD: by sub-letting the tenant had created three separate dwellings in the house, and, as he had no intention of residing in the upper floors, he was not entitled to the protection of the Rent Restrictions Acts in respect of those two floors.

Barrell v. Fordree ([1932] A.C. 676), applied.

Murgatroyd v. Tresarden ([1946] 2 All E.R. 723), explained and applied.

AS TO RESTRICTIONS ON THE LANDLORD'S RIGHT TO POSSESSION, see HALSBURY, Hailsham Edn., Vol. 20, pp. 329-335, paras. 392-401; and FOR CASES, see DIGEST, Replacement Vol. 31, pp. 692-698, Nos. 7829-7894. D

Cases referred to:

- (1) *Skinner v. Geary*, [1931] 2 K.B. 546; 100 L.J.K.B. 718; 145 L.T. 675; 95 J.P. 194; 31 Digest, Replacement, 659, 7612.
- (2) *Barrell v. Fordree*, [1932] A.C. 676; 101 L.J.K.B. 529; 96 J.P. 278; *sub nom. Fordree v. Barrell*, 147 L.T. 206; *affg.* [1931] 2 K.B. 257; 100 L.J.K.B. 515; 145 L.T. 219; 95 J.P. 141; 31 Digest, Replacement, 658, 7609.
- (3) *Murgatroyd v. Tresarden*, [1946] 2 All E.R. 723; [1947] K.B. 316; 31 Digest, Replacement, 659, 7614.

APPEAL by the landlord from an order of His Honour JUDGE BENSLEY WELLS, sitting at Marylebone County Court, dated July 3, 1952, dismissing the landlord's action for possession of two floors of a dwelling-house. The tenant had been contractual tenant of the whole house, and during the pendency of his contractual tenancy had sub-let the two upper floors, retaining only the ground floor for his own occupation. On the expiration of the contractual tenancy, the landlord claimed possession against the tenant of the two floors in which the tenant did not reside. F

Heathcote-Williams, Q.C., and *Hyamson* for the landlord.

D. Wild for the tenant. G

SIR RAYMOND EVERSLED, M.R.: The action is brought by the present owner of premises known as No. 141 Saltram Crescent, W.9, against a Mr. Maidment, who, when the proceedings were brought, was living in the ground floor of that house. From the notes of evidence, it appears that originally the defendant had been a contractual tenant of the whole house, he having lived there for a very long time, but during the pendency of the contract he sub-let the first and second (or top) floors to other persons and confined his own occupation to the ground floor. In other words, the tenant's home, in the ordinary acceptance of the term, consisted exclusively of the ground floor of the premises. It is conceded before us, first, that the tenant has never at any material time H

occupied any part of the two upper floors, having at all material times sub-let them, and, secondly, that he had no intention of ever again residing in any part of either. When the contract subsisted, the tenant granted, as he was entitled to grant, the right of exclusive possession of those two upper floors to the persons to whom he sub-let them. It is, no doubt, the fact, although we have no very precise evidence, that one could not describe the first and second floors as being each a self-contained flat in the sense in which that phrase is applied to flats in a block of flats where each flat has its own front door and so forth.

About a year ago, the contractual tenancy came to an end, and the tenant became a statutory tenant and entitled to rely on the provisions of the Rent Restrictions Acts—at any rate in respect of such part of the premises as he personally occupied. This proceeding, however, relates only to the first and second floors, and the question is: Can the tenant—not his sub-tenants, who are not parties before the court—rely on the Rent Restrictions Acts to defeat the landlord's claim to possession of those floors? I can well understand the logic of the argument of counsel for the tenant, based, as it is, on s. 15 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which provides that a tenant is entitled to the protection of the Act so long as he remains in possession and that under the statutory tenancy such of the terms of the original contract as are consistent with the provisions of the Act continue to apply. Counsel for the tenant says that during the contract the tenant was entitled to sub-let any part of this house for residential, and, indeed, for any, purposes, and that that right persists after the termination of the contract, subject only to the qualification that, by para. (d) of sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, a statutory tenant, who without the consent of his landlord lets the entire premises, or having let some part lets the remainder, then creates in the landlord a right to an order for possession of the whole. On those references alone there is plainly much force in the submission of counsel for the tenant that the tenant, not having brought himself within para. (d), is entitled as statutory tenant to enjoy the same subject-matter as he enjoyed when a contractual tenant. But, whatever the strength of that argument, I think it has been too severely cut into by decisions which proceed on another principle, inherent in the Acts, which is that their purpose was to protect occupants in the occupation of their homes and no more. In *Skinner v. Geary* (1) SCRUTTON, L.J., construed (as I think) the vital words “so long as he retains possession” in s. 15 (1) of the Act of 1920, and said that a person who was found not to occupy any part of the subject-matter of the former contract of tenancy could not claim the benefit of the Acts.

There have been two later decisions which appear to me to point the way in which that second principle has now to be applied, and, subject only to one point (as I think, of altogether too great refinement) to conclude this case. The first is *Barrell v. Fordree* (2), in which the problem arose because the tenant had sub-let or purported to sub-let a part of the premises of which formerly he had been the contractual tenant for business, that is, non-protected, purposes. There was no question of any physical and complete separation of the sub-let part in that case. So much, I think, appears clearly from the statement of the facts in this court ([1931] 2 K.B. 257, 258). The House of Lords held that the part which had been so sub-let, being sub-let for non-protected purposes, was taken out of the protection of the Acts altogether, from which it followed that the tenant could claim protection only for that which remained and was occupied by him as his home.

Secondly, came the case most strongly relied on in the court below by counsel for the landlord, *Murgatroyd v. Tresarden* (3), a decision of this court. That case may fairly be said to be entirely on all fours with the present save in one respect. The decision proceeded on the footing that the sub-division there

was such as is properly described by the phrase "separate self-contained flats", a phrase which I earlier mentioned. Thus, in the judgment of SOMERVELL, L.J., I find that he said ([1946] 2 All E.R. 725):

"If a part of a house was temporarily sub-let, there being no real dividing off of one part from another, I am, at any rate, not prepared to lay down that the principle in *Skinner v. Geary* (1) would be applicable. The defendant here has, however, been content to let the case proceed on the basis that this house consisted of two separate flats. There is no evidence that it had ever been occupied as a single dwelling-house, though, presumably, it was originally so built. The natural meaning of the word 'flat' is, I think, a separate self-contained dwelling, and I can see no reason why the principle, in particular as laid down by SCRUTTON, L.J., in *Skinner v. Geary* (1), does not apply. The defendant has never resided in the upper flat, he has no intention of residing there, and he cannot, therefore, claim the protection of the Acts as against the landlord."

That passage, particularly the last sentence, covers this case unless it can be said that it all turns on the point indicated, that here there is no such severance by physical or structural means as would justify the appellation of "separate self-contained flats" for the two upper floors. I cannot see, on either the ground of logic or on that of authority, that that matter of fact is necessarily conclusive. I say nothing about what might happen with a temporary sub-letting of a furnished room or rooms, having regard, for example, to the Landlord and Tenant (Rent Control) Act, 1949, s. 9, which was not, however, relied on in argument before us. Here the fact is that there was created (and created before the statutory tenancy arose) such a sub-division—such a "real" sub-division, such a permanent cutting off of these floors from the rest—as made out of 141 Saltram Crescent not one dwelling-house, but three dwelling-houses, distinct to this extent, that (as is conceded) the tenant has never occupied the upper two floors and has no intention of residing in any part of them and they now constitute other people's distinct dwelling-houses.

Barrell v. Fordree (2) does not appear to have been cited to the court in *Murgatroyd v. Tresarden* (3). Had it been cited, it might possibly—I know not—have affected the doubt which SOMERVELL, L.J., expressed, but I think that in any case the quaere which appears at the end of the headnote, if I may say so, puts the matter over-high in suggesting the necessity of actual structural and total physical severance. However that may be, and acknowledging, as I do, the force and logic of the argument of counsel for the tenant, in the light of the decisions in *Barrell v. Fordree* (2) and *Murgatroyd v. Tresarden* (3) it appears to me that we can do no other than hold that in this case the tenant would only be entitled to assert and rely on the protection of the Acts in respect of that which was occupied by him as his dwelling-house, and, ever since he became a statutory tenant, only the ground floor has satisfied that description. In the result, in my judgment we should allow this appeal.

I expressed during the early part of the argument in the course of the opening of counsel for the landlord some doubt about the propriety of making an order for "possession" against a defendant limited to part of the premises which he was not in fact occupying at all, and had no intention of so doing. Under the old law I think that such an order would have been inappropriate, but I think it is now too late to question that in cases such as this that form of order is a proper one to make, and the sub-tenants who are in occupation, and who are not before the court, are in any event protected by the express language of s. 15 (3) of the Act of 1920. In the circumstances, therefore, I think the proper order will be that normally made in such cases, viz., an order for possession against the tenant limited to the first and top floors of the house No. 141 Saltram Crescent.

ROMER, L.J.: I agree. Section 15 (1) of the Act of 1920 provides:

“A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy . . .”

- A That has been interpreted, and the scope of the Acts generally has been interpreted, so far as protection from ejectment is concerned, to be confined to tenants who desire to live in their houses or, if away, to return there. It is plain that before these sub-lettings were granted years ago, the dwelling-house to which the Act of 1920 applied was No. 141 Saltram Crescent as a whole. It was one complete dwelling-house, but after the sub-lettings were granted, instead of there being one dwelling-house to which the Act applied, there were
- B three dwelling-houses to which the Act applied, and that, I think, is the necessary result of the decision in *Barrell v. Fordree* (2). Apart from the argument with regard to structural alteration, there were three dwelling-houses, and of those three dwelling-houses the tenant himself occupied only one and does not intend and never has intended to re-occupy the rest of the house. It seems to me, therefore, necessarily to follow that, the other two dwelling-houses
- C being occupied by the sub-tenants, the tenant is not entitled to the statutory protection in regard to them. In my view, the question of physical division of these various dwelling-houses is immaterial for the purpose of deciding whether they are separate dwelling-houses for the purpose of the Act. There was no question of physical division in *Barrell v. Fordree* (2), and it appears to me to be not only consistent with the speech of LORD WARRINGTON OF CLYFFE
- D in that case, but in strict conformity with it, that the view should be taken that, if you find separate dwelling-houses in one building within the accepted meaning of the phrase “dwelling-house” and exclusive possession as between the various occupants, that is sufficient to amount to separate dwelling-houses for the purpose of the Act even though there is nothing in the nature of physical separation between them.
- E I think, accordingly, that this case is completely covered by the principles laid down in *Barrell v. Fordree* (2), and, therefore, that the appeal must be allowed. I will only add that I find it extremely difficult to grasp the conception presented to us that you may have in a building a dwelling-house for the purpose of the Act which is occupied at one and the same time both by the tenant of the building and by the sub-tenant to whom he granted the tenancy.
- F It is the occupier of the dwelling-house, and the occupier alone, who gets the protection of the Acts. I agree with the order that my Lord proposes should be made.

HARMAN, J.: I agree.

Appeal allowed.

Solicitors: *Adam Burn & Son* (for the landlord); *J. M. Morris & Co.* (for the tenant).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

MOONEY v. MOONEY.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Finmore and McNair, JJ.),
October 24, 1952.]

Bastardy—"Single woman"—Child born out of wedlock—Subsequent marriage of parents—Wife now living apart from husband—Bastardy Laws Amendment Act, 1872 (c. 65), s. 3.

On Apr. 21, 1948, the wife gave birth to a bastard child. On Aug. 21, 1948, the wife married the father of the child and lived with him until July 25, 1951, when she left with the intention of not returning to him. On Nov. 7, 1951, a summons by her alleging desertion against the husband was dismissed. On a summons by the wife for an affiliation order,

HELD: although for some purposes a married woman might be treated as a "single woman" within the meaning of s. 3 of the Bastardy Laws Amendment Act, 1872, a wife, even if living apart from her husband, was not a "single woman" within that section quoad her own husband, especially when she had refused to return to him, and, therefore, the summons must be dismissed.

AS TO REQUISITES FOR JURISDICTION IN AFFILIATION PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 582-584, paras. 802-804; and FOR CASES, see DIGEST, Vol. 3, pp. 387, 388, Nos. 253-269, and Digest Supp.

FOR THE BASTARDY LAWS AMENDMENT ACT, 1872, s. 3, see HALSBURY'S STATUTES, Second Edn., Vol. 2, p. 478.

Cases referred to:

- (1) *Jones v. Evans*, [1945] 1 All E.R. 19; [1944] K.B. 582; 114 L.J.K.B. 29; 171 L.T. 138; 108 J.P. 170; 2nd Digest Supp.
- (2) *Taylor v. Parry*, [1951] 1 All E.R. 355; [1951] 2 K.B. 442; 115 J.P. 119; 2nd Digest Supp.

CASE STATED by Lancaster justices.

At a court of summary jurisdiction sitting at Islington, Liverpool, on May 14, 1952, the appellant, Marguerite Mooney, preferred a complaint under the Bastardy Laws Amendment Act, 1872, s. 3, against her husband, the respondent, William Mooney, alleging that he was the father of a bastard child born to her on Apr. 21, 1948.

It was proved or admitted that the child was born on Apr. 21, 1948, at which time the appellant was the wife of one Frederick Molyneux. The appellant had lived apart from the said Molyneux since 1940 and had not seen him since that year. On May 11, 1948, she obtained a decree nisi of divorce on the ground of cruelty against the said Molyneux, the decree being made absolute on June 24, 1948. The wife had been associating with the respondent for about a year preceding the birth of the child and had intercourse with him regularly from about April, 1947. The respondent registered the birth of the child, and was described as the father in the birth certificate. On Aug. 21, 1948, the appellant married the respondent and from then until July, 1951, he maintained her and the child. On July 25, 1951, the appellant left the respondent in circumstances which precluded her from obtaining a maintenance order on the ground of desertion, and she had no intention of returning to the respondent. The justices held that the respondent was the father of the child, but they dismissed the summons on the ground that the appellant was not a "single woman" within the meaning of s. 3 of the Bastardy Laws Amendment Act, 1872. She now appealed.

Homfray-Davies for the appellant.

The respondent did not appear.

LORD GODDARD, C.J., stated the facts and continued: Counsel for the appellant has cited all the relevant authorities which are summarised in

ATKINSON, J.'s judgment in *Jones v. Evans* (1), and he has contended that on the authority of those cases the appellant should be regarded as a "single woman". Parliament might have provided that any woman who was delivered of a bastard child could maintain affiliation proceedings against the putative father, but it has only given that right to a single woman. The courts have construed the words "single woman" to mean a woman whose husband has left her or been absent from her at the time of conception either against her will or because he has been taken from her, as in the case of a soldier or a sailor, or, as in one case, a man who was sentenced to transportation, or, I suppose, a man who was sentenced to a long term of imprisonment, although it is not necessary to decide it. In *Taylor v. Parry* (2) this court decided that for the purpose of considering whether a married woman can be considered as a single woman for the purpose of the Bastardy Laws Amendment Act, 1872, s. 3, the law has not been altered by the National Assistance Act, 1948, which has put the obligation on a man to support his own children and on a woman to support her own children, so that a man is no longer under an obligation to support his wife's illegitimate children.

It is said in the present case that, as the appellant is not living with her husband, she falls within the category of "single woman" on account of a long line of authorities dating from 1807. In my opinion, that is not so. No case has ever yet gone the length of deciding that a married woman can be regarded as a single woman quoad her own husband. What has been decided is that a married woman who is not living with her husband, who is serving abroad or has deserted her, can, quoad a third party, be considered as a single woman. In a way that is an anomaly, but it was introduced because it was thought that that would really do justice and be consonant with the spirit of the Bastardy Laws. On the other hand, it would be asking the court to take an enormous step forward to hold that when a married woman summons her husband she can be heard to say that she is a single woman. Still more would it be anomalous when the fact that she is not living with her husband is not his fault, but her fault, he being willing to have her back and support her and her child, and she refuses. It seems to me impossible to bring this case within the line of authorities which for certain purposes have allowed a married woman for the purposes of these Acts to be considered a single woman, and, for these reasons, I think the justices came to a right decision.

FINNEMORE, J.: I agree.

McNAIR, J.: I agree.

Appeal dismissed.

Solicitors: *Dubovie, Freeman & Co.*, agents for *A. D. Abrahamson*, Liverpool (for the appellant).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

LEEDER v. ELLIS.

[PRIVY COUNCIL (Lord Porter, Lord Oaksey, Lord Tucker, Lord Asquith of Bishopstone and Lord Cohen), July 1, 2, 3, 7, 8, October 8, 1952.]

Appeal—Further evidence—Power in appellate court to receive—Principles on which court will act—Appeal from judge sitting alone—R.S.C., Ord. 58, r. 4.

The principles on which an appellate court which has a discretionary power to receive further evidence on questions of fact should exercise that discretion on an appeal against an order of a judge sitting alone are the same as those laid down for the guidance of an appellate court when considering an application for leave to adduce further evidence in order to secure a re-trial of a case heard before a jury, but the circumstances which it is relevant to take into account may be different.

Dicta of LORD CHELMSFORD in *Shedden v. Patrick & A.-G.* (1869) (L.R. 1 Sc. & Div. 545), and SCRUTTON, L.J., in *Nash v. Rochford Rural District Council* ([1917] 1 K.B. 393), considered.

AS TO FURTHER EVIDENCE ON APPEAL, see HALSBURY, Hailsham Edn., Vol. 26, p. 120, para. 238; and FOR CASES, see DIGEST, Practice, pp. 775-779, Nos. 3396-3434.

Cases referred to:

- (1) *Nash v. Rochford Rural District Council*, [1917] 1 K.B. 384; 86 L.J.K.B. 370; 116 L.T. 129; 81 J.P. 57; 22 Digest 477, 5027.
- (2) *Shedden v. Patrick & A.-G.*, (1869), L.R. 1 Sc. & Div. 470; 22 L.T. 631; 22 Digest 476, 5022.
- (3) *Sanders v. Sanders*, (1881), 19 Ch.D. 373; 51 L.J.Ch. 276; 45 L.T. 637; 32 Digest 458, 1249.
- (4) *Evans v. Bartlam*, [1937] 2 All E.R. 646; [1937] A.C. 473; 106 L.J.K.B. 568; *sub nom. Bartlam v. Evans*, 157 L.T. 311; Digest Supp.
- (5) *R. v. Copestake. Ex p. Wilkinson*, [1927] 1 K.B. 468; 96 L.J.K.B. 65; 136 L.T. 100; 90 J.P. 191; Digest Supp.

APPEAL by the appellant, Edie Maud Leeder, from an order of the High Court of Australia (DIXON, McTIERNAN, WILLIAMS, WEBB and KITTO, JJ.), dated Aug. 3, 1951, allowing an appeal by the respondent, Nance Ellis, from an order of the Full Court of the Supreme Court of New South Wales (STREET, C.J., MAXWELL, J. and ROPER, C.J., IN EQUITY) dated Nov. 1, 1950, dismissing an appeal from an order of SUGERMAN, J., in the Supreme Court of New South Wales dated Aug. 4, 1950, whereby he dismissed an application by the respondent under the Testator's Family Maintenance and Guardianship of Infants Act, 1916-1938, for maintenance out of the estate of her deceased husband.

The respondent was the widow of Herbert Ellis, who died on July 28, 1949. By his will, dated June 27, 1947, he appointed the appellant his sole executrix, and, after bequeathing to her and the respondent certain furniture, he left the residue of his estate, consisting of a cottage, to the appellant. The cottage was valued for probate at £1,000 subject to a mortgage on which there was owing £887. On Mar. 8, 1950, the respondent took out a summons under the Act of 1916-1938. The appellant claimed that the testator was indebted to her to the extent of £497 13s. 7d., and SUGERMAN, J., having found that this claim was supportable as to £200-£300, decided that the estate was insolvent, and dismissed the summons.

By the Equity Act, 1901-1941, s. 82 (1) it is provided:

"All appeals under this Act shall be by way of re-hearing . . ."

By s. 84 it is provided:

"(1) The Full Court shall have . . . full discretionary power to receive further evidence upon questions of fact . . . (3) Upon appeals from a

decree or order upon the merits at the trial or hearing of any suit or proceeding such further evidence . . . shall be admitted on special grounds only, and not without special leave."

On appeal to the Full Court the respondent sought to adduce further evidence consisting of affidavits by two valuers who valued the cottage at between £2,450 and £2,500. The Full Court decided that this further evidence should
A not be admitted and dismissed the appeal. The High Court, in allowing the appeal, held that the respondent was entitled to succeed on the evidence before the trial judge, and DIXON, WILLIAMS and KITTO, JJ., also considered that the further evidence should have been admitted. Accordingly, the court made an order directing the appellant to hold the whole estate on trust for the respondent absolutely.

B *G. E. Barwick, Q.C.* (of the Australian Bar), and *Peter Foster* for the appellant.

Sir Frank Soskice, Q.C., and *J. G. Le Quesne* for the respondent.

Oct. 8. **LORD COHEN:** This appeal raises a point under the New South Wales Testator's Family Maintenance and Guardianship of Infants Act, 1916-
C 1938 (hereinafter referred to as "the Act"). Section 3 (1) of the Act, so far as material, is in the following terms:

D "If any person (hereinafter called 'the testator') dying or having died since Oct. 7, 1915, disposes of or has disposed of his property either wholly or partly by will in such a manner that the widow, husband, or children of such person, or any or all of them, are left without adequate provision for their proper maintenance, education, or advancement in life as the case may be, the court may at its discretion, and taking into consideration all the circumstances of the case, on application by or on behalf of such wife, husband, or children, or any of them, order that such provision for such maintenance, education, and advancement as the court thinks fit shall be made out of the estate of the testator for such wife, husband, or children, or any or all of them."
E

Section 4 (1) enacts that every provision made under the Act shall, subject to the Act, operate and take effect as if the same had been made by a codicil to the will of the deceased. Section 5 (1) provides that the court may not entertain an application by a party claiming the benefit of the Act unless, in the
F case of a party dying after the passing of the Act, the application is made within twelve months from the date of the grant or re-sealing in New South Wales of probate of the will. Section 6 (1) requires that an order making any provision under the Act shall, inter alia, specify the amount and nature of such provision and the part or parts of the estate out of which such provision shall be made. Section 6 (4) enables the court, on the application of the executor
G or of a person beneficially interested in the estate, to rescind or alter any order making any provision under the Act. Their Lordships do not find it necessary to refer to any other provision of the Act, but would observe that neither s. 6 (4) nor any other provision in the Act enables the court to re-open the matter at the instance of an applicant under the Act whose application has been rejected.

H The testator, Herbert Ellis, the terms of whose will gave rise to these proceedings, died on July 28, 1949. He had been married once only and left him surviving his widow, the respondent, and three children—a son aged thirty-three and married, a married daughter, and a younger daughter aged seventeen who lived with her parents. By his will, dated June 27, 1947, the testator appointed the appellant executrix and trustee of his will. He bequeathed to her two specified articles of furniture and to his widow the rest of his furniture. He left the whole of his residuary estate to the appellant absolutely. Probate

was granted to the appellant on Feb. 15, 1950. The estate of the testator consisted only of the furniture (which was claimed by the respondent to be her own property) and a cottage which was the matrimonial home and was valued as at the date of the testator's death by the Valuer-General at £1,000, and was subject to a mortgage on which there was owing about £887. The appellant had lived with the testator and his family in the matrimonial home from some time in the year 1931 until January, 1933, when she left, but thereafter the testator spent almost every week-end with the appellant from Saturday morning until Sunday evening. The rest of his time he lived with his wife. He had been an invalid pensioner from 1943 until his death. Those being the circumstances it is not surprising that on Mar. 8, 1950, the respondent took out a summons under the Act asking that provision be made for her maintenance, education or advancement.

In her affidavit in support of that summons she said that she had no property from which she derived income, and that her only income was a widow's pension of £1 17s. a week and any contributions her unmarried daughter or her son might choose to make. She referred to the Valuer-General's valuation of the cottage at £1,000 and made her claim to all the furniture in the house. In the course of her affidavit she said that she had received substantial support from her son during her husband's lifetime after her husband became an invalid. She did not specify the nature of the support, but their Lordships think that the context indicates that the support took the form of periodical payments. The son, who was called, did not give any evidence to suggest that he was willing to provide any substantial capital sum. Rule 5 of the rules made under the Act required the appellant as executrix, when entering an appearance to the summons, to file an affidavit setting out the nature and amount of the estate and giving such information as might be available to her as to the family of the testator and the persons beneficially entitled to the estate. In compliance with the rule the appellant filed an affidavit in which, *inter alia*, she valued the cottage at £1,000 "as per the Valuer-General's certificate" and stated that the sum of £886 13s. 4d. was owing under the mortgage thereon. She also claimed that the testator was indebted to her in sums totalling £497 13s. 7d. These debts had not been disclosed in the affidavit lodged with the application for administration, but the trial judge accepted as satisfactory the explanation of the omission which she gave in cross-examination. The appellant filed a further affidavit dealing with the ownership of the furniture and with her relationship with the testator. Their Lordships do not find it necessary to go into these matters in detail. There is one other matter of fact to which reference must be made. At the date of the testator's death the cottage was subject to the Land Sales Control Act, 1948, which, in effect, restricted its value to what would have been a fair and reasonable price for it on Feb. 10, 1942. This Act ceased to apply to the cottage on Sept. 1, 1949.

The case came before SUGERMAN, J. (who, their Lordships were informed, happened to be the judge in New South Wales appointed to deal with land valuation matters), on July 28, 1950. The respondent and her son were called and so was the appellant. The cross-examination of the appellant was directed mainly to the validity of the debts claimed by the appellant to be due from the estate, but it also emerged from the cross-examination that the financial position of the appellant was far more secure than that of the respondent. In these circumstances it is not surprising that the trial judge expressed the view, which counsel for the appellant did not seek to contest, that, if there were available in the estate the means of making further provision for the respondent, that should be done. None the less, the trial judge dismissed the application.

From this decision the respondent appealed to the Full Court of New South

A Wales. On this appeal she sought to adduce further evidence consisting of the affidavits of two qualified valuers, one of whom swore that the house was worth £2,500 with vacant possession and £1,750 without it, while the other estimated the then market value of the house at £2,450. The application to adduce fresh evidence fell within s. 84 (3) of the Equity Act, 1901-1941, which corresponds very closely with R.S.C., Ord. 58, r. 4, in England.* Under that section, the order appealed from being an order on the merits at the hearing, the fresh evidence could only be admitted on special grounds and with special leave. When the matter came before the Full Court, STREET, C.J., with whom the other members of the court agreed, dealt first with the question of fresh evidence and decided that it ought not to be received. He then dealt with the matter apart from the evidence and came to the conclusion that the appeal failed saying:

C “The application has to be determined on the position as presented to the court at the time of the hearing, when, undoubtedly, future prospects should be taken into account, if there were evidence justifying a conclusion that the estate was likely to appreciate or depreciate in the future. If there were no evidence to that effect, then the matter must be dealt with on the evidence as it then stands, and if on that evidence the order would be, in effect, a nullity and would confer no benefit, then I do not think the court would be justified in making an order on the chance that it might, in some unforeseen circumstances, provide some benefit for the applicant.”

D The respondent then appealed to the High Court of Australia who allowed her appeal on Aug. 3, 1951. All the judges were of opinion that the respondent was entitled to succeed on the evidence before the trial judge, bearing in mind that the Land Sales Control Act, 1948, no longer applied to the cottage. DIXON, WILLIAMS and KITTO, JJ., also considered that the fresh evidence should have been admitted. McTIERNAN and WEBB, JJ., expressed no opinion on this point. Accordingly, the High Court allowed the appeal and awarded the respondent the whole estate. They ordered the appellant to pay the respondent's costs in the Full Court and in the High Court. From this order the appellant by special leave granted on Nov. 14, 1951, appealed to this Board.

F Their Lordships find themselves in disagreement with the High Court of Australia on both points. Dealing first with the question of the admission of fresh evidence, the conclusion of the majority was based on their view that the principles laid down for the guidance of an appellate court when considering an application for leave to adduce further evidence in order to secure a re-trial of a case before a jury have no application to an appeal of the present nature. Their Lordships, however, think that the principles are of general application though the circumstances which it may be relevant to take into account may be different. Counsel for the respondent sought to support the view of the High Court by pointing out that in *Nash v. Rochford Rural District Council* (1) the object of the application to call fresh evidence was to secure a new trial and that the observations of LORD CHELMSFORD in *Shedden v. Patrick & A.-G.* (2) (L.R. 1 Sc. & Div. 545), which were cited by SCRUTTON, L.J. ([1917]

H * By R.S.C., Ord. 58, r. 1: “All appeals to the Court of Appeal shall be by way of re-hearing . . .” By r. 4: “The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the court . . .”

1 K.B. 393) in the first-mentioned case, were also directed to such applications. But their Lordships do not think that SCRUTTON, L.J., or LORD CHELMSFORD would have expressed a different opinion had the object of the application been to adduce further evidence on an appeal from a judge sitting without a jury. In this connection it is to be observed that in *Sanders v. Sanders* (3) SIR GEORGE JESSEL, M.R., said (19 Ch.D. 380):

"The appellant has applied for leave to adduce fresh evidence, but I am of opinion that it ought not to be granted. The application is for an indulgence. He might have adduced the evidence in the court below. That he might have shaped his case better in the court below is no ground for leave to adduce fresh evidence before the Court of Appeal. As it has often been said, nothing is more dangerous than to allow fresh oral evidence to be introduced after a case has been discussed in court."

That was a case of an appeal from SIR RICHARD MALINS, V.-C., sitting without a jury, and it supports the conclusions that the principles to which their Lordships have referred are of general application: see also per LORD COZENS-HARDY, M.R., in *Nash v. Rochford Rural District Council* (1) ([1917] 1 K.B. 390, 391).

Counsel for the respondent relied on another passage from the judgment of SIR GEORGE JESSEL, M.R., in *Sanders v. Sanders* (3) where he said (19 Ch.D. 381):

"Moreover, speaking for myself, I think that when an application is made for an indulgence, the moral elements of the case ought to be taken into consideration. I am more inclined to grant it when what appears to be a substantially good and honest case is in danger of being defeated on technical grounds . . ."

It may well be that, had the Full Court decided to admit the evidence which the respondent sought to adduce, the High Court would not have felt bound to reverse their decision, but, the matter being one within the discretion of the Full Court, their Lordships consider that the High Court should not have interfered with the exercise of that discretion except in accordance with the well-recognised principles applicable in such cases.

Counsel for the respondent relied on some observations of LORD ATKIN and LORD WRIGHT in *Evans v. Bartlam* (4). LORD ATKIN said ([1937] 2 All E.R. 650):

" . . . while the appellate court, in the exercise of its appellate power, is no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet, if it sees that, on other grounds, the decision will result in injustice being done, it has both the power and the duty to remedy it."

LORD WRIGHT said (*ibid.*, 654):

"It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction, unless the court is clearly satisfied that he was wrong. But the court is not entitled simply to say that, if the judge had jurisdiction, and had all the facts before him, the Court of Appeal cannot review his order, unless he is shown to have applied a wrong principle. The court must, if necessary, examine anew the relevant facts and circumstances, in order to exercise by way of review a discretion which may reverse or vary the order."

Counsel contended that, applying the principles thus laid down, injustice would be done unless the additional evidence was admitted. He argued that the order of SUGERMAN, J., left the respondent without redress, whereas, if an order in her favour had been made, it could not have prejudiced the appellant if in fact the estate proved to be insolvent. He relied also on r. 5 of the rules

made in pursuance of the Act which imposed on the appellant the duty of making an affidavit as to the nature and amount of the estate. It is plain, however, from the judgment of STREET, C.J., that both these points were present to the minds of the Full Court when that court reached its decision. Moreover, the evidence which it was sought to adduce was not as to a matter of fact, but as to a matter of opinion which it would have been open to the appellant to challenge, and it is impossible to say that the evidence, if admitted,

A would necessarily have been conclusive of the matter or at least have an important influence on the result: see as to the importance of this consideration *R. v. Copestake. Ex p. Wilkinson* (5) ([1927] 1 K.B. 477). Looking at the matter as a whole, their Lordships do not think that the facts of this case would have justified the High Court of Australia interfering with the exercise by the Full Court of New South Wales of the discretion vested in it under s. 84 of the Equity Act, 1901-1941. Accordingly, their Lordships would not be prepared to send the case back to the Full Court of New South Wales to hear further evidence.

The question, therefore, is whether on the facts as established before SUGERMAN, J., the High Court were justified in reversing his decision confirmed as it was by the Full Court. Those facts stated shortly were as follows:

C (1) The only relevant asset was the equity of redemption of the house. (2) That house was valued as at the testator's death by the Valuer-General at £1,000. (3) On the basis of this valuation the equity of redemption was worth only £113. (4) The Land Sales Control Act, 1948, had ceased to apply to the house since the testator died. As a result some increase of value might be expected, but the respondent's counsel said that the interest in the cottage would not be D worth much at the date of the hearing. (5) Out of the proceeds of sale of the equity there had to be discharged funeral expenses (£31), the costs of obtaining probate, the costs of the application before SUGERMAN, J., any other testamentary expenses, and the liability, if established, of the testator to the appellant. (6) SUGERMAN, J., found the appellant's claim to be supportable at least to the extent of £200 and £300.

E If that be the correct view of the facts, it seems difficult to say that the learned judge did not judicially exercise the discretion entrusted to him by the Act, or, indeed, that the conclusion he reached that the estate was insolvent was not justified.

In the Full Court it would appear that the only points seriously argued were, first, as to the admission of the fresh evidence, and, secondly, that the F court ought to make an order even though the estate might be insolvent. With the first point their Lordships have already dealt. Counsel for the respondent repeated the second submission before this Board. He argued that, unless it was conclusively established that there was no net estate, the court, if satisfied that the widow had made a case on what he called the merits, must make an order. Their Lordships do not find it necessary to decide what is

G the proper course for a judge to adopt who is left in doubt whether the estate will ultimately prove to be solvent or not since, as they read the learned judge's judgment, he reached a definite conclusion that the estate was hopelessly insolvent. Counsel did not dispute that, if that conclusion was right, the learned judge was justified in refusing the order. Their Lordships do not think that the High Court took a different view of the law. As their Lordships H read the judgments of the learned judges of the High Court they came to the conclusion that, on the evidence before him, SUGERMAN, J., should have come to the conclusion that the estate was solvent and that there would be a surplus available to meet the widow's claim. They based this conclusion on two grounds. The first, and that on which they chiefly relied, was that, in their opinion, the house had a value considerably above £1,000 in the middle of 1950. The second was that they were not satisfied that the appellant had a valid claim against the estate.

The validity of the appellant's claim against the estate depended mainly on whether her evidence was accepted. The learned judge who saw her treated her as a witness of truth and their Lordships do not consider the High Court were justified in disturbing his finding on that point. The main issue was as to the value of the house. DIXON, J., relied for his conclusion on the fact that the Land Sales Control Act, 1948, had ceased to apply to the house and the effect that, in his view, that event must have had on the price of houses such as the testator's. McTIERNAN, J., took the same view. It is plain, however, that the trial judge took notice of the fact that the consequence of terminating control was that the market price of cottages rose and the official valuation which was accepted for probate purposes would not be a true estimate of the price at which the cottage could be sold. He reached his conclusion with these considerations in mind. It may have been wrong, but it plainly did not shock the judges of the Full Court. Moreover, the circumstances to which DIXON, J., and McTIERNAN, J., refer must have been present to the minds of the legal advisers of the respondent when the matter was before SUGERMAN, J., and they called no evidence to support the view that there was the substantial rise which the High Court assumed to be a matter of notoriety. The issue is one as to a matter of opinion and their Lordships think that in all the circumstances the High Court were not justified in disturbing the order of SUGERMAN, J., supported by the evidence before him and confirmed by the Full Court, because they differed from him on a matter of opinion on a subject as to which the opinions even of experts generally differ. On this branch of the case their Lordships agree with the observations of STREET, C.J., which they have already cited.

Their Lordships feel great sympathy with the respondent, but they agree with STREET, C.J., when he said:

"It is impossible for this court, within the limits which necessarily control it, to achieve abstract justice in every case. It must work within its prescribed limits, and rules must be observed and complied with in the general interests of justice, and one general interest is that there should be an end to litigation, once it is instituted, and that parties should not be permitted to protract proceedings indefinitely by taking a chance on the hearing in the lower court as to whether the evidence is sufficient, and on finding it insufficient should then be able to come to the appellate court and ask for fresh evidence to be admitted, which was available at the time and in respect of which no difficulty arose in the way of putting that evidence before the court, and seek to have the matter reopened on that ground."

For these reasons their Lordships will humbly advise Her Majesty to allow the appeal and restore the order of the Full Court. The respondent must pay the appellant's costs of the appeals to the High Court and to this Board.

Appeal allowed.

Solicitors: *Farrer & Co.* (for the appellant); *Light & Fulton* (for the respondent).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

HAR-SHEFI v. HAR-SHEFI.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), October 29, 1952.]

Nullity—Jewish bill of divorcement—Declaratory judgment sought that marriage dissolved—Husband domiciled in Israel—Wife resident in England—R.S.C., Ord. 25, r. 5.

The parties were married on Jan. 10, 1950, at the office of the Chief Rabbinate in Israel, the wife being then domiciled in England and the husband in Israel. The wife was now resident in England and the husband was resident and domiciled in Israel. On Sept. 6, 1951, a Jewish bill of divorcement dissolving the marriage was received by the wife at the Beth Din, London (the court of the Chief Rabbi). On May 16, 1952, the wife filed a petition for a declaration that the marriage had thereby been validly dissolved. On July 2, 1952, the husband purported to enter an appearance, but was unable to provide an address within the jurisdiction. On a summons by the wife for leave to proceed with the petition,

HELD: (i) R.S.C., Ord. 25, r. 5, did not extend the jurisdiction of the court to entertain a petition which merely sought a declaration that a foreign decree of divorce was valid;

(ii) since the wife was in effect seeking a declaration of nullity, the proper court to consider the validity of the bill of divorcement was the court of the domicile, and, accordingly, both the summons and petition would be dismissed.

De Reneville v. De Reneville ([1948] 1 All E.R. 56), applied.

AS TO DECLARATORY JUDGMENTS, see HALSBURY, Hailsham Edn., Vol. 19, pp. 212-217, paras. 511-514; and FOR CASES, see DIGEST, Replacement Vol. 30, pp. 168-181, Nos. 192-292, and Digest Supp.

AS TO JURISDICTION OF ENGLISH COURTS IN NULLITY SUITS, see HALSBURY, Hailsham Edn., Vol. 6, p. 303, para. 357, and 1952 Supp.; and FOR CASES, see DIGEST, Vol. 11, p. 482, Nos. 924-926, and Digest Supp.

Cases referred to:

(1) *Schuck v. Schuck*, (1950), 66 (pt. 1) T.L.R. 1179; 2nd Digest Supp.

(2) *Igra v. Igra*, [1951] P. 404; 2nd Digest Supp.

(3) *Robert (otherwise De La Mare) v. Robert*, [1947] 2 All E.R. 22; [1947] P. 164; [1948] L.J.R. 680; 2nd Digest Supp.

(4) *De Reneville v. De Reneville*, [1948] 1 All E.R. 56; [1948] P. 100; [1948] L.J.R. 1761; 2nd Digest Supp.

SUMMONS adjourned into court.

On May 16, 1952, the wife, who was resident in England, filed a petition seeking a declaration that her marriage had been validly dissolved by a Jewish bill of divorcement. On July 2, 1952, the husband, who was both resident and domiciled in Israel, purported to enter an appearance, but he was unable to provide an address within the jurisdiction. The wife now applied ex parte by a summons for leave to proceed with the petition.

William Latey, Q.C., and *J. C. Mortimer* for the wife.

The husband did not appear.

Cur. adv. vult.

Oct. 29. BARNARD, J., read the following judgment. This is an ex parte summons by a wife for leave to proceed with her petition. The petition was filed on May 16, 1952, and alleges no matrimonial offence against the husband and seeks no relief other than a declaration that their marriage has been validly dissolved. Counsel for the wife bases his right to file such a petition, not under the Matrimonial Causes Act, 1950, but by virtue of R.S.C., Ord. 25, r. 5, which reads as follows:

"No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the court may

make binding declarations of right whether any consequential relief is or could be claimed, or not."

By the Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 80, the Rules of the Supreme Court are made applicable with the necessary modifications to the practice and procedure in divorce.

Counsel in support of his argument relied on two recent authorities—*Schuck v. Schuck* (1) and *Igra v. Igra* (2). In both these cases the court granted a declaration under R.S.C., Ord. 25, r. 5, that the marriage in question had been validly dissolved, but both petitions were properly constituted petitions for jactitation of marriage. I have come to the conclusion that Ord. 25, r. 5, does not in any way extend the jurisdiction of this court to entertain a petition which merely seeks a declaration that a foreign decree of divorce is valid. The husband purported to enter an appearance to this petition on July 2, 1952, but was unable to provide an address within the jurisdiction.

The facts of the case, so far as I know them, are set out in the petition, which states that the parties were married on Jan. 10, 1950, at the office of the Chief Rabbinate in Tel Aviv, Israel. At the time of the marriage the husband was domiciled in Israel and the wife, who is a Jewess, was domiciled in England, and, although the parties resided for a short period in London, the husband retained his domicile of origin and at the present time is both resident and domiciled in Israel. On Sept. 6, 1951, a Jewish bill of divorcement dissolving the said marriage was received by the wife at the Beth Din, London, or court of the Chief Rabbi. The wife alleges in her petition that this said bill of divorcement is valid to dissolve the marriage according to the laws of Israel, both parties being domiciled in Israel at the time. It is clear from the husband's memorandum of appearance that he is anxious to defend the case, and he states in a letter to the registrar, dated July 3, 1952, that this divorce is against the law of England as well as the law of Israel; that, being so far away, it is very difficult for him to defend himself; that he has seen a solicitor in Israel who is of the opinion that his wife should come to Israel as she was domiciled in Israel when they were married; and that the marriage took place in Israel.

The wife is, in effect, seeking a declaration of nullity on the ground that her marriage has been validly dissolved, and her counsel argued that, as she was resident in England, she was entitled to come to the English courts to ascertain whether or not she had a married status according to the law of England. This argument was the basis of my decision to assume jurisdiction in *Robert (otherwise De La Mare) v. Robert* (3), but *Robert v. Robert* (3) was expressly overruled by the Court of Appeal in *De Reneville v. De Reneville* (4), and LORD GREENE, M.R., in the course of his judgment said ([1948] 1 All E.R. 63):

"That a wife who is resident but, ex hypothesi, not domiciled here can compel her husband who is both domiciled and resident abroad to come to this country and submit the question of his status to the courts of this country appears to me to be contrary both to principle and to convenience."

I have, therefore, come to the conclusion that the proper court to consider the validity of the divorce granted on Sept. 6, 1951, is the court of the domicile, and, therefore, the English court has no jurisdiction to entertain this petition, and both this summons and the petition must be dismissed.

Summons and petition dismissed.

Solicitor: *G. Parry Jones* (for the wife).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

PRACTICE NOTE.

LOUTFI v. C. CZARNIKOW, LTD.

[QUEEN'S BENCH DIVISION (Sellers, J.), October 6, 7, 8, 9, 10, 1952.]

Pleading—Amendment—Application for leave to amend after close of case but before judgment.

A Unless there is very good ground and strong justification for so doing, the court should be reluctant to grant amendments of the pleadings after the close of the case but before judgment, even though it has been indicated in the course of the hearing that some amendment might be asked for.

B Such an amendment may be allowed: (i) where the matter involved has been raised in the course of the trial and counsel has addressed the court on it, since it will be merely incorporating in the pleadings that which has emerged in the course of the case as an issue between the parties; (ii) where the fact the subject of the amendment has been referred to by counsel in opening and evidence about it has been given, since there has been sufficient indication in the course of the trial and in the evidence

C that it is a matter in controversy and the amendment will enable the court to arrive at the view, if it thinks fit, that what is pleaded is a correct interpretation of the facts.

D Where leave to amend is given, the other party may be allowed to re-call a witness and/or amend his pleadings, and it will be the obligation of the party asking for the original amendment to file the proper amendments, incorporating those of the other party, with the court before judgment.

AS TO AMENDMENT OF PLEADINGS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 55-57, paras. 89-91; and FOR CASES, see DIGEST, Pleading, pp. 116-119, Nos. 1024-1065.

ACTION for damages for breach of contract.

E At the close of the case, but before judgment, counsel for the plaintiff made an application to the court for leave to amend his statement of claim and reply.

Levy, Q.C., Pearl and B. R. M. Austin for the plaintiff.

MacKenna, Q.C., and T. G. Roche for the defendants.

F **SELLERS, J.:** Whilst it was indicated in the course of the case, and before counsel for the plaintiff finally addressed the court, that some amendment might be asked for, no formal amendment was submitted until after both learned counsel had addressed me. I entirely accept the submission for the defendants that that is very late, and that the court should be reluctant to grant amendments at such a late stage unless there is very good ground and strong justification for so doing. Applying those principles to the proposed amendment of the reply, I disallow it.

G The other two amendments asked for are in rather a different position. The real issue on liability before me was whether or not a concluded contract had been entered into between the parties. In the original statement of claim the contract was based only on an oral agreement of Jan. 9, 1950, but, before the matter came to trial, there was an amendment, in the form of para. 1b, relying on a written agreement, viz., a letter of credit of the same date. In the course of

H his opening, counsel for the plaintiff spoke of a telephone conversation in Egypt on Jan. 7, which was the date when the plaintiff and one of those associated with him received a cablegram containing an offer from the defendants. Some evidence was given about it. The effect of it was that, having received the cable, the plaintiff told Mr. Sednaoui, who was interested in this matter with him, that it was acceptable to him subject to the Egyptian government's coming into line, and Mr. Sednaoui on that date informed a Mr. Gargour—an agent, as it was alleged, for the defendants—of that acceptance, and then on Jan. 9,

the Egyptian government had been seen and the necessary permission obtained. That has given rise to the proposed amendment—para. 1d—which says that there was a telephone conversation and an offer which was accepted on Jan. 7, subject to the condition that the matter should be sanctioned by the Egyptian government.

The other matter arises on the proposed amendment in para. 1c relating to the same subject-matter—the cable being an offer—and alleging an acceptance of that offer by the conduct of the plaintiff in carrying out the terms which the offer advised. In the course of the trial the matter was raised as to that form of acceptance and was considered, and learned counsel addressed me on it. I think it would be only in conformity with well-established rules that I should allow that amendment because it is simply setting out in the pleadings that which has emerged in the course of the case as an issue between the parties.

The proposed amendment 1d is very simple. In fact, it was canvassed in the course of the case, but counsel for the defendants has said that, if he had appreciated that this was being relied on as one of the ways of proving the contract—the offer and acceptance—he might have called Mr. Gargour, or cross-examined some of the plaintiff's witnesses more fully. I accept that submission, which makes it more doubtful whether the second amendment should be allowed. But it would be making it very difficult for the court which has heard such evidence as has been given and must draw certain inferences from it to decide the case without its being open to it to arrive, if it thought fit, at a view that that which is pleaded in para. 1d is a right interpretation of the facts. I think there was a sufficient indication in the course of the trial and in the evidence that that was a matter in controversy. I think it is unfortunate that the matter was not clarified at the commencement of the proceedings, as well it might have been, because it was in the mind of learned counsel for the plaintiff when he was opening the case. Not without some doubt, looking at the matter which has now to be decided and contemplating that it may have to be considered by other courts in the future, I feel it is undesirable that it should go forward for further consideration without this matter being open. Therefore, I will allow the second amendment—1d. But even at this late stage, having regard to the fact that the defendants might have dealt with the evidence differently, I shall give leave for this particular matter to be reopened, and give leave for the defendants to call Mr. Gargour—and I think he is the only witness who can be called—if they wish. I think the best course is to reserve the costs of calling him. *Prima facie* the costs of and occasioned by an amendment should be at the expense of the party asking for it, but that is only a *prima facie* position, and I think it would be better if I were to reserve a final decision as to the costs of the amendment.

[After an adjournment for the defendants to consider the position, counsel for the defendants said that the defendants did not propose to take any further step except to ask HIS LORDSHIP to receive an amendment to the defence to meet the amendments which had been permitted to be made in the statement of claim.]

SELLERS, J.: I will grant this further amendment. The costs of and occasioned by the amendments will be the defendants' in any event. It is the plaintiff's obligation to file the proper amendments, including the defendants' further amendment, with the court before the case comes up for judgment.

Judgment reserved.

Solicitors: *Godfrey Davis & Foster* (for the plaintiff); *Lawrance, Messer & Co.* (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

HASELL v. McAULAY.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Finemore and McNair, JJ.), October 23, 1952.]

Cultivation Control—Cultivation according to rules of good husbandry—Termination of owner's occupation of "land"—"Land"—Inclusion of dwelling-house and buildings—Agriculture Act, 1947 (c. 48), s. 17 (1) (b).

A

An order requiring "the occupation of land" to be given up by the owner and occupier, made by the Minister of Agriculture and Fisheries under s. 17 (1) (b) of the Agriculture Act, 1947, will apply to a dwelling-house or other building included in the land since, by s. 109 (2) of the Act, "'agricultural unit' means land which is occupied as a unit for agricultural purposes, including—(a) any dwelling-house or other building occupied by the same person for the purpose of farming the land."

B

FOR THE AGRICULTURE ACT, 1947, s. 17 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 1, p. 177.

CASE STATED by Somerset justices.

C

At a court of summary jurisdiction sitting at Keynsham, Somerset, a complaint was preferred by the respondent, an officer of the Somerset County Agricultural Executive Committee and a duly authorised agent of the Minister of Agriculture and Fisheries, under the Agriculture Act, 1947, s. 17 (7), charging the appellant with having failed to comply with an order dated Aug. 27, 1951, made by the Minister under the Agriculture Act, 1947, s. 17 (1) (b), having remained in possession of land, described in the schedule to the order, of which he was the owner and occupier and his occupation of which was required by the order to be surrendered on Jan. 1, 1952.

D

On the hearing of the complaint on June 6, 1952, it was proved or admitted that the appellant was the owner and occupier of Stockwood Farm, Keynsham, Somerset, consisting of a farmhouse, farm buildings and land and containing 106.614 acres. On Jan. 5, 1950, the Minister made a supervision order under the Agriculture Act, 1947, s. 12 (1), placing the appellant under the Minister's supervision so far as related to his farming of the agricultural unit known as Stockwood Farm. On Aug. 27, 1951, the Minister made an order which, after referring to the supervision order and reciting that the Minister was "satisfied that the farming [of Stockwood Farm] does not show satisfactory improvement" and that the appellant had "failed to comply with directions given to him under Part II of the Agriculture Act, 1947," continued: "Now the Minister, in pursuance of s. 17 (1) of the Agriculture Act, 1947, hereby orders that occupation of the land described in the schedule to the order shall be given up by the [appellant] on Jan. 1, 1952, and that the [appellant] shall, as from that date, let it to a tenant approved by the Minister." The schedule contained a description of land at Keynsham which included the farmhouse and farm buildings.

F

G

On Feb. 26, 1952, the appellant made a proposal by letter to the respondent that he should let the land to his brother-in-law, who occupied a farm twenty-five miles away, the appellant to retain the farmhouse himself. The county agricultural executive committee rejected the proposal on the ground inter alia that it was "essential that Stockwood Farm should be farmed as a separate unit by an occupier resident in the house and giving full-time attention to the day-to-day work on the holding". The same objection was made to another suggested alternative tenant who occupied a farm ten miles away.

H

For the appellant it was contended inter alia that the Agriculture Act, 1947, s. 17 (1) (b), gave the Minister power to direct the occupier to give up his occupation of "land", but that "land" did not include a dwelling-house and buildings, and that the order of Aug. 27, 1951, should have used the term "agricultural unit", as defined in s. 109 (2) (a), if it was intended to include the dwelling-house and buildings. For the respondent it was contended that under the

Interpretation Act, 1889, s. 3, unless the contrary intention appeared, "land" included "messuages, tenements, and hereditaments, houses, and buildings of any tenure,"* and that the order, in using the term "land", followed the wording of the Agriculture Act, 1947, s. 17 (1) (b), and no other wording could be used or was necessary to incorporate the dwelling-house and buildings in the scope of the Minister's order.

The justices held that "land" included the dwelling-house and buildings erected on some portion thereof and that the order complied with the provisions of the Agriculture Act, 1947, and they made an order for the appellant to give possession forthwith of Stockwood Farm. The appellant appealed.

Skelhorn for the appellant.

Wingate-Saul for the respondent.

LORD GODDARD, C.J.: Counsel for the appellant has argued that, while the Minister has power to order a farmer to give up land, he has no power to order him to give up an agricultural unit. Before the justices the Interpretation Act, 1889, s. 3, was relied on by the respondent for a definition of the word "land". On the other hand, counsel for the appellant has put forward an attractive argument based on various sections of the Agriculture Act, 1947, which suggested that land might be distinguished from buildings, and, therefore, the Interpretation Act, s. 3, was excluded because the definitions therein only applies where the context does not otherwise require. In my opinion, the fallacy in the argument is that the Interpretation Act has nothing to do with this case. The order appealed against was made under s. 17 (1) (b) of the Agriculture Act, 1947, which provides:

"Where a supervision order is in force in relation to the farming of an agricultural unit, and the Minister is satisfied that the farming thereof does not while the order is in force show satisfactory improvement, then subject to the provisions of this section . . . (b) where in the case of any land comprised in the unit the occupier is the owner thereof, the Minister shall have power by order to direct that as from such date as aforesaid the occupier shall give up his occupation of that land, or any part thereof specified in the order, and let it to a tenant approved by the Minister."

It is agreed that there was a supervision order in force in relation to the farming of this agricultural unit. I do not look at the Interpretation Act, 1889, s. 3, because by the definition section of the Act of 1947 (s. 109 (2)):

"In this Act the expression 'agricultural unit' means land which is occupied as a unit for agricultural purposes, including—(a) any dwelling-house or other building occupied by the same person for the purpose of farming the land . . ."

Therefore, if the Minister makes an order in respect of land comprised in an agricultural unit and that land includes a dwelling-house or other building, those buildings fall within the scope of the order, though it is open to the Minister, if he chooses to do so, under the latter part of s. 17 (1) (b), to exclude the house or other building from the order as being a "part" of the land. To give effect to the argument of counsel for the appellant would produce the extraordinary position that the Minister could order the appellant to give up the farm, but not the buildings, although no farmer could carry on the farm without the buildings. But the argument fails, not because of that possible inconvenience, but because the definition in s. 109 (2) (a) shows what "land" includes.

* By the Interpretation Act, 1889, s. 3: "In every Act passed after the year 1850, whether before or after the commencement of this Act, the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them; namely . . . The expression 'land' shall include messuages, tenements, and hereditaments, houses, and buildings of any tenure . . ."

FINNEMORE, J.: I agree.

McNAIR, J.: I agree.

Appeal dismissed.

Solicitors: *Robbins, Olivey & Lake*, agents for *Forrester & Forrester*, Chippenham (for the appellant); *Solicitor, Ministry of Agriculture and Fisheries* (for the respondent).

A

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

DOBBS v. LINFORD AND ANOTHER.

B

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Romer, L.J., and Harman, J.), October 21, 22, 1952.]

Landlord and Tenant—Lease—Forfeiture—Breach of covenant—Prohibition of use of premises for any purpose other than as a private dwelling-house—Sub-lease of part of premises as private residence.

C

The lease of a dwelling-house contained a covenant by the tenant "not to use the . . . premises for any purpose other than as a private dwelling-house and not to sub-let or part with the possession of the premises (except as a furnished house) without the consent . . . of the landlord such consent not to be unreasonably withheld in the case of a respectable and responsible person". There was a proviso for re-entry in the event of a breach of covenant. The tenant having sub-let the top floor of the premises, the landlord claimed possession on the ground of breach of covenant.

D

HELD: the phrase "a private dwelling-house" in the covenant not to use the premises for any purpose other than as a private dwelling-house envisaged the use of the whole building as one dwelling and created a conception which was inconsistent with the division of the house into more than one residence, and, therefore, the lease contemplated that the subject-matter of the demise was to be used as one dwelling-house; as the covenant in regard to user was immediately followed by the covenant not to sub-let the premises without the landlord's consent, there was no need in the latter covenant to provide against sub-letting of a part since that was already provided for, the covenant not to use the premises other than as one dwelling-house being inconsistent with the reservation of a right to sub-let part of the premises; and, therefore, the sub-lease of a part of the premises was a breach of the covenant as to user, even if the sub-tenant was using that part, and was bound to use it, as a private residence.

E

Barton v. Keeble ([1928] Ch. 517), approved.

F

Downie v. Turner ([1951] 1 All E.R. 416), distinguished.

G

AS TO COVENANT TO USE PREMISES SOLELY AS A PRIVATE DWELLING-HOUSE, see HALSBURY, Hailsham Edn., Vol. 20, p. 229, para. 251; and FOR CASES, see DIGEST, Replacement Vol. 31, pp. 167, 168, Nos. 3017-3029.

Cases referred to:

H

- (1) *Downie v. Turner*, [1951] 1 All E.R. 416; [1951] 2 K.B. 112; 2nd Digest Supp.
- (2) *Cook v. Shoesmith*, [1951] 1 K.B. 752; 2nd Digest Supp.
- (3) *Grove v. Portal*, [1902] 1 Ch. 727; 71 L.J.Ch. 299; 86 L.T. 350; 31 Digest, Replacement, 414, 5436.
- (4) *Barton v. Keeble*, [1928] Ch. 517; 97 L.J.Ch. 215; 139 L.T. 136; 31 Digest, Replacement, 168, 3027.
- (5) *Berton v. Alliance Economic Investment Co.*, [1922] 1 K.B. 742; 91 L.J.K.B. 748; 127 L.T. 422; 31 Digest, Replacement, 160, 2980.
- (6) *Berton v. London and Counties House Property Co.*, unreported (1920), Nov. 17.

APPEAL by the first defendant, a sub-tenant, from an order of His Honour JUDGE ARCHER, made at Chichester County Court on July 11, 1952, in an action for possession of premises on the ground of breach of covenant by the tenant.

The lease of the premises contained a covenant by the tenant not to use the premises for any purpose other than as a private dwelling-house and not to sub-let them without the consent of the landlord. The tenant sub-let the top floor to the first defendant and a room in the premises to the second defendant. In December, 1951, the tenant died intestate, and no representation had been taken out to her estate. In an action against the sub-tenants the landlord claimed possession of the whole of the property.

The first defendant denied that there was a breach of covenant and relied on the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3). The second defendant took no part in the proceedings. The learned county court judge held that the division of the premises into more than one residence constituted a breach of the covenant in regard to user, and he gave judgment for the landlord in respect of the whole of the premises.

C. J. S. French for the sub-tenant (the first defendant).

H. G. Garland for the landlord.

SIR RAYMOND EVERSLED, M.R.: I will ask ROMER, L.J., to deliver the first judgment.

ROMER, L.J.: This is an appeal from an order made by His Honour JUDGE ARCHER in the Chichester County Court. The action was brought by Miss Edith Sybil Dobbs (referred to hereafter as the landlord), who claims that she is entitled to possession of a certain house, called "New Barn Lodge", Felpham, Sussex, of which she is the freeholder. On Apr. 25, 1936, she let that property to a Miss May Sophia Miller (referred to hereafter as the tenant) for a term of three years from Apr. 25, 1936, and thereafter from year to year, at a rent of £65 a year. The agreement contained a covenant as to user and sub-letting or parting with possession, to which I will refer in more detail in a moment. In 1943 the tenant sub-let the top floor of the property to Mrs. Linford, the first defendant in these proceedings. She also sub-let a room in the premises to Mrs. Ide, the second defendant. On Dec. 11, 1951, the tenant died intestate and no representation has been taken out to her estate.

The landlord claimed possession and succeeded in obtaining an order in her favour for possession of the whole of the property. That order went too far because, in the first place, the second defendant has taken no part in these proceedings. I do not think her case was considered separately from that of the first defendant, and, in any event, the estate of the tenant, in whom was vested the interest in the house as a whole, was not before the court. The learned judge considered the case which was presented on behalf of the first defendant (referred to hereafter as the sub-tenant), in which she denied the contention on which the landlord was relying, namely, that the sub-lease to her by the tenant was in breach of the agreement of 1936, and she put up as an alternative defence that, if there was a breach, it had been waived by the landlord. In fact, the sub-tenant's defence to this action is based on the footing that the sub-lease granted to her by the tenant was a lawful sub-lease for the purpose of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3), and, accordingly, she has become tenant of the landlord in the events which have happened. The learned judge treated the matter as a question of construction of the lease, and, in my judgment, he was right in so treating it. He held, as a matter of construction, that the sub-lease to the sub-tenant constituted a breach of covenant.

The lease of Apr. 25, 1936, after reciting the parties, stated that the landlord agreed to let and the tenant agreed to take

"... all that messuage or tenement with the garden thereto situate

in New Barn Lane Felpham in the county of Sussex and known as New Barn Lodge for the term of three years certain from Apr. 25, 1936, at and under the rent and conditions following that is to say the rent shall be £65 per annum."

Then followed certain covenants by the tenant, and among them there was a covenant

A " . . . not to use the said premises for any purpose other than as a private dwelling-house and not to sub-let or part with the possession of the premises (except as a furnished house) without the consent in writing of the landlord such consent not to be unreasonably withheld in the case of a respectable and responsible person."

B Finally, there was an agreement that

"If any rent shall be in arrear for seven days whether legally demanded or not or there shall be any breach by the tenant of the conditions herein contained the landlord or her agent may re-enter upon the premises without giving any notice to quit and expel the tenant therefrom."

C The judge held that the covenant not to use the premises for any purpose other than as a private dwelling-house was an obligation on the tenant to use the premises for that purpose and for that purpose only, and that it could not be said that she was complying with that obligation if she was using part of the dwelling-house as a private residence for herself and was sub-letting another part to someone else, even if that other person was using it, and was bound to use it, as a private residence. The ground on which he arrived at that conclusion

D was that the phrase "a private dwelling-house" envisages the use of the whole building as one dwelling-house, and, therefore, creates a conception which is inconsistent with the division of the house into more than one residence.

After the words "as a private dwelling-house", the tenant's covenant went on:

E " . . . and not to sub-let or part with the possession of the premises (except as a furnished house) without the consent in writing of the landlord such consent not to be unreasonably withheld in the case of a respectable and responsible person."

Counsel for the sub-tenant contends that, notwithstanding the covenant not to sub-let or part with the possession of the premises without the consent in writing of the landlord, the tenant can grant a sub-lease or part with the possession of a part of the premises without breaking the covenant. He cited a number of cases in support of that proposition, the first of which was *Downie v. Turner* (1), a decision of this court. In that case both SOMERVELL, L.J., and JENKINS, L.J., referred to the question whether an under letting of part of a house to be used as a dwelling-house by a sub-tenant was a breach of a covenant

G not to use the demised premises for any other purpose than as a private dwelling-house, and they made certain observations to which I do not think that I need refer, because it appears to me that the language of the agreement in that case was different in a vital respect from the language of the agreement in the present case. The agreement in that case contained the following term, among others:

H "The tenant will not during such tenancy underlet the premises or any part thereof without the previous consent in writing of the landlord."

Accordingly, in that case, it was expressly contemplated that the house might be divided into more than one dwelling-house, and, therefore, a different consideration was present in that case from that which is present here. The same idea was expressed in *Cook v. Shoesmith* (2), and *Grove v. Portal* (3), but it does not appear to me that there is room for that kind of contention where the agreement contemplates that the subject-matter of the demise is to be used as one

dwelling-house and not more. If, in fact—as, in effect, we are invited to find—this covenant against sub-letting or parting with possession had been followed by a proviso to the effect that the tenant might sub-let or part with the possession of part of the premises, that would have been a very relevant consideration for the purpose of construction, as throwing light on what was meant by the expression “other than as a private dwelling-house”. But the point is that there is no such qualification, and it seems to me that it would be impossible to say, in the case before us, that, if the judge be right, it amounts to a derogation of the right of the tenant to sub-let a part, because, in effect, there is no grant of any such right. It is quite true that, if a landlord grants a tenancy of certain premises, then prima facie that carries with it the right to alienate, and it may be said that, if one takes a covenant which qualifies that general right, then, in so far as it is not cut down, it remains, by reason of the fact, not that it is expressly granted, but because the general right is only excluded in part. But when it comes to a question of construction—as, in my judgment, it is in this case a question of construction—whether the right of sub-letting in part is preserved or not, then when one finds, as, in my opinion, one does find here, something which is quite inconsistent with the reservation of such a right, that right must be regarded as eliminated.

It seems to me, then, that one has to take this covenant as one finds it, and one finds that it is a covenant to use the premises for no other purpose than that of a private dwelling-house. It is not in dispute that it has been used by the tenant partly as a dwelling-house for her sub-lessee. That appears to me to be a plain breach of covenant, which is not rescued from being a breach of covenant by the conception to which I have referred—that she impliedly had the right to sub-let that part of it. As I have said, I do not think that the cases on that topic to which we were referred, about the right to grant an assignment or to let a part of the premises, when the only covenant is a covenant not to part with the premises as a whole, have any bearing on the matter. But in construing the relevant covenant as to user, which is said to have been broken, and which the judge found to have been broken, and which, in my opinion, was broken, one has the authority, as I think, of *EVE, J.*, in *Barton v. Keeble* (4), and the observations of *ATKIN, L.J.* ([1922] 1 K.B. 758), in *Berton v. Alliance Economic Investment Co.* (5) on the unreported case of *Berton v. London and Counties House Property Co.* (6), for the view that the interpretation of that covenant of user is that to which I have referred and which the learned judge accepted in the court below.

In my opinion, the sub-demise by the tenant to the sub-tenant (the first defendant) was in breach of the covenant as to user, the learned county court judge was right in so holding, and the appeal must be dismissed. I would merely add that the further additional defence of waiver was apparently not persisted in before the judge, and has not been revived before us.

HARMAN, J.: The covenants in a lease must be construed by reference to the covenants which follow or precede them. Thus, where a covenant not to use otherwise than as a private dwelling-house is followed by a covenant against sub-letting a part without consent, one must construe the first by reference to the second, and that is all that *JENKINS, L.J.*, was saying in *Downie v. Turner* (1). It also follows, in my judgment, that, where the covenant to use as a private dwelling-house is followed by a covenant not to sub-let the whole, the inference is irresistible that there was no need in the second covenant to provide against sub-letting of a part, because that was already provided for in the covenant not to use otherwise than as a dwelling-house, scilicet, one single dwelling-house. That was pointed out by *SIR RAYMOND EVERSHED, M.R.*, during the argument, and it seems to me conclusive. In my opinion, the county court judge was right.

SIR RAYMOND EVERSLED, M.R.: I also agree that the construction adopted by the learned county court judge was the correct view of the provision against user otherwise than as a private dwelling-house. That that is the prima facie effect of such a covenant is, I think, in accordance with the law laid down by EVE, J., in *Barton v. Keeble* (4), and in keeping with the observations of ATKIN, L.J., in *Berton v. Alliance Economic Investment Co.* (5). I have been unable to accept the view that the basis of those decisions was that the under letting in those cases amounted to a use of the premises for business purposes. In my judgment, departure from the prima facie meaning of the material words must depend on particular words in a particular document, and that, for the reasons which ROMER, L.J., and HARMAN, J., have stated, I think was the case in *Downie v. Turner* (1), on which counsel for the sub-tenant mainly relied. In the result, counsel for the landlord consenting, the order of the county court judge will be varied by limiting it to the top floor of the premises, of which alone the sub-tenant (the first defendant) is in occupation.

Appeal dismissed, subject to variation of county court judge's order.

Solicitors: *Maples, Teesdale & Co.*, agents for *Benning, Hoare & Drew*, Luton (for the sub-tenant); *Large & Co.* (for the landlord).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

LYON v. LYON.

[COURT OF APPEAL (Singleton, Birkett and Morris, L.JJ.), October 17, 1952.]

D *Legal Aid—Costs—Taxation—Costs representing full value of work done allowed on taxation as between party and party—No further allowance on solicitor-and-client basis—Legal Aid and Advice Act, 1949 (c. 51), sched. III, para. 4 (1).*

E A wife to whom a legal aid certificate under the Legal Aid and Advice Act, 1949, had been granted was successful in her divorce petition against her husband, who was ordered to pay the costs of the suit. Those costs were directed to be taxed as between party and party, while the costs to which the wife would be entitled under the Act fell to be taxed, under sched. III, para. 4 (1), to the Act, as between solicitor and client. On taxation of her costs certain items in the solicitor-and-client column of her bill of costs were struck out by the taxing master, on the ground that the amount allowed against her husband in the party-and-party column represented the full value of the work done.

F **HELD:** where the taxing master was of the opinion that the full value of the work done had been allowed on a party-and-party taxation, no further costs could be allowed as between solicitor and client, and, therefore, the items in question had properly been disallowed.

G *Gibbs v. Gibbs* ([1952] 1 All E.R. 942), distinguished.

FOR THE LEGAL AID AND ADVICE ACT, 1949, sched. III, para. 4 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 566.

Cases referred to:

- H** (1) *Gibbs v. Gibbs*, [1952] 1 All E.R. 942.
(2) *Reed v. Gray*, [1952] 1 All E.R. 241; [1952] Ch. 337.

APPEAL by the wife from an order of His Honour JUDGE RICHARDSON, sitting as a special commissioner in divorce, made on Aug. 1, 1952, at Newcastle-upon-Tyne, upholding an order of the district registrar that certain items in the bill of costs of the wife who had successfully petitioned for divorce should be disallowed as between solicitor and client, on the ground that full allowance had been made in party-and-party costs for the value of the work done. The wife had obtained a legal aid certificate under which her contribution

was nil, so that, though the appeal was in form one by the wife, it was in effect by her solicitors, who could recover their costs in excess of those awarded against the husband only from the legal aid fund to the extent allowed on taxation as between solicitor and client.

Seuffert for the wife.

The husband did not appear.

SINGLETON, L.J.: The wife, Mrs. Irene Lyon, was the petitioner in a suit for a decree of dissolution of marriage, and the husband, Gordon Johnson Lyon, was respondent. She had been granted a legal aid certificate under the Legal Aid and Advice Act, 1949, on Aug. 7, 1951. Her petition was undefended, and when the order was made decreeing dissolution of the marriage it was further ordered that the husband should pay the costs of the suit. Those costs were directed to be taxed as between party and party, while the costs to which the wife would be entitled under the Act fell to be taxed, under sched. III, para. 4 (1), to the Act, as between solicitor and client. Then the wife's solicitors brought in a bill of costs in four columns as required. That was considered by the district registrar, and he taxed the bill. The amount which appears to have been allowed against the husband, including the fifty per cent. addition to profit costs, came to £75 16s. The wife's solicitors objected to the disallowance of some items on the bill of costs. Those items were considered by the registrar, who made his observations on them, and we have before us those observations. This appeal really affects the solicitors who were acting on behalf of the wife. The wife has been granted legal aid for the purposes of this appeal, and the certificate, dated Aug. 8, 1952, is before me. In that way it may be said that this appeal is being financed under the Legal Aid and Advice Act scheme. In effect, it is an application that there should be paid out of the fund more than the registrar has allowed under his taxation of the bill of costs.

The objection made to the items in question is that the registrar has not allowed costs on a more generous scale in respect of those items than he did in making his allowance on the party-and-party taxation. It is claimed that it was his duty on each of the items to allow more than he did. The biggest of the items is item no. 53 in the bill:

"Instructions for brief including attendance upon the petitioner and five witnesses (all the witnesses being interviewed at Whitley Bay), obtaining history of the marriage and lengthy statements, considering evidence, and generally preparing case for hearing including twenty-five attendances and eight letters not otherwise charged for."

The bill, as rendered, included in the column for party-and-party taxation as claimed ten guineas, and in the column for solicitor-and-client costs as claimed five guineas, fifteen guineas in all, which would, had it been allowed, have been increased by fifty per cent. under the rules which now apply. The taxing master came to the conclusion that nine guineas was a sufficient charge for that item, and that the whole of the nine guineas should be allowed against the husband. That is the chief item. There are six other items with which we are concerned in which the charge in the party-and-party column for the purposes of taxation was 13s. 4d., and a further charge of 6s. 8d. was made in the column for taxation as between solicitor and client. One of them, for instance, is item no. 71: "Attending hearing of maintenance application when order made for £2 per week"; 13s. 4d. charged in the party-and-party column, and 6s. 8d. in the solicitor-and-client column; and the same sort of thing occurs later. Item no. 90: "Attending hearing when order made for permanent maintenance"; 13s. 4d. charged in the party-and-party column, and there is a further item of 6s. 8d. in the solicitor-and-client column.

In regard to the smaller items, the observations of the registrar are as follows:

"With regard to items 1, 34, 46, 61, 90 and 99, the full amount claimed in the party-and-party column was allowed, and, in my view, the amount charged represents the full value of the work done. I, accordingly, decline to allow any further sum in the solicitor-and-client column. To do so would make the legal aid fund liable for a fee which has not been earned."

With regard to the biggest item, item no. 53, the observation is:

- A "As I regard the allowance made as the full value of the work done I do not consider that any further allowance could properly be made."

- B Thus, the taxing master, whose decision is final as to amount, has said that he allowed the full value of the work done, but, notwithstanding that statement by the master, who is familiar with the ordinary charges made in this class of work, counsel on behalf of the wife submits that it is the duty of the taxing master, who has allowed the full amount against the opposite party, to allow more as against the legal aid fund. He supported that argument by saying that under the legal aid fund the solicitor only gets eighty-five per cent. of his profit costs, and, therefore, there ought to be more allowed on these items than the taxing master allowed on a party-and-party taxation. I confess I find that argument difficult to follow. A solicitor who undertakes work under the Legal Aid and Advice Act knows at least that he is safe for his costs. He has the legal aid fund behind him, and he knows, when he undertakes work under the Act, that he and all other solicitors who accept work under the Act have agreed to accept eighty-five per cent. of the profit costs as prescribed by sched. III to the Act. I do not think that Parliament intended to mean that a solicitor should be paid for something which he has not done. If it be the fact that the amounts which are allowed in these items against the husband represent the full value of the work done, the taxing master is right, for to allow more would make the legal aid fund liable for a fee which has not been earned. Yet it is submitted that this court ought to make an order which would have that result.

- E Section 9 of the Act is in these terms:

- F "(1) The functions of the Law Society under this Part of this Act shall include the establishment and administration of the legal aid fund. (2) All receipts and expenses of the Law Society attributable to this Part of this Act shall be paid into and out of the legal aid fund, and the general funds of the Law Society shall be indemnified thereout against any liability in respect of those expenses . . . (6) The sums required to meet payments out of the legal aid fund, after allowing for sums received apart from this provision, shall be paid to that fund by the Lord Chancellor at such times and in such manner as he may with the approval of the Treasury determine, and shall be so paid out of moneys provided by Parliament."

- G Schedule III, para. 2, to the Act deals with the amounts payable to solicitors. In para. 4 (1) it is provided:

"Subject to the last foregoing paragraph, costs shall be taxed for the purposes of this schedule according to the ordinary rules applicable on a taxation as between solicitor and client where the costs are to be paid out of a common fund in which the client and others are interested."

- H That provision has been considered by the courts on two occasions recently. In *Gibbs v. Gibbs* (1) HAVERS, J., referring to a most instructive passage in the book on Legal Aid by Mr. SACHS, Q.C., which appears at pp. 136, 137, said ([1952] 1 All E.R. 960):

"Counsel was not able to cite any authority for the passage in Mr. SACHS' book that the result of the taxation was normally about fifteen per cent. higher where costs are taxed on the footing that they are to be paid

out of the common fund. I myself am not aware of the precise way in which the different modes of taxation are worked out and I prefer to express no opinion about it. I read this objection to mean this, that the solicitor is arguing that a taxation as between solicitor and client when costs come out of a common fund is entitled to embrace a more generous allowance than on a taxation as between party and party, and that generosity can extend, not only to increasing the amounts of items, but also to allowing additional items beyond those which would be allowed on a taxation as between party and party. If so, leaving out for the moment the precise percentage of increase, it seems to me to embody the true principle which I have been endeavouring to state. The learned registrar made some observations. He says: 'My answer is applicable to all objections. This is a solicitor and client bill and not a solicitor and own client bill. I can well understand the difficulty in which solicitors who undertake legal aid cases find themselves. They really, perhaps not unreasonably, desire an indemnity as to costs, however incurred. My own view is that the legislature would have said so had they so intended. I understand that the solicitor is not allowed to recover any sum from the client and in some ways this seems a logical outcome of the proposal for legal aid. But it opens the door to the abuse of a privilege not so much by the solicitor as by the client. I should be very grateful for a ruling'. I agree with the learned registrar that this is a taxation as between solicitor and client out of a common fund and not a taxation as between solicitor and own client. However, the learned registrar disallowed or reduced these twenty items and it seems to me clear that he cannot have accepted the objection which was put forward on behalf of the petitioner to which I have already referred, namely, that there ought to be a more generous allowance than on a taxation as between party and party. I think the proper inference I ought to draw is that the learned registrar declined to accept that basis of taxation, and it seems to me to follow that he must have adopted a standard of taxation which was less generous than that which the petitioner's solicitors were inviting him to adopt. If so, it seems to me that he failed to apply the right principle, and, as his answer applied to all the objections, it, therefore, vitiates all the items disallowed which are affected by these objections."

Nothing of that kind applies in the circumstances of the present case. The taxing master has said: "I have allowed the full value of the work done." I cannot help thinking that when costs are ordered against an unsuccessful party, that party ought to pay the costs reasonably and properly incurred by the successful party in pursuance of his suit, and they ought to be so allowed on taxation. I have not heard any reason given why the item no. 53 in this case, a charge of ten guineas plus five guineas, one in the party-and-party column, and the other in the solicitor-and-client column, in respect of instructions for brief, was made in that way. The taxing master thought nine guineas plus the fifty per cent. allowance was enough for all the work done, and he thought that that ought to be allowed against the husband. If the whole of the costs incurred can properly be charged against the opposite party who is ordered to pay costs, they ought to be. They ought to fall on him, and not on the successful party or on the legal aid fund. Again, let me take item no. 71 to which I have already referred. We ought to assume that the taxing master knows what it is proper to charge for that item. He said: "I have allowed 13s. 4d., which is full value for the work done." Not a word is said to the contrary, but it is argued that because 13s. 4d. is the right charge on a party-and-party taxation, therefore, on this form of taxation as between solicitor and client something ought to be added to it, that is, 6s. 8d. There is no basis for that. If there had been, it would have been pointed out to

the taxing master, and he would have dealt with it. It is not contended, so far as I can see, that the taxing master's views on amount are wrong. His statement is: "I have allowed the full value of the work done."

A It is submitted to us as a point of principle that because the taxing master has allowed nine guineas against the unsuccessful party to the litigation on instructions for brief he ought to allow something over and above that amount against the client, which means for this purpose against the Law Society's fund. I know of no reason why he should do so unless it is shown that there is some such charge which could properly be made. It is said that taxation as between solicitor and client is, and is intended to be, on a more generous basis than a taxation between party and party. That may well be so in some of the ways mentioned by HAVERS, J., in *Gibbs v. Gibbs* (1) ([1952] 1 All E.R. 942, at p. 960), but, if the facts are that the full value of the service rendered is allowed against the unsuccessful party and recovered against him, it seems to me that any further charge allowed on the basis contended for by the wife would be no more, and no less, than a bonus for work not done. However long you look at this case, you are faced with the finding that the full amount has been allowed. If that be right (and it is not challenged), the application for something more appears to me to be an effort to obtain out of the legal aid fund something which has not been earned. To grant it would be, I think, against the public interest.

B The taxing master's observations show that he dealt with the case on its merits, and when the appeal was before the learned commissioner he gave his judgment in the clearest possible terms. He was of opinion that *Gibbs v. Gibbs* (1) did not go so far as to say that a larger allowance than the full value of the work done could properly be made, and that, as the full value of the work had been allowed on the party-and-party taxation, there could be no justification for an additional fee in the solicitor-and-client column on these items. That represents my opinion. In my view, the findings of the taxing master ought to have been accepted, and the appeal should be dismissed. I should add that the taxing master did allow some additional amounts on other items on the taxation as between solicitor and client, so that that which was allowed to the wife's solicitors was in fact higher than the allowance on the taxation as between party and party.

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E **BIRKETT, L.J.:** It is said that a decision on this matter may affect similar cases coming in the future before courts all over the country. I do not take that view, and I want to make it quite clear that in the judgment which I am delivering I am dealing with the precise facts in this case and with no other. I agree most fully with what my Lord has said, namely, that I think this case is covered by one very special matter, and that is the findings of the taxing master. The substance of those findings was that the amount allowed as between party and party represented the full value of the work done. The taxing master added:

G "I, accordingly, decline to allow any further sum in the solicitor-and-client column. To do so would make the legal aid fund liable for a fee which has not been earned."

H That is the finding of the taxing master, but, as I understood the argument, it is contended that, despite the fact that he said that he had allowed the full value of the work done, nevertheless he ought to have made a more generous allowance in dealing with the solicitor-and-client column.

With regard to *Gibbs v. Gibbs* (1) and *Reed v. Gray* (2), which was referred to in the elaborate judgment of HAVERS, J., in which the whole matter was reviewed, I think the pith of the matter is where the learned judge said ([1952] 1 All E.R. 959):

"In my view, the principle which the taxing master ought to adopt is as follows: (i) Under the order for taxation it is the duty of the taxing master

on a taxation as between party and party to adopt as his normal standard the direction in R.S.C., Ord. 65, r. 27 (29). (ii) At the same time he should make more generous allowances than he would on a taxation as between party and party. In making more generous allowances the taxing master, in my judgment, is permitted, not only to allow items which can be properly included on a party-and-party taxation at a higher figure than that at which they would be allowed on a party-and-party taxation, but also to allow additional items which would not be allowed on a taxation as between party and party. The taxing master has, of course, a very wide discretion."

The way in which I interpret that is that the distinction between a taxation on a party-and-party basis and one on a solicitor-and-client basis is that the taxing master, in his discretion and having the facts of the whole matter before him, can say: "There are certain items which I do not think it proper to include in the party-and-party taxation, but I think it proper to include them in a solicitor-and-client taxation. Secondly, there are certain items on which I have allowed a certain amount in the party-and-party column. I think in my discretion I could be more generous on the solicitor-and-client basis." I cannot think that that rule has any application on the precise facts in the present case, because, as I understand it, there is no margin for the exercise of the more generous allowance when the taxing master has said in terms: "I have allowed everything that has been earned". As the learned commissioner said in his judgment:

"It seems to me that, if a fee in the party-and-party column was ample to cover the service rendered then, there is no need for a further fee in the solicitor-and-client column. That would, in fact, be a kind of bonus which I cannot think was ever intended. I have no doubt that an extra fee can be allowed for instructions for brief in the solicitor-and-client column, but only in exceptional cases—for instance where evidence of adultery is quite properly investigated, but the investigation fails to result in a charge, the decree being obtained on other grounds."

I cannot think that in this case, applying the words of HAVERS, J., there were items which the taxing master ought to have allowed in the solicitor-and-client column, which were not allowed in the party-and-party column, or that there were any grounds in his express finding for making a more generous allowance in the solicitor-and-client column than he made in the party-and-party column. I confine myself to the precise facts in this case, and it does not seem to me to be right that where a taxing master, exercising his discretion, says: "I have allowed the full value of what was done", nevertheless, he should go on to say: "I must award in the other column sums which have not been earned," for that would mean that these further allowances, though coming out of the legal aid fund, would take on themselves the character which the commissioner gave to them, that is, of being a bonus. Therefore, it seems to me that the learned commissioner was right in saying that he could see nothing in *Gibbs v. Gibbs* (1) to suggest that a larger allowance than the full value of the work done should be properly made. For these reasons I agree that this appeal ought to be dismissed.

MORRIS, L.J.: I am in full agreement with the judgments which my Lords have given. In my view, the findings of the taxing master are decisions of fact which, together with his decisions on matters of quantum, conclude this matter. It seems to me that where a taxing master has allowed the maximum in the sense of the full value of all the work done by a solicitor in regard to an item, and has held that all the work done in regard to that item is properly referable to a party-and-party basis, in such a case there is no

room for considering anything in the nature of a more generous allowance on a solicitor-and-client basis.

Appeal dismissed.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Patterson, Glenton & Stracey*, Newcastle-upon-Tyne (for the wife).

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

A PARKER AND OTHERS v. BRAITHWAITE AND ANOTHER.

[CHANCERY DIVISION (Danckwerts, J.), October 29, 1952.]

Mortgage—Possession of mortgaged property—Mortgagor not in occupation—Person in occupation under agreement with mortgagor—Mortgagor's power of leasing excluded except with consent of mortgagees—Mortgagees having knowledge of tenancy for eight months prior to notice to quit—Implied confirmation of tenancy.

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On May 23, 1949, the mortgagor executed a mortgage by demise of his dwelling-house in favour of a building society. The mortgage was in the usual form and excluded the mortgagor's statutory power of leasing except with the written consent of the building society. In October, 1950, without the consent of the building society, the mortgagor let four rooms in the house to T., retaining the rest of the house for his own occupation. In April, 1951, the building society was informed by its agent, L., of T.'s tenancy, and also of an agreement made between the mortgagor and L. on Apr. 3, 1951, that L. should, as from May 9, 1951, collect the rent of the house, pay thereout the mortgage repayments, rates, insurance premiums and commission to himself, and remit the balance to the mortgagor. Early in May, 1951, the mortgagor vacated the rooms in the house previously retained by him, and as from May 9 T. occupied and paid rent for the whole house. L. collected the rent until Aug. 24, 1951, when the tenant suspended payment owing to a dispute as to the amount of rent chargeable and the mortgage repayments fell into arrear. By a letter dated Jan. 1, 1952, the building society gave T. notice to quit and now sought possession of the house.

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HELD: the failure of the building society until Jan. 1, 1952, to attempt to evict T. as a trespasser did not amount to such recognition of the tenancy as to deprive them of their right to possession.

Re O'Rourke's Estate (1889) (23 L.R. Ir. 497), applied.

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AS TO LEASES GRANTED BY MORTGAGOR ULTRA VIRES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 332, 333, paras. 495, 496; and FOR CASES, see DIGEST, Vol. 35, pp. 335-339, Nos. 776-816.

Cases referred to:

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(1) *Dudley & District Benefit Building Society v. Emerson*, [1949] 2 All E.R. 252; [1949] Ch. 707; [1949] L.J.R. 1441; 31 Digest, Replacement, 639, 7472.

(2) *Iron Trades Employers Insurance Assn., Ltd. v. Union Land & House Investors, Ltd.*, [1937] 1 All E.R. 481; [1937] Ch. 313; 106 L.J.Ch. 206; 156 L.T. 322; Digest Supp.

(3) *Doe d. Whitaker v. Hales*, (1831), 7 Bing. 322; 9 L.J.O.S.C.P. 110; 131 E.R. 124; 35 Digest 337, 794.

H

(4) *Evans v. Elliot*, (1838), 9 Ad. & El. 342; 8 L.J.Q.B. 51; 112 E.R. 1242; 35 Digest 336, 789.

(5) *Doe d. Rogers v. Cadwallader*, (1831), 2 B. & Ad. 473; 109 E.R. 1218; 35 Digest 338, 811.

(6) *Re O'Rourke's Estate*, (1889), 23 L.R. Ir. 497; 35 Digest 336, o.

(7) *Bradford Permanent Building Society v. Cholmondeley*, unreported (1952), May 26.

ADJOURNED SUMMONS under R.S.C., Ord. 55, r. 5A, by which the trustees of the Liverpool Victoria Friendly Society claimed an order that the second defendant, Mrs. K. Tuson, deliver up to them the possession of a dwelling-house which was demised by the defendant, Eustace Adolphe Braithwaite, to the plaintiffs by a mortgage dated May 23, 1949.

F. G. King for the plaintiffs, the trustees of the Liverpool Victoria Friendly Society, the mortgagees.

Edward Jackson for the first defendant, the mortgagor.

Martin Roth for the second defendant, the tenant.

DANCKWERTS, J.: This is an originating summons by the trustees of a building society claiming possession of certain property which was mortgaged to them by the first defendant, Mr. Eustace Adolphe Braithwaite, and it is resisted by a tenant, Mrs. Tuson, who claims to have had a tenancy granted to her by Mr. Braithwaite. The mortgage, which was dated May 23, 1949, was by Mr. Braithwaite in favour of the building society, and it was made by demise. The mortgage is in the form usual in mortgages to building societies. By cl. 9 the statutory power of leasing, agreeing to lease, and accepting surrenders of leases, is not to be exercisable by the mortgagor without the consent in writing of the mortgagees. By cl. 13:

"The mortgagor attorns tenant from year to year to the mortgagees of the scheduled property at the yearly rent of sixpence if demanded. The mortgagees may at any time without giving any previous notice to the mortgagor or otherwise determine the tenancy and enter upon the property comprised therein or any part thereof . . ."

A tenancy was created by the mortgagor in favour of the tenant, Mrs. Tuson, and the legal situation which resulted, having regard to the mortgage, assuming that the tenancy was effective at all, would be this. The building society were the tenants of the mortgagor under a long term of years. The mortgagor was the tenant of the building society by virtue of cl. 13 of the mortgage, and the tenant, Mrs. Tuson, was an under-tenant, therefore, of the mortgagor. That might be the strict legal position, but, to some extent, it is an unreal position created by the particular provisions of the deed and the modern law of mortgages. The real position is that this letting by the mortgagor could not be valid as an exercise of the statutory power of leasing conferred on a mortgagee by the Law of Property Act, 1925, s. 99 (1), because there is no suggestion that the building society ever gave consent in writing to the exercise by the mortgagor of that statutory power. It is contended, however, that in some way the building society have recognised the tenancy of Mrs. Tuson and are not in a position to treat her as a trespasser as they otherwise would under the law of mortgages. It is submitted that the tenant is entitled to continue her tenancy, and is, further, protected by the Rent Restrictions Acts and cannot be turned out. If the building society have not in some way by their conduct bound themselves so that they cannot refuse to recognise the tenant's tenancy, it is plain that the Rent Restrictions Acts are no assistance to her because that has been effectively disposed of by the decision of the Court of Appeal in *Dudley & District Benefit Building Society v. Emerson* (1).

It is necessary, therefore, to examine the evidence and see what has really happened. The tenant states in her affidavit that in October, 1950, she agreed with the mortgagor to rent from him four rooms at the property in question for 30s. a week, and that the mortgagor retained two other rooms in the house. About the beginning of May, 1951, the mortgagor vacated the two rooms previously retained by him. She says that he then agreed to let the whole house to her for £2 a week, inclusive of rates, and she says that from May 9 onwards she paid the rent to a Mr. Long, whom she knew to be the local agent of the Liverpool Victoria Friendly Society. Mr. Long was, in fact, the local

agent of the Liverpool Victoria Friendly Society, the present mortgagees. The tenant further says that Mr. Long collected the weekly rent of £2 from her until Aug. 24, 1951, when she suspended payment of rent pending investigation as to what was the standard rent of the property, and she also alleges that Mr. Long told her that the society knew that he was collecting such rent and paying the rates and knew that he himself paid the monthly instalments due under the mortgage to the society before accounting to the mortgagor for the balance. She says: "Mr. Long told me that he got permission from the society to carry out this arrangement". In an affidavit sworn on behalf of the building society it is stated that the society's agents are not authorised to collect mortgage instalments, and that the rent collected by Mr. Long was collected entirely on his own account and not as a servant of the building society.

It appears that a letter dated Apr. 3, 1951, was written to Mr. Long by the mortgagor, under which the mortgagor appointed Mr. Long to be his agent in these terms:

"Dear Mr. Long, I hereby appoint you to collect the rent due in respect of my property known as 55 Whalebone Grove, Chadwell Heath, the said rent to be collected weekly as from May 9, 1951. I further authorise you to pay from the proceeds of rents collected all moneys which are or may become due in respect of my mortgage on the said property; also in respect of the fire insurance on the said property; also the general rate and water rate which are or may become due in respect of the said property. I agree that account may be rendered by you to me on a quarterly basis together with any cash balance which may be in credit. I further agree that you may deduct five per cent. of the gross rents collected in payment of your services."

Mr. Long, in his affidavit, says that he entered into an agreement with the mortgagor in the terms set out in that letter and he collected the rent payable by the tenant from May 9, 1951, to Aug. 24, 1951, as shown in the rent book in which the receipts were in fact signed by him. Shortly after Dec. 12, 1951, he was informed by the tenant that she had been instructed by the mortgagor to pay the rent in future direct to him. Mr. Long says:

"At no time did I represent to the defendant K. Tuson that I was collecting rent for and on behalf of the Liverpool Victoria Friendly Society . . . Shortly after the said agreement I informed the district manager of the society both of the agreement and of the tenancy. The society, therefore, became aware of the tenancy of the defendant K. Tuson in April, 1951."

It was sought to show from that that the society, through their district manager, consented to the letting in May, 1951, of the whole of the house. I do not think that inference can be drawn. It seems to me that when the district manager was informed of the agreement and the tenancy shortly after the date of the agreement, it must have referred to the previously created tenancy between the mortgagor and the tenant in respect of part of the house and not of the whole, and, therefore, I am not prepared to infer that the district manager knew beforehand that there was to be a tenancy created of the whole house or that he can be taken to have ever assented, on behalf of the society, to a future letting of that character. It is further contended that the society, through their district manager, have recognised the tenant's tenancy, and cannot now be allowed to say that a valid tenancy was not created by the mortgagor in her favour. The facts, as they appear to me, are that the rents were collected by Mr. Long, not as the agent of the society, but as the agent of the mortgagor and nobody else, and I do not find any permission was given by the society to represent in any way to the tenant that the mortgagor had permission to create a tenancy of the property in her favour. All that can be said, I think, is that, in the circumstances, for about eight months or so the society refrained from treating the tenant as a trespasser and ejecting her from the property.

They may have received the benefit of some part of the rents in that they received payment of the instalments, but beyond that it seems to me that the society were not in any way concerned with the collection of the rents from the tenant.

There are some authorities which it is necessary to consider. In a case before FARWELL, J., in 1937, *Iron Trades Employers Insurance Assn., Ltd. v. Union Land & House Investors, Ltd.* (2), in which the point was solely whether there had been a breach of a covenant by the mortgagor not to exercise his statutory power of leasing when in fact he had created a tenancy of the property, it was held that the tenancy so created could not be a lease under his statutory power, but was merely an exercise of the common law power of letting which a mortgagor in possession of the property possessed. A passage in the judgment of FARWELL, J., was relied on on behalf of the tenant. FARWELL, J., said ([1937] Ch. 318):

"The mortgagee as soon as he ascertained that the mortgagor had granted a lease to a third party was entitled to take steps immediately to evict the tenant, to treat him as a trespasser, and, subject to the tenant's right to redeem, the mortgagee could evict him and recover possession of the property. On the other hand, he might, if he desired, confirm what had been done, but if, knowing the facts, he stayed his hand and did nothing, he might find himself in danger of being held to have acquiesced in and thereby confirmed the lease and, therefore, not entitled to oust the tenant."

FARWELL, J., suggested that, in certain circumstances, it might be the mortgagee would be disentitled to oust the tenant, but he did not specify more than generally what those circumstances might be.

In *Doe d. Whitaker v. Hales* (3) an attorney for the mortgagee, who was also the attorney for the mortgagor, had applied to the occupier of the land for rent with which to pay the interest of the mortgage and had threatened to dis-train. It was held that the mortgagee could not treat the occupier as a trespasser and eject him on a demise anterior to the application by his attorney as above. The court held that, because the agent of both parties, with the full knowledge of the existence of the tenancy, had required the tenant to pay rent for the purposes of payment of the interest, the mortgagee was not entitled to disregard the tenancy and treat the tenant as a trespasser. But it appears that in that case the attorney in question had not obtained payment of the rent simply as the agent of the mortgagor, but had gone to the tenant as the agent of the mortgagee and in that capacity required him to pay rent. It seems to me, therefore, that it was a very different case from the present, though there may, at first sight, appear to be a certain superficial resemblance.

In *Evans v. Elliot* (4) a mortgagor in possession had made a lease, and it was claimed that the mortgagee was bound to recognise the tenancy. It was held that the mortgagee was not bound, but the case was cited to me because of certain observations of LORD DENMAN, C.J., in giving the judgment of the court. These observations appear to have been reservations made by him in which he differed from the other members of the court. He said (9 Ad. & El. 354):

"This argument was, that the mortgagee may always treat both the mortgagor and all who claim under him as trespassers; and that, for that reason, the mortgagor's lessee cannot become the tenant of the mortgagee. My learned brothers are, I believe, disposed to assent to this proposition, which, generally speaking, is certainly not to be questioned. But, for my own part, I wish to guard myself against being understood to adopt it as universal. The contrary must, I think, be admitted—that a mortgagee may so bind himself by his own conduct as to be precluded from treating the mortgagor's lessee as a trespasser: what conduct might amount to a recognition, seems to me to be rather matter of evidence than of law; but

I confess that *Doe d. Whitaker v. Hales* (3), appears to me, though doubted by my brother LITTLEDALE in *Doe d. Rogers v. Cadwallader* (5), to be well decided. I am by no means prepared to admit that a jury would not be warranted in inferring a recognition of the tenant's right to hold from the mere circumstance of the mortgagee's knowingly permitting the mortgagor to continue the apparent owner of the premises, as before the mortgage, and to lease them out, exactly as if his property in them continued."

A In an Irish case, *Re O'Rourke's Estate* (6), decided in 1889, MONROE, J., says (23 L.R. Ir. 501):

B "I certainly cannot infer the creation of a new tenancy between the tenant and the mortgagee merely because the mortgagee takes no active steps to disavow a tenancy created by the mortgagor. The mortgagor, while in possession, and bound to keep down the interest on his mortgage, is at liberty to manage the lands as he pleases. It is not for the mortgagee to interfere with that management unless he choose to go into possession. He treats the tenancy as one binding on the mortgagor, but in no way binding upon himself if he find it afterwards for his interest to repudiate it."

C That case was followed and applied by HARMAN, J., in an unreported case decided by him on May 26, 1952—*Bradford Permanent Building Society v. Cholmondeley* (7)—where it appeared that, in rather similar circumstances, a local agent of a building society was acting in more than one capacity, and that, there being a tenancy created by the borrower in favour of the borrower's sister, the building society, who were held by HARMAN, J., to have knowledge of the transaction through their agent, stood by for a year or eighteen months without claiming to treat the tenant as a trespasser and yet were held not to be thereby prevented from enforcing their legal right to possession when they finally took action.

E The result of those authorities seems to me to be this. It is not to be denied that there may be cases where a mortgagee may so conduct himself as to confirm in some way a tenancy which has been created by the borrower in favour of a short-term tenant. It, no doubt, depends on the circumstances of the particular case whether that recognition of a tenancy has occurred, so that the mortgagee is bound to treat the tenancy as lawful against him and cannot evict the tenant, but otherwise it seems to me that, where the statutory power of leasing is exercisable only with the written consent of the mortgagee, a tenancy created by the mortgagor without that consent is not binding on the mortgagee. In the circumstances of the present case the mere refraining by the building society from taking action to evict the tenant and doing nothing for some eight months cannot amount to such recognition of the tenancy as to deprive them of their right to recover possession of the property, not only against the borrower, but also against the tenant who holds only by such right as the borrower would give her. Accordingly, it seems to me that there is no answer in this case to the claim to possession by the building society, and that the society is entitled to succeed.

G Order accordingly.
Solicitors: *J. Tickle & Co.* (for the plaintiffs); *Arnold, Fooks, Chadwick & Co.* (for the mortgagor); *Ashby, Rogers & Co.* (for the tenant).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

R. v. BATES AND ANOTHER.

[CENTRAL CRIMINAL COURT (Donovan, J.), September 23, 1952.]

Criminal Law—Inducement to invest money—“Reckless” making of misleading forecast—Need to prove fraud—Prevention of Fraud (Investments) Act, 1939 (c. 16), s. 12 (1).

The defendants were charged on an indictment which, by counts 1 and 2 alleged that, by false statements and by the dishonest concealment of material facts, they fraudulently attempted to induce persons to invest money in a company, contrary to s. 12 (1) (a) of the Prevention of Fraud (Investments) Act, 1939, and, alternatively, by count 3 that they attempted such inducement by the reckless making of a forecast which was misleading, false or deceptive, contrary to s. 12 (1) (a). On an application by the defence to strike out count 3 on the ground that, in the absence of proof of fraud, the defendants could not be convicted on that count,

HELD: the word “reckless” in s. 12 (1) should be given its ordinary meaning and not be restricted to recklessness involving dishonesty, and, therefore, count 3 was properly included in the indictment as being alternative to counts 1 and 2.

FOR THE PREVENTION OF FRAUD (INVESTMENTS) ACT, 1939, s. 12 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 16, p. 525.

Cases referred to:

(1) *Derry v. Peek*, (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 9 Digest 125, 642.

(2) *R. v. Hindes & Musgrave*, (1951), unreported.

APPLICATION to quash a count in an indictment alleging an offence under s. 12 (1) of the Prevention of Fraud (Investments) Act, 1939.

By counts 1 and 2 of the indictment the defendants, Harry Noel Bates and Charles Frederick Russell, were charged with fraudulently attempting to induce persons to invest money, contrary to s. 12 (1) of the Act of 1939, the particulars of offence alleging, in count 1, that between Apr. 1, 1945, and Nov. 30, 1945, in a letter headed Joseph Sebag & Co., Statistical Department, dated November, 1945, the defendants attempted to induce persons to enter into agreements for acquiring ordinary shares in Specialloid, Ltd., by the dishonest concealment of material facts. By count 2 it was alleged that by the letter of November, 1945, the defendants attempted to induce persons to acquire shares in Specialloid, Ltd., by a forecast which they knew to be misleading, false, and deceptive. Count 3 charged the defendants with attempting to induce persons to invest money by the reckless making of a forecast which was misleading and deceptive, contrary to s. 12 (1). The Crown, in opening the case, stated that count 3 was alternative to counts 1 and 2, and that, whereas the first two counts involved dishonesty, the third count did not, and if the defendants were acquitted on the first two counts they might be convicted on count 3. For the defendants it was contended that “reckless” in s. 12 (1) should be construed as meaning recklessness amounting to dishonesty, and that, on the Crown's interpretation of the meaning of the word, the count did not disclose an offence and should be struck out.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.), Vaughan, Q.C., Faulks and Syrett for the Crown.

Gardiner, Q.C., and S. Shaw for Bates.

F. H. Lawton and R. Day for Russell.

DONOVAN, J.: Objection is taken on behalf of each defendant to count 3 of this indictment. In view, it is said, of the Solicitor-General's avowal that the word “reckless” in that count does not necessarily connote dishonesty, the count alleges an offence unknown to the law and should be quashed. Section

12 (1) of the Prevention of Fraud (Investments) Act, 1939, under which the charge is laid, provides:

"Any person who, by any statement, promise or forecast which he knows to be misleading, false or deceptive, or by any dishonest concealment of material facts, or by the reckless making of any statement, promise or forecast which is misleading, false or deceptive, induces or attempts to induce another person [to invest money] . . . shall be guilty of an offence

A . . . "

Counts 1 and 2 of the indictment allege against each of the accused the dishonest concealment of material facts and the making of a statement which each knew to be misleading, false or deceptive. Count 3 reads thus:

B "Statement of Offence: Recklessly attempting to induce persons to invest money, contrary to s. 12 (1) of the Prevention of Fraud (Investments) Act, 1939. Particulars of offence: [Bates and Russell] on a day between Apr. 1, 1945, and Nov. 30, 1945, in the county of London, in a letter headed 'Joseph Sebag & Co., Statistical Department', dated November, 1945, attempted to induce persons to enter into agreements for acquiring ordinary shares in Specialloid, Ltd. by the reckless making of a forecast which was misleading and deceptive, namely, that the directors of Specialloid, Ltd. anticipate that the profits for the year ended Mar. 31, 1946, should not be less than those shown in the auditors' report for the preceding year, namely, £65,349, before charging income tax."

C The Solicitor-General, in opening the case, said that count 3 was an alternative to counts 1 and 2, in the sense that it would be possible to convict under count 3 even if each accused were acquitted under counts 1 and 2, for counts 1 and 2 obviously involved charges of dishonesty, whereas count 3 did not. A man, it was said, might make a forecast which was false, misleading, and deceptive, through recklessness falling short of dishonesty. In the present case he (the Solicitor-General) would be content, in supporting count 3, to allege such recklessness. Even though it fell short of dishonesty, such a case, he argued, is still caught by the words of s. 12 (1). That view is challenged on behalf of each accused, and it is said that, unless the prosecution allege recklessness amounting to dishonesty, count 3 has no legal basis, and since no such allegation is made, that count is bad and ought to go. The issue which this argument raises is purely one of construction of s. 12 (1), and, in particular, the construction of the passage "the reckless making of any statement, promise or forecast which is misleading, false or deceptive".

F The rival constructions of this passage appear from what I have already said. Counsel for Bates contends that one, at least, of the meanings of the word "reckless" in this context is careless whether the statement be true or false, and he quotes the speeches of LORD BRAMWELL and LORD HERSCHELL in *Derry v. Peek* (1) to the effect that a man who makes a statement, careless whether it be true or false, and induces another to act on it to the latter's detriment, would be guilty of fraud so as to make him liable to an action for deceit. LORD BRAMWELL, in particular, says (14 App. Cas. 350):

G " . . . a man who makes a statement without care and regard for its truth or falsity commits a fraud. He is a rogue. For every man who makes a statement says 'the truth is so and so, and I know it or believe it'."

H So, it is argued that the word "reckless" in s. 12 (1) should be construed in the same sense, that is, as meaning, and meaning only, a statement made by a person careless whether the statement be true or false, and, therefore, dishonest. This is purely a question of the construction of s. 12 (1), in which the word "reckless" finds its setting. Obviously I am not constrained by what was said in *Derry v. Peek* (1) to decide that in s. 12 (1) the word connotes only something dishonest, and it is not suggested that I am.

Derry v. Peek (1) was an action for deceit, to succeed in which the plaintiff had to establish fraud, and the House of Lords said, among other things, that a statement made recklessly—that is, without belief in its truth—would be fraud for that purpose. They contrasted such a statement with one made recklessly, but with belief in its truth, which could not be fraud. Obviously the word “reckless” may be used as connoting something entirely free from any moral stigma. It is, however, said that it is not so used in s. 12 (1), but is used only in the sense that LORD BRAMWELL used it in *Derry v. Peek* (1), that is, dishonest or fraudulent, and the reasons are these. First, the long title to the Act proclaims as one of its purposes

“ . . . to make general provision for preventing fraud in connection with dealings in investments . . . ”

Secondly, the cross-heading which immediately precedes s. 12 (1) reads thus:

“ General provisions for the prevention of fraud.”

Thirdly, the marginal note to the section is:

“ Penalty for fraudulently inducing persons to invest money.”

I agree that the long title is a legitimate aid to the construction of s. 12 (1), and I take the same view, in this case, of the cross-heading. When Parliament proclaims what the purpose of an Act is, it would be wrong to leave that out of account when construing the Act—in particular, when construing some doubtful or ambiguous expression. In many cases the long title may supply the key to the meaning. The principle, as I understand it, is that where something is doubtful or ambiguous the long title may be looked to to resolve the doubt or ambiguity, but, in the absence of doubt or ambiguity, the passage under construction must be taken to mean what it says, so that, if its meaning be clear, that meaning is not to be narrowed or restricted by reference to the long title. I take the same view about the cross-heading. Instances, indeed, abound where Parliament, proclaiming in an Act that its purpose is to prevent people doing such and such a thing, has caught people who never had any intention of doing it. The patch, in other words, has been larger than the hole. A neat example is s. 21 of the Finance Act, 1922, which has been held to apply to persons altogether innocent of the mischief which Parliament said it intended the section to prevent. The section has frequently come under review in the House of Lords without that construction ever being questioned by their Lordships.

The marginal note I reject as a guide to construction. As I said during the argument, it is not the subject of debate or amendment in Parliament, and it follows that during the passage of a Bill amendments may be made to a clause which extends its effect beyond the scope of the marginal note, which, nevertheless, remains unamended. The note, therefore, would then become actually misleading if used as a guide to construction. I might point out that in s. 12 of the Act of 1939, the marginal note gives no indication that a fraudulent attempt to induce people to invest is an offence. It refers only to the completed act of inducing.

The vital question is: Is there such an ambiguity or doubt about s. 12 (1) in this particular respect that I ought to restrict the meaning of the word “reckless” by reference to the long title and the cross-heading? In other words, although “reckless” may mean “careless, but without dishonesty”, am I to say that the word does not bear that meaning here? If one analyses s. 12 (1), it is found to deal with three categories of persons who have induced or attempted to induce other persons to invest money. The first is the person who makes a statement which he knows to be misleading, false or deceptive; the second is the person who dishonestly conceals material facts; and the third is the person who recklessly makes a statement, promise, or forecast which is misleading, false, or deceptive. Categories 1 and 2 obviously refer to persons who are dishonest, but, after referring to a person who has knowingly

made a false statement or has dishonestly concealed material facts, the legislature, introducing its third category by the disjunctive "or", changes its language altogether. It does not specify a person who knowingly makes a misleading, false, or deceptive statement, promise, or forecast, or dishonestly makes it. It simply specifies a person who recklessly makes these things.

- It is admitted that, if the arguments to which I have listened are right, the word "reckless" means, and means only, something dishonest. If that be so,
- A why did Parliament not use that word as it had done in the line immediately before? Am I to say that the change of words involves no change of meaning? The ordinary meaning of the word "reckless" in the English language is "careless", "heedless", "inattentive to duty". Literally, of course, it means "without reck". "Reck" is simply an old English word, now, perhaps, obsolete, meaning "heed", "concern", or "care". In accordance with the
- B accepted principles of construction I ought to give that meaning to the word, and, therefore, include that recklessness which is not dishonest, unless it is clear that in s. 12 (1) it bears a restricted meaning. On what grounds can I say that that is clear? Because, says counsel for Bates, the long title and cross-heading apart, Parliament cannot have intended that recklessness which would not even have supported a civil action for deceit should amount to a
- C criminal offence carrying a maximum penalty of seven years' imprisonment, and because, says counsel for Russell, Parliament cannot have intended to treat alike dishonest rogues and persons who were honest, but careless. Those are cogent arguments. Against them there is this important consideration. The first two things with which s. 12 (1) deals are false statements of fact and dishonest concealment of facts. It is not a difficult matter to decide in any
- D given case whether a false statement of fact is false to the knowledge of him who makes it, nor whether a concealment of facts is dishonest. But then the section goes on to deal, among other things, with forecasts which are misleading, false or deceptive. The case of a forecast seems to me to be a different matter. A man may say: "I expect the profits to go on increasing, or to be not less than last year", or: "I expect the value of the company's land and
- E property to appreciate considerably". Those forecasts may turn out to be falsified by the events. How, in the majority of cases, could one prove that they were made dishonestly, even if such were the case? There would, I suppose, be glaring cases where it could be done, but such are the vicissitudes of human affairs, and their reaction on trade and business, that forecasts such as I have instanced might be made quite honestly, although they turned out to be
- F unjustified. Obviously, therefore, it might be very difficult to bring to justice the person who had made such a forecast dishonestly.

- It would seem to be quite understandable, in those circumstances, if Parliament, intending to do something about misleading, false and deceptive forecasts, took the view that, as a practical matter, it ought to go a step further than in the case of false statements and dishonest concealment of facts, and, besides
- G striking at the dishonest prophet, do something to ensure that even the honest ones should take due care to see that their forecasts were not misleading, false and deceptive, and if, although honest, they were reckless, they should be liable to a penalty. There is nothing in this so repugnant to natural justice that I ought to limit the meaning of words which Parliament has used. It has given the courts, after all, ample latitude in the matter of punishment,
- H enabling them to discriminate properly between moral turpitude and mere recklessness. It is not without interest to observe that LORD HERSHELL in *Derry v. Peek* (1) foreshadowed (14 App. Cas. 376) that Parliament might one day provide against negligence which was merely a breach of moral duty. Such weight as attaches to that which I have just said is not diminished because this part of s. 12 (1) deals also with statements and promises. With those considerations in mind and remembering all that has been urged on behalf of

the accused, I am unable to accede to the argument that the word "reckless" in s. 12 (1) should receive a restricted meaning connoting only such recklessness as is dishonest. I think it must be left to bear its full meaning, and be construed, therefore, as covering also the case where there is a high degree of negligence without dishonesty. I thus reach independently the same conclusion as HUMPHREYS, J., did in *R. v. Hindes & Musgrave* (2), and I hold count 3 of the indictment to be good.

[The trial proceeded and the defendants were convicted on counts 1 and 2, the jury being discharged from giving a verdict on count 3.] A

Solicitors: *Solicitor to the Board of Trade* (for the Crown); *E. P. Rugg & Co.* (for Bates); *Claude Hornby & Co.* (for Russell).

[Reported by J. D. PENNINGTON, Esq., *Barrister-at-Law.*]

J. W. SMART (MODERN SHOE REPAIRS), LTD. v. HINCKLEY AND LEICESTERSHIRE BUILDING SOCIETY. B

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.), October 20, 1952.]

Landlord and Tenant—New lease—Shop—Premises reasonably required for demolition or re-construction—Reasonableness—Leasehold Property (Temporary Provisions) Act, 1951 (c. 38), s. 12 (3) (c). C

The landlords owned two adjoining buildings each comprising a shop on the ground floor with rooms above. The tenants occupied one shop, and the landlords used the adjoining shop for the purposes of their business. On the expiration of their lease, the tenants applied to the court under the Leasehold Property (Temporary Provisions) Act, 1951, Part II, for the grant of a new tenancy. The landlords desired to alter the ground floors of the buildings by making internal re-arrangements, including some structural work, in order to extend the accommodation available for their own business. Plans for the re-construction had been prepared, but no further steps had been taken by the landlords. D

HELD: (i) the question of reasonableness in relation to s. 12 of the Act of 1951 was one of fact for the trial judge, and the Court of Appeal would be loth to interfere with his conclusion on that question. E

(ii) the object of the Act being to make only temporary provision for the protection of tenants, a landlord could not be said reasonably to require possession in order that premises might be demolished or re-constructed unless the demolition or re-construction was to be effected within at most the period covered by the Act; for a landlord to bring himself within s. 12 (3) (c) of the Act of 1951 he must show that the demolition or re-construction of the premises is the immediate and primary purpose of his desire for possession of the premises; on the evidence, the landlord's primary object in seeking possession of the shop was to occupy it for their own purposes, the scheme of re-construction being merely ancillary to that purpose; there was no evidence that the scheme would immediately be carried into effect or that it would be unduly delayed or prejudiced by the grant of a new tenancy; and, therefore, the landlords did not reasonably require possession in order that the premises might be re-constructed within s. 12 (3) (c), which, accordingly, did not operate to defeat the tenants' application. F G

Per ROMER, L.J.: The fact that the landlords may have in contemplation that after demolition or re-construction they will resume possession cannot in itself render unreasonable their requirement of possession under s. 12 (3) (c), but it is a matter to be taken into account. H

FOR THE LEASEHOLD PROPERTY (TEMPORARY PROVISIONS) ACT, 1951, s. 12, see HALSBURY'S STATUTES, Second Edn., Vol. 30, p. 210.

Case referred to:

(1) *John Kay, Ltd. v. Kay*, [1952] 1 All E.R. 813; [1952] 2 Q.B. 258.

APPEAL by the landlords from an order of His Honour JUDGE WRANGHAM, sitting at Leicester County Court, dated July 7, 1952, granting the tenants a new tenancy for twelve months under the Leasehold Property (Temporary Provisions) Act, 1951, Part II.

Grove for the landlords.

Stimson for the tenants.

SIR RAYMOND EVERSHED, M.R.: This appeal raises again a problem under the Leasehold Property (Temporary Provisions) Act, 1951, which has already been more than once before this court. The applicants (and I think it will make for convenience in my judgment if I call them hereafter "Smarts") applied in due order, as is conceded, under the Act for the grant of a new tenancy for the period of twelve months which the Act contemplates, to take effect on the expiration of their existing tenancy, viz., Sept. 29, 1952. In March, 1950, the other parties to the application, the appellants in this court, whom I will call for convenience "the building society", had acquired the premises in question, which consisted of the ground and upper floors of 102 and 104 Granby Street, Leicester. At the time of their so acquiring the property, I understand that only the ground floor of No. 104 Granby Street was vacant, but it was given in evidence that they had in mind that, when other parts of the property fell vacant, they would be able to expand their occupation into those other parts. No. 102 Granby Street is on the corner of Granby Street and Northampton Street, and the ground floor of those premises, which adjoins the ground floor of No. 104 (now adapted for and used by the building society) consists of a shop with display cases, and the character of the shop is sufficiently indicated by the legend on the fascia board, Modern Shoe Repairs, Ltd., that being the business of Smarts.

The matter fell to be considered by the learned judge, who was asked to refuse Smarts' application on the ground, first, that under the general provisions of s. 12 (1) it would not be reasonable to make an order extending Smarts' right of occupation, but more specifically under the restrictive provisions of s. 12 (3) (c) or (e), the latter being a restriction to the effect that an order shall not be made if the court is satisfied

"that having regard to all the circumstances of the case greater hardship would be caused by ordering the grant of a new tenancy than by refusing to do so."

The present appeal is not against the findings of the learned judge in favour of Smarts on the general head or under s. 12 (3) (e), but is against the findings under s. 12 (3) (c). I think, however, it will be convenient, before I refer to the precise language of para. (c), to look at the section rather more generally, and to make one or two observations on it. Section 12 (1) provides:

"Subject to the provisions of this section, on an application under this Part of this Act duly made the court may, if in all the circumstances of the case it appears reasonable so to do, order that there shall be granted to the tenant a tenancy for such period, at such rent . . . as the court in all the circumstances thinks reasonable . . ."

As I have said, the judge thought that Smarts had satisfied the general requirements of that sub-section, for in his judgment the learned judge said:

"I have considered and weighed the various factors, and, in my view, it is reasonable to make an order granting a new tenancy. I hold, therefore, that the requirements of s. 12 (1) of the Act have been fulfilled. The Act is intended to give temporary protection to tenants. There is nothing unreasonable in expecting the landlords to continue to conduct their business through Mr. Cockshaw at No. 104 for another twelve months."

Section 12 (2) limits the period, and sub-s. (3) provides what I have described as a certain measure of restriction on the court's otherwise general power. That sub-section provides:

"The court shall not order the grant of a new tenancy if it is satisfied [and I interpolate "however reasonable it might otherwise be"] . . . (c) that the landlord reasonably requires possession in order that the premises the subject of the expiring tenancy, or a substantial part of those premises, may be demolished or re-constructed."

The learned judge decided that, on the hardship point under para. (e), which I have already read, no case was made giving rise to the restriction. The matter turns now only on para. (c) under which the learned judge found that there was not a sufficient case made by the landlord.

Before I examine that paragraph in a little more detail, and what the judge said about it, let me say, first, that, as I think has been noticed in these courts before, this being in its nature a temporary Act intended to give protection in appropriate cases to tenants of shops whose tenancies were expiring until Parliament had determined on some more general enactment, one finds throughout the relevant section repetitive reference to the standard of reasonableness, and in the recent case of *John Kay, Ltd. v. Kay* (1) this court had some observations to make about that standard. I do not propose to add to what is, perhaps, already a superfluity on this matter save to say, first, that the question of reasonableness is plainly intended to be a matter for the court of trial, and, secondly, that, in deciding the question (and, of course, assuming that the trial judge has not taken wrong things into account, or excluded matters which he should take into account), prima facie it is a matter of fact for the court of trial to determine, having due regard to all the circumstances. I apprehend, therefore, that this court will always be a little slow to disturb conclusions based on matters of that kind.

When, however, we come to para. (c) it is said (as regards the reasonableness there imported) that it is particularly referable to the landlord's side of the matter, so to speak. The language is: "the landlord reasonably requires", and counsel for the building society put it somewhat in this fashion, that the requirement must not be capricious, but for good sound business reasons. I find it unnecessary to attempt anything by way of a definition (which would, perhaps, but tend to confuse), for the learned judge has made it plain that, whether or not in other respects the landlords were reasonable (and I will refer at length presently to the terms of his judgment), it cannot be said that the possession of these premises is required in order that they may be demolished or re-constructed. I think that the learned judge rightly so concluded, and rightly interpreted the sense of the paragraph. I agree with counsel for the building society that the subject-matter to be demolished or re-constructed is, of course, the premises of which the applicants desire a new tenancy, for the paragraph says so, but to bring the case within para. (c), as I hold, the emphasis has to be put on the premises themselves rather than the occupation or use to which they are to be put. As counsel for Smarts pointed out, there is nowhere in this Act anything of the character that one finds in other Acts—that it will be, or may be, a bar to the making of an order that the landlords require the premises for their own occupation, except in so far as that is involved in the hardship provision. One must never lose sight of the fact that this Act in its effect is intended to be temporary, and the grant of a tenancy postpones the landlord's possession for twelve months, or possibly twenty-four at most. Therefore, in my view, the learned judge rightly approached this matter by putting to himself the question: Is there here some project for demolition or re-construction, and, if so, is it reasonable for the landlords to say: "In order that this project may be brought to fruition and not defeated or delayed, it is reasonable to give us possession now of this particular shop"?

When the evidence is examined, I think it is plain that that kind of condition is not satisfied. It is quite true that, if possession of Smarts' shop is obtained, by the necessary internal re-arrangements, including some structural work, the office premises, now, no doubt, somewhat cramped, of the building society will be expanded and made much more commodious, and all the more so since their agent, Mr. Cockshaw, appears to carry on, in addition to acting on behalf of the building society, the independent profession of an estate agent or an accountant on the premises. But, as the judge himself has stated, this work of adaptation with its structural components is, after all, but ancillary to the desire of the landlords themselves to occupy the shop and to make that occupation more commodious, and it is, I think, untrue to say on the evidence, in the ordinary use of language, that there is here in immediate prospect a re-construction scheme. As the witnesses conceded, though the plans have been prepared, that is as far as the matter has progressed. There is no evidence that any costing has been done, and, indeed, Mr. Martin, the architect, said that he has not been asked to cost the work. He says: "We may have to use steel joists. I don't know". That vital matter has not yet been decided. "The licensing authorities may grant a licence for the use of steel joists." It is obvious, therefore, that the question of this work is still in a very early stage, and as I think (and as the learned judge said) it becomes impossible to say that to grant an extension of Smarts' occupation for twelve months could, in any proper sense of the term, stand in the way of or defeat a re-construction.

That, I think, is the end of the matter, and I conclude by referring to the language which the learned judge used, expressing my own agreement with it, which, perhaps, would have been sufficient without any further attempt on my part to express independent reasons, as I have done out of regard for the arguments that we have heard. The learned judge said:

"The next question is: Have the requirements of s. 12 (3) (c) been fulfilled? The burden of proof is on the landlords. I am satisfied that the landlords require possession of the premises in order to occupy them or to put a tenant in them for the purposes of their business, that this is a reasonable requirement measured from the point of view of the landlords, and that to render the premises convenient for the landlords a substantial portion thereof may be re-constructed. The landlords intend to throw the ground floors of Nos. 102 and 104 into a single office or series of offices. The architect called by the landlords has said that he thinks the licensing authority would look favourably on such an alteration. I am not satisfied that the premises will in fact be re-constructed, but I am satisfied that the landlords intend to re-construct them if they obtain possession and are permitted to do so, and that they may be so re-constructed. The landlords say that on these facts the requirements of s. 12 (3) (c) have been fulfilled. The tenants say not."

After referring to the terms of the sub-section, the learned judge proceeds:

"The tenants say that the landlord must show that he requires possession for the purposes of re-construction, and that such requirement is reasonable. The sub-section does not say that the landlord is entitled to possession if he reasonably requires it for his own occupation. There is no provision in the Act comparable to provisions in the Act of 1927 and the Rent Restriction Acts, that a landlord who reasonably requires possession for his own occupation is entitled thereby to defeat an application for a new tenancy . . . In my view, the construction placed on the sub-section by the tenants is the correct one . . . I think that in the present case the primary and real object for which the landlords require possession of these premises is for occupation by Cockshaw, and that the re-construction contemplated by them is only ancillary to that occupation, and is, therefore, not the real reason for requiring possession."

In other words, the learned judge is putting the matter as I have done, viz., that the landlords cannot say here: "This is a case where these premises are to be re-constructed, and it is unreasonable for us to be deprived of immediate possession of this part, because by so doing the re-construction is defeated or delayed." That is not the case. For the reasons which I have tried to state, I think we should not interfere with the decision of the learned judge, but that the appeal should be dismissed.

DENNING, L.J.: I agree. In order that the landlord should bring himself within para. (c), demolition or re-construction must be the immediate and primary purpose. That is not so here. A

ROMER, L.J.: I also agree. It was argued by the tenants that the main object of the landlords in opposing their application was to get possession themselves. I merely point out that the fact that the landlords may have in contemplation that after demolition or re-construction they will resume possession cannot in itself render unreasonable their requirement of possession under s. 12 (3) (c), but it is, of course, a matter to be taken into account. On the word "reasonably" in the sub-section, it seems to me that that has to be considered in the light of two circumstances. One is that the whole object of the Act is to make provision for the granting of a new tenancy on the basis that it would be just that a tenant should have a temporary renewal of his tenancy in certain circumstances. The second element is that the Act is not dealing with a case where the landlord is being kept out of possession indefinitely, but only for a short period—in other words, that, even if an order is made, the landlord will get possession in a year's time or at the most two years' time. Therefore, it appears to me that on the question of reasonableness in sub-s. (3) (c) one has to balance the general desirability (providing that s. 12 (1) has been fulfilled, and the learned judge here held that it had) of extending the tenancy against the reasonable desire of the landlord (for the reasons mentioned in para. (c)) not only to obtain possession, but to obtain more or less immediate possession. The mere fact that the landlord finds it inconvenient that he should be unable at once to put in hand the work of re-construction that he has in mind is not sufficient to disturb the claim, if otherwise well-founded, of a tenant to renewal of his tenancy. B
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In the present case, the landlords have never suggested in their evidence that the re-construction would be undertaken or put in hand within the next twelve months, and, indeed, the evidence of the architect who was called points very strongly to the belief that it will not be put in hand at once, nor, indeed within any definite time. Secondly, there was no suggestion in the evidence which the landlords adduced that this plan which they have in mind of knocking these two premises into one for their own private purposes is one that will be prejudiced if it is put off for a year, or, indeed, longer. Accordingly, the point as to immediate possession to which I have adverted in connection with the word "reasonable" in sub-s. (3) (c) becomes a matter of some importance, because it cannot be said—at all events, it has not been shown—that, however desirable it is in the interests of the landlords that they should sooner or later get possession of the premises to put the scheme into effect, they should get possession now. I think the learned judge was quite right in coming to the conclusion that the landlords have not satisfied the court on those grounds. For these reasons, as well as those to which my Lord has more particularly referred, it cannot be said that the landlords did reasonably require possession of the premises within the meaning of sub-s. (3) (c). I, accordingly, agree that the appeal should be dismissed. F
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Appeal dismissed.

Solicitors: *Corbin, Greener & Cook*, agents for *Southall & Co.*, Hinckley (for the landlords); *Allen & Overy*, agents for *Harding & Barnett*, Leicester (for the tenants).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

WATSON v. BRITISH THOMSON-HOUSTON CO., LTD.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.J.J.), October 31, 1952.]

Factory—Dangerous machinery—Circular saw—Riving knife—Arc of “radius not exceeding radius of largest saw used on bench”—Woodworking Machinery Regulations, 1922 (S.R. & O., 1922, No. 1196), reg. 10 (b) (i).

A and that blade was replaced when necessary with a new twenty-four inch blade, but with use the diameter of a blade was gradually reduced by the continual sharpening of the tips and re-gulleting (cutting deeper by filing) of the indentations. Owing to market conditions a new blade, ordered in February, 1948, was not received until April, 1950, and, in consequence, in March, 1950, the diameter of the old blade was only $19\frac{1}{2}$ inches, compared with a diameter of twenty-four inches of the circle of which an arc was formed by the riving knife used to fence it. The distance of the front edge of the riving knife from the teeth of the saw at table bench level was under half an inch in accordance with the requirements of reg. 10 (b) (ii) of the Woodworking Machinery Regulations, 1922, but, owing to the different diameters, the distance horizontally $4\frac{3}{4}$ inches above the table, where the knife met the guard covering the top of the saw, was $1\frac{1}{2}$ to $1\frac{1}{4}$ inches. On Mar. 13, 1950, while he was removing a piece of wood jammed in the machine, the operator's fingers were caught in the saw and he was injured.

D HELD: regulation 10 (b) (i) of the Woodworking Machinery Regulations, 1922, contemplating as it did that the bench might be used for saws of different sizes, was complied with so long as the radius of the arc formed by the riving knife did not exceed the radius of the largest saw used on the bench; in the present case, the largest saw used was of twenty-four inch diameter, and it did not cease to be the largest saw within the meaning of the regulation merely because for a time it became of less diameter; and, therefore, there had been no breach of the regulation.

E Decision of PARKER, J. ([1952] 1 All E.R. 1125), affirmed.

FOR THE WOODWORKING MACHINERY REGULATIONS, 1922, reg. 10 (b) (i), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 8, p. 116.

APPEAL by the plaintiff from an order of PARKER, J., made on Apr. 3, 1952, and reported [1952] 1 All E.R. 1125, in an action for damages for negligence and breach of statutory duty.

F The plaintiff had been employed for twenty-three years by the defendants as a sawyer, and since 1946 he had been in the case-making department in charge of a cross-cut saw. The saw was a vertical, revolving circular saw with a movable table on one side and a fixed table on the other for the wood to be cut and the ends or offshoots cut off respectively. The surfaces of the tables were approximately level with the centre of the saw. There was a guard on top of the saw which was supported by a pillar and which came over a riving knife at the back, the operator facing the front edge of the saw. The curve of the riving knife followed the curve of the circumference of the saw and served to keep cut portions of the wood apart and prevent their jamming and also as a fence to prevent the operator's hand from coming into contact with the saw. G On Mar. 13, 1950, when about to clean the saw, the plaintiff noticed an offshoot of wood jammed between the pillar which held the guard over the saw and the riving knife. He put his right hand forward to try to remove it, but the end of the wood caught in the teeth of the saw, which was still revolving, and dragged his hand in contact with the blade, causing the middle and index fingers to be severed through the middle phalanges. At the time of the accident the radius of the saw was $9\frac{3}{4}$ inches and the radius of the circle of which the riving knife formed an arc was twelve inches. The gap between the riving knife and the H

teeth of the saw at table level was seven-sixteenths of an inch, and at $4\frac{3}{4}$ inches high, where the riving knife disappeared under the guard, it was, horizontally, approximately $1\frac{1}{4}$ or $1\frac{1}{8}$ inches. The plaintiff contended that the largest saws used on the bench were of a radius considerably less than that of the circle of which the riving knife formed an arc, and that the defendants were, therefore, in breach of reg. 10 (b) (i) of the Woodworking Machinery Regulations, 1922, and that they were negligent in not providing a safe system of work by reason of the difference between the radius of the saw and the arc of the riving knife. A

PARKER, J., held that the expression "the largest saw used on the bench" in reg. 10 (b) (i), did not mean the largest saw capable of being used, designed to be used, at some time used, or constantly used, but the largest saw which could be said to be used on the bench in the light of all the circumstances, including how often such a saw was used as opposed to any other saw; on the facts the largest saw used was a twenty-four inch saw; and there had thus been no breach of the regulation requiring that the edge of the knife nearer the saw should "form an arc of a circle having a radius not exceeding the radius of the largest saw used on the bench". His LORDSHIP also held that there had been no negligence by the defendants at common law. B

Denny for the plaintiff.

Berryman, Q.C., Bassett, Q.C., and Anwyl-Davies for the defendants. C

SOMERVELL, L.J.: This is an appeal from a decision of PARKER, J., in a claim for damages for personal injury based on an alleged breach of the Woodworking Machinery Regulations, 1922. Regulation 10 provides:

"Every circular saw shall be fenced as follows . . . (b) Behind and in direct line with the saw there shall be a riving knife, which shall have a smooth surface, shall be strong, rigid, and easily adjustable, and shall also conform to the following conditions:—(i) The edge of the knife nearer the saw shall form an arc of a circle having a radius not exceeding the radius of the largest saw used on the bench." D

Sub-paragraph (ii) provides that this riving knife, which is adjustable, shall be adjusted at the level of the bench table so as to be not more than half an inch from the saw. It is not disputed that that adjustment was made by the plaintiff himself in the present case. In construing and applying this regulation it is important to note that it contemplates that a circular saw may be used when the radius of the saw is less than that of the riving knife. It is unnecessary to speculate on the reason, but it would appear either that the gap between the saw and the riving knife was not thought to create any appreciable danger, or it was difficult or impracticable to arrange that there should be riving knives of different radii when saws of different radii were being used. Counsel for the plaintiff admitted, and I do not think that it could be disputed, that there would be no breach of this regulation if, say, on Mondays, Wednesdays, and Fridays a twenty-four inch saw was used and on Tuesdays and Thursdays an eighteen-inch saw was used with a riving knife of twelve-inch radius although, of course, with a saw of eighteen-inch diameter the gap above bench table level would be somewhat greater than it was in the present case. In other words, the danger, such as it was, which actually arose in the present case is one which the regulation contemplates may arise, and the question is whether the circumstances of this case are the circumstances contemplated by the regulation. E

The learned judge considered the construction of reg. 10 (b) (i), and the facts to which he had to apply the regulation may be summarised as follows. The blades which were originally supplied with the saw were twenty-four inch blades. A twenty-four inch blade had been ordered in 1948 and was on order at the time of the accident. The learned judge was, I think, entitled on the evidence to come to the conclusion that the defendants used twenty-four inch blades on this saw and that the blade in question had started life as a twenty- F G H

four inch blade, but it had diminished in size with repeated sharpening. On that evidence the learned judge said ([1952] 1 All E.R. 1127):

“Wherever the history of purchases of replacements can be proved . . . it shows purchases of twenty-four inch saws, and I am entitled to infer, on the evidence, that when the blades were replaced, they were replaced by twenty-four inch blades. In the intervals between purchases, the blades, no doubt, would be of varying diameters from time to time, going down, as they did in this case, from twenty-four inches to the 19½ inches of the blade at the time of the accident . . . But it does not seem to me that it can be said that twenty-four inch saws were not used on the bench within the meaning of this regulation merely because, for a time, they became of less diameter and for another period of time (albeit a long time owing to market conditions) a twenty-four inch replacement was not obtainable. Accordingly, I do not think that in this case there has been any breach of the regulations.”

I think that was right, and the only point I wish to add to what I have already said is that, if counsel for the plaintiff is right and the actual size at the time of any particular user is to be the test imposed by the regulation, then, as admittedly all saws diminish in size as they are sharpened, every time that the largest saw in use becomes half an inch less in diameter than when it started there would have to be a new riving knife fitted to the saw. That result would, I think, be unexpected, having regard to the regulation as it is framed and as I sought to analyse it earlier in this judgment. If we had been in favour of the plaintiff on that point there were other points which counsel wished to argue, but in the view I have taken they do not arise and I would dismiss the appeal.

JENKINS, L.J.: I agree. Regulation 10 (b) (i) does not provide that the radius of the arc formed by the riving knife shall not exceed the radius of any saw at any time used on the bench. It says that that radius shall not exceed the radius of the largest saw used on the bench, so that the regulation clearly contemplates that a bench may be used for saws of different sizes, but will, nevertheless, be complied with so far as sub-para. (b) (i) is concerned if the radius of the arc formed by the riving knife does not exceed that of the largest saw used on the bench. The question, therefore, is in each case: What is the largest saw used on this bench? In my view, on the facts of this case the fair answer to the question would be that the largest saw used on this bench is a saw of twenty-four inches in diameter. I agree that the appeal fails on the construction of the regulation alone.

HODSON, L.J.: I also agree.

Appeal dismissed.

Solicitors: *Rowley, Ashworth & Co.* (for the plaintiff); *Stuart H. Lewis* (for the defendants).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

D. v. D.

[COURT OF APPEAL (Singleton, Birkett and Morris, L.J.J.), October 27, 1952.]

Divorce—Cruelty—Wife's unnatural sexual relations with another woman—Right of other woman to intervene—Matrimonial Causes Act, 1950 (c. 25), s. 31.

A husband petitioned for divorce on the ground of his wife's cruelty, alleging unnatural practices by her with another woman and conduct which put him in fear that she was indulging in such practices with the other woman. On an application by the woman named for leave to intervene in the suit, A

HELD: under s. 31 of the Matrimonial Causes Act, 1950, the court had power to allow the named woman to intervene in the suit, and in the circumstances of the case she should be allowed to do so.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 31, see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 416. B

Cases referred to:

- (1) *Lowe v. Lowe*, [1899] P. 204; 68 L.J.P. 60; 80 L.T. 575; 27 Digest, Replacement, 465, 4005.
- (2) *Gardner v. Gardner*, [1947] 1 All E.R. 630; 177 L.T. 148; 27 Digest, Replacement, 308, 2552. C
- (3) *Harrop v. Harrop*, [1899] P. 61; 68 L.J.P. 58; 80 L.T. 171; 27 Digest, Replacement, 465, 4004.

APPEAL by an applicant for leave to intervene in the suit against an order of BARNARD, J., dated Oct. 2, 1952, refusing such leave.

Merrylees for the applicant. D

Sir John Hoskyns for the petitioner (the husband).

SINGLETON, L.J.: This is an appeal from a decision of BARNARD, J., in chambers on Oct. 17, 1952. The question arises on a petition by the husband for a decree against his wife, alleging cruelty on her part. The petition, which bears date July 16, 1952, was amended on July 24, 1952. There is no answer on the file as yet, but we were told that the time for the filing of the answer has been extended. The cruelty alleged is of an unusual kind. I propose to read para. 10 of the petition and part of para. 11: E

"(10) That in or about the month of September, 1949, and thereafter the respondent has shared to the knowledge of the petitioner an unnatural relationship with one Miss P. One day in or about the month of August or September, 1950, when the petitioner was away from [home] the said Miss P. was found in bed with the respondent in her bedroom by . . . a servant girl who . . . told the petitioner on his return some days later. (11) That on divers occasions and against the wishes of the petitioner the respondent has stayed under the same roof as the said Miss P. and thereby put him in fear that the respondent was indulging in unnatural practices." F G

Thereafter follow a number of instances when, it is said, the respondent and Miss P. stayed together. The allegation of cruelty is thus, in part, one of the commission of unnatural practices, and in part one of conduct which the petitioner feared was an indulging in unnatural practices.

On Aug. 12, 1952, a summons was taken out on behalf of Miss P. for leave to intervene and file an answer in the suit, and to take such further steps as might be necessary to refute the allegations contained in the petition. That application came before Mr. Registrar LONG in chambers, and he gave leave to intervene. An appeal by the husband came before BARNARD, J., on Oct. 2, 1952, and he reversed the decision of the registrar, ordering that the appeal be allowed and that the order be set aside. The learned judge gave leave to H

appeal. During the hearing of the summons BARNARD, J., remarked that it was a monstrous thing if Miss P. was not allowed to intervene when these charges were made against her or in regard to her, but he appears to have been persuaded by counsel for the husband that he ought not to make an order that she should be allowed to intervene. The application was made under s. 31 of the Matrimonial Causes Act, 1950, which followed in almost the same form s. 3 of the Matrimonial Causes Act, 1907. It is quite likely that that section was passed because of what SIR NATHANIEL LINDLEY, M.R., said in *Lowe v. Lowe* (1) ([1899] P. 204, at p. 208). He drew attention to the old practice in the ecclesiastical courts by which the inquiry was comparatively private. There was no jury and no viva voce examination and cross-examination. The inquiry was into the conduct of the husband or wife, and other people never heard anything about the matter. He added (*ibid.*):

“Now all that is altered: everything is in public; and most grievous injustice is done to a person whose conduct is being investigated under the publicity of modern times, where he is not able to say a word in his defence. That, however, is a question for the legislature, not for us.”

Section 31 of the Act of 1950, so far as material, is in these terms:

“In every case in which any person is charged with adultery with any party to a suit or in which the court may consider, in the interest of any person not already a party to the suit, that that person should be made a party to the suit, the court may, if it thinks fit, allow that person to intervene upon such terms, if any, as the court thinks just.”

The registrar thought that Miss P. ought to be allowed to intervene. BARNARD, J., we understand, took the view that it was not right to apply the terms of that section to a case in which the allegation on the file was one of cruelty. I agree with him to the extent that I think it is very seldom that such a position can arise in a cruelty case, and, in any event, I feel that the powers given by the section should be applied sparingly, but in the present circumstances there is an allegation on the file of cruelty of a most unusual kind.

On the information before us we do not know what is the position between the husband and Miss P. I should have thought that, in reply to the application before the registrar, the husband might have said: “There is no need for this, which is only going to add to the costs. If an answer is not put in, I will not oppose an application by you to intervene, and, if an answer is put in, I will undertake not to take any steps without letting you know what they are.” In that way Miss P. would have been fully protected, as I think she would be if she was called as a witness for the wife without being given leave to intervene. The husband, however, opposes such leave being given, and counsel for the husband submits that BARNARD, J., was right in saying that this was not the type of case in which the provisions of s. 31 should be applied. It was rather put that the learned judge had exercised his discretion. I do not think that is the right way of putting it if the judge held that he ought not to apply the provisions of the section in a cruelty case.

In my view, the most satisfactory way to deal with the case is to allow the appeal, which means that Miss P. will be allowed to intervene in the suit. The provisions of s. 31 of the Act of 1950 are sufficiently wide to cover the position. I consider that Miss P. is a party interested, and if, in the circumstances, she wishes to intervene, she ought to be allowed to do so. For these reasons, I think the appeal ought to be allowed.

BIRKETT, L.J.: I agree with the decision which has just been announced by my Lord. The cruelty alleged was conduct on the part of the wife with a named person. It is plain that the language of the petition follows the language

of the judgment of HODSON, J., in *Gardner v. Gardner* (2). For example, HODSON, J., said ([1947] 1 All E.R. 631):

" . . . the conduct alleged consists of the wife's unnatural sexual relations with other women and neglect of her marital home and duties which so affected the husband as to break down his health . . .",

It is highly significant that in LATEY ON DIVORCE, 14th ed., p. 546, this passage appears under the heading of: "Unnatural offences by wife." The paragraph begins:

"Lesbianism was held to constitute cruelty in *Gardner v. Gardner* (2), and the husband was granted a decree of divorce . . ."

Then the learned editor recites s. 31 of the Act of 1950 in the same paragraph. I gather that the learned author's view is that the decision in *Gardner v. Gardner* (2) so recently as 1947 was that this kind of conduct might be cruelty and in that case was cruelty, and, by appending s. 31 of the Act of 1950 to the paragraph, he would seem to suggest that this is a matter regarding which a party concerned can intervene. However that may be, what we are concerned with is this. On Aug. 12, 1952, a summons was taken out before Mr. Registrar LONG citing s. 31, and the learned registrar granted the application. The matter then came before BARNARD, J., and he set aside the order, and from his order this appeal is brought here today. It is not very clear what BARNARD, J., said about the matter, but we were told that during the hearing the learned judge said it was a monstrous thing if Miss P. could not intervene, but after some argument in which the analogy of a slander or a libel action was employed, he appears to have said not: "I have no jurisdiction", not: "There are no rules applicable to it"; but merely: "I do not think I can allow this to stand". It is a little unsatisfactory.

In *Lowe v. Lowe* (1) SIR NATHANIEL LINDLEY, M.R., said this relating to the passage in SHELFORD ON MARRIAGE which has been cited in the present case about the practice of the ecclesiastical courts, in support of the argument that the court could allow this intervention ([1899] P. 209):

"The authorities that have been referred to are in favour of this view, and notwithstanding the ambiguous expressions in SHELFORD ON MARRIAGE which have been alluded to, I prefer to follow the recent decisions, including that of GORELL BARNES, J., in *Harrop v. Harrop* (3)."

It is clear that the decisions in *Lowe v. Lowe* (1) and in *Harrop v. Harrop* (3) were both based on the existing state of the law when those decisions were given. In *Harrop v. Harrop* (3) a husband, in answer to a petition by his wife for dissolution of the marriage, made a counter-charge against her of adultery with a specified person without claiming cross-relief or such further and other relief as the nature of the case might require, and the court held that it had no power to allow the alleged adulterer to intervene. That was because of s. 28 of the Matrimonial Causes Act, 1857, and s. 2 of the Matrimonial Causes Act, 1866. In that case, in the last sentence of his judgment, GORELL BARNES, J., said ([1899] P. 64):

"For these reasons I hold that, though the application is in itself a reasonable one, I have no power to grant it."

I agree with what my Lord has said about s. 31 of the Matrimonial Causes Act, 1950. It certainly seems to me that it grants the power which was non-existent when SIR NATHANIEL LINDLEY, M.R., gave judgment in *Lowe v. Lowe* (1), and GORELL BARNES, J., gave judgment in *Harrop v. Harrop* (3). Speaking for myself, I think the essential element of justice, imperfect though our justice may be, is that anyone in any court who is under some odious charge, whatever it may be, should be allowed a full opportunity to deal with it. I know it is said here, and it may be true, that in the result the attitude of the wife and

that of the applicant may coincide, but it may not, and it is because it may not, that I think that, this section giving the power and warranting the exercise of the power, this appeal should be allowed, and Miss P. should be allowed to intervene.

MORRIS, L.J.: I agree. Very grave allegations were made in the petition against Miss P. When the petition is heard the conduct of Miss P. will unquestionably be investigated, and, though the issue will be whether the wife has been guilty of cruelty, it would be unreal not to recognise that Miss P.'s conduct will be the subject of inquiry and her reputation will be at stake. In the language of SIR NATHANIEL LINDLEY, M.R., as used in *Lowe v. Lowe* (1) ([1899] P. 208):

“ . . . most grievous injustice is done to a person whose conduct is being investigated under the publicity of modern times, where he is not able to say a word in his defence.”

I have no doubt that Miss P., if she wishes it, should be given the right to speak in her own defence, and I consider that the court is enabled to give her that right by the provisions of s. 31 of the Matrimonial Causes Act, 1950.

Appeal allowed.

Solicitors: *Cripps, Harries, Hall & Co.* (for the applicant); *Gustavus Thompson & Sons*, agents for *Herrington & Carmichael*, Camberley, Surrey (for the husband).
[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

COOPER v. COOPER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Davies, J.), October 15, 1952.]

Justices—Husband and wife—Maintenance—Conflict of jurisdiction—Decree of judicial separation—Application to High Court for permanent alimony discharged—Summons for maintenance in court of summary jurisdiction.

On Oct. 9, 1946, the wife obtained a decree of judicial separation. On Nov. 15, 1947, she applied to the registrar for an order for the payment of permanent alimony. In April, 1948, the husband agreed to pay the wife a weekly sum for maintenance. Subsequently, he defaulted, and on Jan. 16, 1952, the wife's application for permanent alimony was, at her request, dismissed, on Jan. 21 she applied to justices for a summons for a maintenance order against her husband on the ground that he had wilfully neglected to maintain her, and on Feb. 22 that summons was dismissed by the justices on the ground that, if they entertained it, there would be a conflict of jurisdiction with the High Court where the suit for judicial separation was still in existence.

HELD: on Jan. 16, 1952, the then existing proceedings for alimony in the High Court were terminated; the mere fact that the wife had a right to make a further application to the High Court for permanent alimony, or the possibility that at some future date she might make such an application, did not create either an actual conflict of jurisdiction or a reasonable likelihood or probability of such a conflict between the court of summary jurisdiction and the High Court; and, therefore, the justices were bound to hear and determine the summons.

Pooley v. Pooley ([1952] 1 All E.R. 395), applied.

Quaere whether as a result of the difference in wording between s. 190 (4) of the Supreme Court of Judicature (Consolidation) Act, 1925, and s. 20 (2) of the Matrimonial Causes Act, 1950, the principles relating to the time within which an application for permanent alimony must be brought after a decree of divorce or nullity now apply to such an application after a decree

of judicial separation, and whether r. 45 of the Matrimonial Causes Rules, 1950, is ultra vires.

AS TO JURISDICTION OF COURT OF SUMMARY JURISDICTION WHERE DIVORCE SUIT PENDING, see HALSBURY, Hailsham Edn., Vol. 10, p. 852, para. 1362; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 694, 695, Nos. 6641-6644.

Cases referred to:

- (1) *Higgs v. Higgs*, [1935] P. 28; 104 L.J.P. 1; 152 L.T. 24; 98 J.P. 443; 27 Digest, Replacement, 695, 6642.
- (2) *Pooley v. Pooley*, [1952] 1 All E.R. 395; [1952] P. 65; 116 J.P. 108.
- (3) *Kilford v. Kilford*, [1947] 2 All E.R. 381; [1947] P. 100; [1948] L.J.R. 447; 111 J.P. 495; 27 Digest, Replacement, 723, 6910.
- (4) *Scott v. Scott*, [1921] P. 107; 90 L.J.P. 171; 124 L.T. 619; 27 Digest, Replacement, 631, 5917.

APPEAL by the wife against the dismissal by justices for the Parts of Lindsay, Lincolnshire, sitting at Grimsby, on Feb. 22, 1952, of her summons alleging that her husband had wilfully neglected to provide reasonable maintenance for her.

The parties were married in 1931 and in January, 1945, the wife filed a petition for judicial separation on the ground of the husband's adultery. On Oct. 9, 1946, a decree was pronounced in her favour. On Nov. 15, 1947, the wife applied by summons in the Grimsby district registry for an order for permanent alimony. In January, 1948, the summons was adjourned sine die, and on Apr. 1, 1948, an agreement was made between the parties whereby the husband agreed to pay the wife a weekly sum of money for her maintenance. The husband having defaulted in the payment of that sum, on Jan. 16, 1952, on the wife's application, the registrar dismissed her application for permanent alimony, and on Jan. 21, 1952, she took out a summons for a maintenance order, alleging against her husband wilful neglect to maintain her. On Feb. 22 that summons was dismissed on the ground that there would be a conflict of jurisdiction with the High Court. The wife now appealed.

D. H. Robson for the wife.

Gillis for the husband.

LORD MERRIMAN, P.: This is a wife's appeal against the dismissal by justices for the Parts of Lindsay, Lincolnshire, sitting at Grimsby on Feb. 22, 1952, of her summons for wilful neglect to provide reasonable maintenance. The justices dismissed the summons, holding, in effect, that they had no jurisdiction to decide the case—though I am willing to assume that, in using those words, they meant that they should stay their hands so as to avoid a supposed conflict of jurisdiction with the High Court. I make that qualification because it is important to bear in mind that Parliament has invested courts of summary jurisdiction with powers in matrimonial disputes which in many respects are identical with those possessed by the High Court. The most that this court, or, as far as I know, any court has said, while recognising the co-existence of the two jurisdictions, is that, if there is conflict between them, the court of summary jurisdiction should hold its hand, at any rate until the risk of conflict is past. The wife's case here is that there is no conflict. [His Lordship stated the facts and continued:] It seems to me to be impossible to dispute that when the application for permanent alimony was dismissed on Jan. 16, 1952, it was disposed of and no longer existed. From that it follows, it seems to me, that when on Jan. 21, 1952, the wife took out her present summons on the ground of wilful neglect to maintain there neither was, nor could be, any conflict between that summons and the application for permanent alimony instituted by her in November, 1947. But it is said that her suit in the High Court still existed, for she had deliberately elected to proceed for a judicial separation in the High Court on the ground of her husband's adultery instead

of going to the justices who, under the Matrimonial Causes Act, 1937, s. 11 (1), had power to make a separation or a maintenance order on the ground of that adultery, and, therefore, because the institution of that suit gave, and still gives, all the rights to ancillary relief which may be claimed in the High Court in such a suit, there is, notwithstanding the dismissal of her application for alimony, a conflict of jurisdiction. The justices give their reasons for dismissing the summons as follows:

A “In 1945 the wife had two courses open to her. She could have taken out a summons under the Summary Jurisdiction (Married Women) Act, 1895, or she could commence proceedings in the High Court. She elected to adopt the latter alternative, and did, in fact, obtain an order in the High Court, with all the rights and remedies attaching thereto, the most important right so far as this matter is concerned being her right to apply for permanent alimony, and this right was exercised by summons in 1947 and remained on the file until it was dismissed in January, 1952, upon the application of the wife.”

B They refer to various cases, including *Higgs v. Higgs* (1), in support of the proposition, which I have assumed in favour of the husband, that during the whole of that time the High Court was seised of the matter. Then they say that it had been contended that on and after Jan. 16, 1952, all proceedings in the High Court were at an end and that an election was again open to the wife, but that, in the absence of any cited authorities, they came to the conclusion that

C “. . . when the wife elected to proceed in the High Court and obtained a decree for judicial separation in that court the High Court became seised and remained seised of the matter despite the wife's efforts to put an end to such jurisdiction, for the decree obtained in the High Court is still in existence and the rights accruing to the wife under the Matrimonial Causes Rules, 1950, r. 45, are still open to her at any time.”

D Before dealing with the main point of this case I regret to say that I have appreciated for the first time that it is not clear on the face of r. 45 that when the rule provides that the wife in a suit for judicial separation can apply for alimony at any time it is *intra vires*. The point arises in this way. Section 190 (4) of the Supreme Court of Judicature (Consolidation) Act, 1925, so far as is relevant, reads:

E “Where any decree for . . . judicial separation is made on the application of the wife, the court may make such order for alimony as the court thinks just . . .”

F In other words, all that was necessary was that a decree for judicial separation should have been made, and made on the application of the wife. But there was a change in the wording of the Matrimonial Causes Act, 1950, s. 20 (2) of which reads:

G “On any decree for judicial separation, the court may make such order for the payment of alimony to the wife as the court thinks just.”

As is well known, the use of the words “on any decree” in connection with the earlier sub-sections of s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, in their application to divorce and nullity has given rise to a great deal of litigation. Suffice it to say that judicial attempts to release the fetters imposed by those words have not met with universal success, and it is certain that “on any decree” and “where any decree is made” are not synonymous expressions. When, therefore, the group of sections relating to alimony, maintenance and custody of children in the Matrimonial Causes Act, 1950, perpetuates the words “on any decree” for divorce or nullity and uses the same formula with reference to a decree for judicial separation, it is likely to

lead to the suggestion that the word "on" must have the same significance wherever it appears, even if it can be argued—as, no doubt, it could be argued—that regard must be had to the fact that one case is dealing with a marriage which has been dissolved and persons who are no longer husband and wife, while the other is dealing with persons who, though judicially separated, are still husband and wife. Nevertheless, the question will still arise whether the Rules Committee exceeded their powers in keeping alive the effect of the old wording of the Act of 1925 by saying in r. 45 that:

"An application for permanent alimony may be made at any time after a decree for judicial separation . . . has been pronounced."

I have looked at the Parliamentary transactions which led up to the Act of 1950. There was, as the memorandum which is called for by the standing orders of the House shows, an intention to make a slight alteration in the law, but it was plainly not the intention to make an alteration which had the effect suggested. What was intended was, as the memorandum shows, to enable the court to give the wife alimony on a judicial separation, whether the proceedings were initiated by her or by her husband. The real emphasis is not "*on any decree*" but "*on any decree*". Before leaving this side-issue I ought to say that counsel for the wife argues that on any view of the matter it would be difficult, after the lapse of six years from the making of the decree and after the dismissal, on her own application, of her original application for alimony, allowing the utmost liberality of interpretation to the word "on" in reference to a suit for judicial separation as contrasted with a suit for divorce, to say that any application now brought by the wife could, by any stretch of construction, be described as "*on the decree*" which she obtained in 1946.

Though it has been necessary to notice that point, because it is one of some public importance, it is, in my opinion, a comparatively subsidiary matter in this case, for the real substance of the justices' reasons and of the argument that has been addressed to us in support of them is that the mere existence of the proceedings for judicial separation always has raised, and still raises, a conflict of jurisdiction in connection with maintenance. The justices say that the argument to the contrary is unsupported by any authority. I think there is authority to the contrary, namely, *Pooley v. Pooley* (2), where a wife who had obtained a maintenance order on the ground of desertion had, on the ground of the continuation of the same desertion for the statutory period, obtained a decree of divorce, and then wished to bring ancillary proceedings for maintenance in the High Court, in order to do which, realising rightly that she could not have two maintenance orders running at the same time and so proceedings for maintenance in one court while there was already a subsisting order in another court of competent jurisdiction would not be encouraged, applied to the magistrate for the discharge of her subsisting order. The magistrate refused to discharge it on the ground that the mere exercise of the jurisdiction to discharge it, albeit to evade a conflict of jurisdiction, would give rise to such a conflict. The present is the converse case, but I think there are passages in the judgments which dispose of the suggestion that the mere presentation of a petition, whether for divorce or judicial separation, because thereunder it will be possible to exercise certain rights to claim maintenance, ipso facto raises a conflict of jurisdiction. I will read the headnote ([1952] P. 65):

"A wife who is taking divorce proceedings is entitled to pursue her rights for maintenance for alimony pending suit in the divorce court provided that she has any existing order for maintenance made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, discharged. But she is under no obligation to apply for the discharge of that order before presenting a petition for divorce; and such an application creates no conflict between the two jurisdictions."

That is an accurate summary of certain passages in the judgments. The point, I think, is that, if the contention is correct that the mere presentation of the petition and the subsistence of the suit, even after the pronouncement of a decree, creates a conflict of jurisdiction, it would be necessary to get rid of the justices' order before presentation of the petition, but that, we were careful to say, was not so. I will read one passage ([1952] 1 All E.R. 396):

A “Even if the course which the magistrate suggests is the proper solution of the difficulty, namely, making an application to the Divorce Court, having it adjourned for a specified period, and then going back to the magistrate's court to get the order set aside, the matter is still pending in both courts. There is no escape from it unless one thing is done, namely, that she goes to the magistrate [for the discharge of her order] before presenting her petition. In my opinion, there is no obligation on her to do that.”

B I think the true effect of that decision may be summarised as being that the mere possibility that identical issues may arise in the High Court and in the court of summary jurisdiction does not give rise to a conflict of jurisdiction. It is the identity of the actual issues in the two courts which is the mischief at which decisions like *Higgs v. Higgs* (1) and the decision of BARNARD, J., in *Kilford v. Kilford* (3) are aimed.

C In my opinion, when the wife issued the present summons five days after the dismissal on Jan. 16, 1952, of her application in the High Court, there was no conflict. The mere possibility that she might raise further proceedings in the High Court for alimony or maintenance will not do, though, as I have said, I think her right to do so in the same form is extremely doubtful in the circumstances of this case. But I think the principle has a wider application, for, apart altogether from any proceedings which she could take for alimony in the suit for judicial separation, under the Matrimonial Causes Act, 1950, s. 23 (1), she has the right to sue in the High Court for wilful neglect to maintain. If she did so, there would be a conflict of jurisdiction with her present summons, but the mere possibility that she might do so or the mere fact that she has the right to do so does not, in my opinion, raise any conflict of jurisdiction at all. The appeal should be allowed, the order dismissing the wife's summons set aside, and the matter sent back for determination.

D E DAVIES, J.: I agree. As my Lord has said, there is in many respects a co-equal jurisdiction between courts of summary jurisdiction, on the one hand, and the High Court, on the other, in these matters which arise between husband and wife. The principle, as I have always understood it, which applies to such cases, is that if on the same issue between the same parties there is an actual conflict of jurisdiction, or a reasonable likelihood or probability of such a conflict of jurisdiction, the inferior court, as a matter of obvious convenience and public policy, should not proceed with the hearing of the summons.

F G If that is right and one applies that principle to the facts of the present case, it is, in my judgment, plain that there was no actual conflict of jurisdiction. In January, 1952, the proceedings for alimony in the judicial separation suit were finally terminated, so that when this matter came before the justices in February there was no proceeding for alimony at all in the High Court. There then being no actual conflict of jurisdiction, was there, in the words I have used, a reasonable likelihood or probability of a conflict of jurisdiction? What is said on behalf of the husband is this: True, those proceedings had been put an end to by the order of the district registrar, but the suit for judicial separation was still in existence, the decree having been pronounced, and at any time the wife could apply for alimony, in which event the same issues would arise. In my opinion, that speculative possibility does not give rise to such a reasonable likelihood or probability of a conflict of jurisdiction as should have induced the justices to dismiss the summons before them. After all, the wife in this case,

who is entitled, other things being equal, to choose the court in which she will proceed, had done all she could to make it plain that she was not going on in the High Court, but was going on in the court of summary jurisdiction. This case is almost the converse of *Pooley v. Pooley* (2), and I need read only two sentences from the judgment of my Lord in that case ([1952] 1 All E.R. 397):

"I think the whole of the suggestion that there is a conflict between the two jurisdictions in getting rid, pending suit, of the old order, is a fallacy. The truth and the reality of the matter is that the application is made to ensure there is no overlapping between the two."

That is exactly what the wife in the present case did when she went to the district registrar and had the proceedings in the High Court disposed of. Therefore, in my opinion, on Feb. 22, 1952, when this matter came before the justices, not only was there no actual conflict, but there was no reasonable likelihood or probability of a conflict of jurisdiction, and they should have proceeded.

That is sufficient to dispose of the present appeal, but two other points were taken by counsel for the wife. His submission is that not only was there no reasonable likelihood of a conflict, but that there could in no event ever again have arisen any conflict. The first ground for that submission is that once the application for alimony has been dismissed it could not thereafter be renewed. That point was not fully argued before us, and I do not propose to express any opinion about it one way or the other. The other ground raises, as my Lord has said, matters of very much more general importance and interest. The proposition is that as the result of the change of wording in s. 20 (2) of the Matrimonial Causes Act, 1950, as compared with that of s. 190 (4) of the Supreme Court of Judicature (Consolidation) Act, 1925, and the difference between the words, "Where any decree for . . . judicial separation is made", and the words, "On any decree for judicial separation", the same principles which have hitherto been applied to applications consequent on divorce or nullity should apply to applications consequent on judicial separation. As we all know from many cases, of which, perhaps, the best-known is *Scott v. Scott* (4), it has been held that, without putting any final and precise limit of time on it, "on any decree" means within, at any rate, a reasonably short time after the decree. Counsel argued that that principle must now, as the result of the change of the wording in the Act, be applied to applications for permanent alimony. As I have said, it is not, in my judgment, necessary to pronounce, for the purposes of this appeal, a final view on that contention, but it does seem to me that there is a great deal of force in that argument. It may well be that on that point alone not merely is there no reasonable likelihood of the wife applying again in the judicial separation suit, but that, in fact, by the wording of the Act, after the lapse of six years, she is now barred in law as well.

Appeal allowed.

Solicitors: *Theodore Goddard & Co. and Deacons & Pritchards*, agents for *H. K. & H. S. Bloomer & Co.*, Grimsby (for the wife); *Russell Jones & Walker*, agents for *Pearlman & Rosen*, Hull (for the husband).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

RIMMER v. RIMMER.

distinguished. TUNSTALL v. TUNSTALL. [1953] 2 All E.R. 310. 1952.]
 Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.),

Husband and Wife—Title to property—Matrimonial home—Both parties contributing to purchase—Respective beneficial interests not ascertainable by reference to amounts of contributions—Married Women's Property Act, 1882 (c. 75), s. 17.

In 1934 the husband and the wife, both of whom throughout their married life were wage earners, were married. In 1935 a dwelling-house was bought in the name of the husband for £460, to serve as the matrimonial home. The wife provided the deposit of £29, and the rest of the purchase money was borrowed on the security of a mortgage from a building society in the name of the husband. £151 of the principal of the mortgage money was repaid out of housekeeping money provided by the husband, and the remaining £280 was repaid by the wife out of her own money while the husband was on war service. The wife provided all the furniture for the home out of her own resources. In 1951 the husband left the wife and in 1952 the house was sold for £2,117. On a summons under the Married Women's Property Act, 1882, s. 17, to determine how the proceeds of the sale should be divided,

HELD: the question was: On all the facts, what was the fair and just answer to be given to the question posed, having regard not merely to what occurred at the time when the property was originally purchased, but also to the light which the whole conduct of the parties had thrown on their relationship together as contributors to the property which was their joint matrimonial home?; in some cases it might well be that the amounts which they respectively contributed ought to conclude the question of the shares in which they should partake in the proceeds, but on the facts of the present case it was not possible fairly to assess the separate beneficial interests of the husband and the wife by reference to the contributions which they had made towards the purchase of the house, and, in all the circumstances, the proper and equitable course was to divide the proceeds of sale between them in equal shares.

Re Rogers' Question ([1948] 1 All E.R. 328), distinguished.

Dictum of MAUGHAM, L.J., in *Re Dickens* ([1935] Ch. 309), applied.

Jones v. Maynard ([1951] 1 All E.R. 802), approved.

Per ROMER, L.J.: Cases between husband and wife ought not to be governed by the same strict considerations, both at law and in equity, as are commonly applied to the ascertainment of the respective rights of strangers when each of them contributes to the purchase price of property, and the old-established doctrine that equity leans towards equality is peculiarly applicable to disputes of the character of the present one, where the facts, as a whole, permit of its application.

AS TO SUMMARY PROCEEDINGS BETWEEN HUSBAND AND WIFE AS TO PROPERTY, see HALSBURY, Hailsham Edn., Vol. 16, p. 740, para. 1211; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 263-265, Nos. 2119-2133.

Cases referred to:

- (1) *Re Rogers' Question*, [1948] 1 All E.R. 328; 27 Digest, Replacement, 264, 2130.
- (2) *Newgrosh v. Newgrosh* (June 28, 1950), unreported.
- (3) *Jones v. Maynard*, [1951] 1 All E.R. 802; [1951] Ch. 572; 27 Digest, Replacement, 152, 1112.
- (4) *Re Dickens*, [1935] Ch. 267; 104 L.J.Ch. 174; 152 L.T. 375; Digest Supp.
- (5) *Petit v. Smith*, (1695), 1 P. Wms. 7; 24 E.R. 272.

(6) *Hoddinott v. Hoddinott*, [1949] 2 K.B. 406; 27 Digest, Replacement, 259, 2100.

APPEAL by the wife from an order of His Honour JUDGE BROWN sitting at Southport County Court, dated July 25, 1952.

The wife applied under the Married Women's Property Act, 1882, s. 17, for the determination of the question how the sum of £2,117 15s. 2d., the proceeds of the sale of a dwelling-house which had been the matrimonial home, should be divided between her and the husband. The house had been purchased for £460 to which the wife had contributed £29 as a deposit and £280 towards the repayment of money borrowed by the husband from a building society and secured by a mortgage of the property. The husband had provided for the repayment of £151 to the building society. On June 11, 1952, the registrar ordered that the proceeds be divided between the wife and the husband in the proportion of 309 to 151. On an appeal by the husband the county court judge held that the proceeds ought to be divided in the proportion of twenty-nine to the wife and 431 to the husband, subject to the payment to the wife of £280 representing the amount of the mortgage money which she had repaid.

W. G. O. Morgan for the wife.

Kennan for the husband.

SIR RAYMOND EVERSHERD, M.R.: This appeal is another illustration of the difficulties with which a court is confronted in trying to do justice, as enjoined by the Married Women's Property Act, 1882, s. 17, between a husband and wife as regards some item of property when their marriage has come to grief.

The facts of the case are, as they will generally be found to be in all these cases, in some degree peculiar, but in this year, 1952, it is, undoubtedly, a common feature of such cases that, owing to the great rise in values in house properties, the real question in issue between the parties in large measure refers to the division of what may be regarded as a windfall for both or either. I venture to emphasise that point. Perhaps, in ten years' time the situation will be quite different. I am, therefore, anxious that what falls from the court on this occasion should not cause trouble hereafter in the application of this judgment to circumstances which may be quite different. That is in a sense saying no more than the obvious, viz., that in all cases of this kind the result must always depend on the particular facts in the particular case. One other observation may be made, no less obvious. As I myself ventured to say in *Re Rogers' Question* (1) (a sentence of mine in which case has been relied on by the registrar and the county court judge in arriving at diametrically opposite conclusions) ([1948] 1 All E.R. 328):

"When two people are about to be married and are negotiating for a matrimonial home it does not naturally enter the head of either to inquire carefully, still less to agree, what should happen to the house if the marriage comes to grief. What the judge must try to do in all such cases is, after seeing and hearing the witnesses, to try to conclude what at the time was in the parties' minds and then to make an order which, in the changed conditions, now fairly gives effect in law to what the parties, in the judge's finding, must be taken to have intended at the time of the transaction itself."

In a sense, therefore, the court is proceeding to decide a question on a hypothesis which does not exist. Certainly, in this case it is clear that there never was any agreement, in the ordinary sense of the term, between the husband and the wife when the house in question was bought. As ATKIN, L.J., observed in a well-known case*, the ordinary incidents of contract have no application in the ordinary relations between husband and wife.

* *Balfour v. Balfour*, [1919] 2 K.B. 571.

It is appropriate to remember what the Act calls on the court to do. The relevant part of s. 17 provides:

A "In any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland . . . [who] may make such order with respect to the property in dispute, and as to the costs of and consequent on the application, as he thinks fit . . ."

B So the problem posed in the present case is: What is a fit order to make in regard to a sum of £2,117, being the proceeds of sale of a house which was the matrimonial home? I venture to take as my guide or test the observations of BUCKNILL, L.J., in *Newgrosh v. Newgrosh* (2), where he said:

C "That [s. 17] gives the judge a wide power to do what he thinks under the circumstances is fair and just. I do not think it entitles him to make an order which is contrary to any well-established principle of law, but, subject to that, I should have thought that disputes between husband and wife as to who owns property which at one time, at any rate, they have been using in common are disputes which may very well be dealt with by the principle which has been described here as 'palm tree justice'. I understand that to be justice which makes orders which appear to be fair and just in the special circumstances of the case."

D In the present case the husband and the wife were both wage earners, and, after marriage in 1934, they bought the house in question. Its price was £460, now risen to £2,117, and so representing a windfall for one or both of more than £1,600. At the time of the purchase it was necessary that £29 should be provided in cash, and the whole of the rest of the price was advanced by a building society on the usual building society mortgage. The wife provided the whole of the sum in cash, £29, and the property was then conveyed to the husband alone, and he alone executed the building society mortgage. During the years E that ensued until the outbreak of the late war certain payments in respect of the mortgage amounting to £151 were made by the husband. It appears that no reckoning has been made of any interest payments, and I shall, therefore, exclude them. After the outbreak of war the husband joined the merchant service and was away on such service until after the war had ended. During that time he sent certain weekly sums to his wife which the registrar has found F as a fact were not more than sufficient, unless by a margin which is not relevant, to maintain the wife, i.e., were not sufficient to provide sums for discharging further capital payments on the mortgage. During the period of the husband's absence, and, in particular, between 1944 and 1946, the wife out of her own private resources discharged the remainder that was due in respect of principal on the mortgage, viz., £280, making with the £151 paid by the husband a total G of £431, i.e., the purchase price, £460, less the £29 paid in cash. The husband returned and resumed life with his wife at the house in question until October, 1951, when they parted company. It appears that during the time of their married life together, substantial quantities of furniture were acquired, and, as has been found (and there is no appeal on this matter), the furniture was contributed by the wife out of her resources.

H The question was tried before the registrar, who heard the evidence of the two parties and of another witness. He concluded that the just result on those facts was that the sum in question should be divided between husband and wife in direct arithmetical proportion to the contributions in fact made, i.e., the husband having paid £151 and the wife altogether £309, the proceeds be divided roughly (though the figure awarded was, of course, accurately calculated) in the proportions of one to two as between husband and wife, and that gave the wife £1,423 out of the proceeds. The matter was taken by the husband

on appeal to the county court judge who came to a different conclusion. He thought that the proper beneficial interests must be treated as having been determined at the date of the purchase. He thought that the wife having contributed in cash £29 and the husband having made himself liable for the rest (and, therefore, as he said, being in the same position as though he had contributed the remaining £431 in cash), their shares were fixed in the proportions of twenty-nine to 431, subject to this, that in addition the wife was entitled to recoupment out of the proceeds of the £280 she had contributed in discharge of the mortgage. That method of dealing with the matter gave to the wife a total sum of £414, approximately. The wife has now appealed to this court, and by way of emphasising the great difficulties of cases of this kind and the pitfalls into which a judge may fall in expressing any matters of principle or in making any expressions which may be so regarded, it is to be noticed that in arriving at their different conclusions both registrar and judge purported to follow what is stated in another sentence of mine in *Re Rogers' Question* (1), which is as follows ([1948] 1 All E.R. 329):

"In his view, [that of ROXBURGH, J.,] the effect of the evidence of the so-called tiff was to support, or, at least, not to contradict, the conclusion that each must be taken to have contributed to the purchase in the proportion in which they did, in fact, contribute or (in the case of the husband) make himself liable to contribute."

The registrar interpreted that observation as guiding him to hold here that, the contributions having been £309 by the wife and £151 by the husband, in those proportions the total proceeds must be shared. That view is, I think, open to the criticism that it took no account of the fact that the husband, by executing the mortgage, had made himself solely liable to the building society. The learned judge applied the same sentence and treated it as guiding him to hold that the date at which the determination must be made was the date of the purchase, and, holding that the execution of the mortgage was equivalent to payment in cash, that the proportions were twenty-nine to 431. That in turn, in my judgment, is open to the criticism that the execution of the mortgage was not equivalent to payment in cash. He paid on the occasion in question no cash whatever, and the mortgage was discharged unequally as between the wife and husband, the former paying considerably more than the latter.

In my judgment, the proper answer in this case is that both parties ought to share equally the proceeds of this sale. If it be possible to formulate the principle to be applied in a sentence (though, by doing so, one is doing no more than pronouncing a generality so wide as to be almost a platitude), I think that in each case the question is: On all the facts, what is the fair and just answer to be given to the question posed, having regard not merely to what occurred at the time when the property was originally purchased, but also to the light which the whole conduct of the parties throws on their relationship together as contributors to the property which was their joint matrimonial home? In some cases it may well be that the amounts which they respectively contributed ought to conclude the question of the shares in which they should partake in the proceeds. Thus, to take for the moment an imaginary case, if there was nothing else before the court save that a wife put up (say) £x in cash when the property was bought and the husband undertook to discharge solely, and did discharge solely, the obligation to pay all the rest, the court could conclude (though I do not say it must) that those shares ought to fix their beneficial interests respectively. In *Re Rogers' Question* (1), there was an additional fact, viz., that the wife had plainly intimated that the amount of her original contribution was the total she was prepared to contribute, and with that additional fact this court held that the answer must be that which ROXBURGH, J., had himself given. The facts in the present case are different, and I do not think that the actual sums contributed ought to fix the shares.

I think so to hold over-emphasises the accident of the precise figures which they happened to contribute, more particularly since during the years from 1942 to 1946 the husband was serving abroad and disabled in any case from taking any active part in dealing with the building society. I think all the facts (which include the circumstance that the wife contributed so substantially as regards the furniture, that not only did she pay these sums in discharge of the mortgage out of her private resources, but, as I have followed
A the evidence, that she conceived it was within her province so to do, the fact that here was a childless marriage, both parties being substantially throughout the period in question wage earners) lead to the conclusion that a fair division of the proceeds, consisting so largely as they do of what I have called the windfall, is that they take it equally. Put another way, it leads justly to the conclusion that at the relevant date, which is when this summons was issued,
B the court should conclude that the husband, although he held the sole legal title, held it on behalf of both of them as a joint home, and, there being no other evidence which would precisely quantify the shares, held it, therefore, for them equally.

I appreciate that to fall back on what may be called a Solomonesque judgment is, as counsel for the husband said, perhaps to yield to obvious temptation to
C shirk more difficult computations, but I do not think that is a just criticism of the conclusion at which I have arrived. Where the court is satisfied that both the parties have a substantial beneficial interest and it is not fairly possible or right to assume some more precise calculation of their shares, I think that equality almost necessarily follows. VAISEY, J., for example, in *Jones v. Maynard* (3), rightly, in my judgment, applied that reasoning, and I think
D that an analogous application of the same reasoning was adopted by this court when the question of beneficial ownership of a copyright was considered in *Re Dickens* (4). MAUGHAM, L.J., said ([1935] Ch. 309):

“In these circumstances, my opinion is that part of the sum realised properly belongs to the estate of Sir Henry Dickens and part to the estate
E of Charles Dickens. There are no materials for apportioning the sum otherwise than in equal shares between the two estates: and that is, in my opinion, the proper conclusion, not only because, according to the language of LORD SOMERS (*Petit v. Smith* (5) (1 P. Wms. 9)), ‘equity did delight in equality’, but also because, in the exceptional circumstances of the present case, the two contending parties have equal rights to share in the
F proceeds of sale.”

I venture to apply that reasoning to this case.

I conclude by emphasising the point that in this case, in 1952, we are concerned with a property which has, by the accident of things, produced what I have called a windfall for the two parties. If in future years that particular
G characteristic ceases to be common, it may well be (though nothing that I have said should stand in the way of a court reaching whatever conclusion might appear just in all the particular circumstances) that a court would place greater emphasis than I have thought it right to do on the actual contributions which, in otherwise similar circumstances, a husband and wife might have made towards the acquisition of a property, but, on all the facts and in all
H the circumstances of this case, I think it would be wrong to attach to the accident of the precise figures contributed the consequence that the beneficial interests must be arithmetically related to the contributions. I, therefore, think, with all respect to the county court judge and to the registrar, that the proper answer to the question posed is, as I have said, that the two, husband and wife, should share equally in these proceeds. This appeal should be allowed and that declaration should be substituted for the one which commended itself to the county court judge.

DENNING, L.J.: The parties married in 1934, and in the following year they bought a house for £460. It was bought in the husband's name for £29 cash down and £431 borrowed from a building society. The wife, who was of a very thrifty disposition, paid the deposit of £29 out of her own savings. Thereafter, during the whole of their married life, they both went out to work. The husband made the wife a housekeeping allowance which varied according to his earnings, but at one time, for instance, he was making her a housekeeping allowance of £4 a week, and she was earning, by her own work, £3 10s. a week. She used the housekeeping allowance to pay, not only the housekeeping expenses proper, but also the current instalments to the building society, which included, of course, interest and capital. In addition, she was able to save a good deal of her own earnings, and with this money from 1944 to 1946 she was able to make substantial capital repayments off the mortgage to the building society, with the result that the mortgage was completely paid off by May, 1946. The amount of capital which she thus paid off out of her own savings was £280. The amount of capital which she had previously paid off, by paying instalments out of the housekeeping allowance, was £151. Five and a half years later, in October, 1951, the husband deserted the wife, leaving her in possession of the house. At the end of January, 1952, he came back and turned her out, and she has not been there since. In February, 1952, she obtained a maintenance order against him on the ground of his desertion. The house has since been sold for over £2,000, thus realising a very substantial profit on the original purchase price. The question is how that money is to be divided? The registrar said that it should be divided according to the contributions made by the husband and wife respectively to the repayment of capital, £309 by the wife (£29 plus £280) and £151 by the husband, i.e., roughly, two to one in favour of the wife. The judge held that it should be divided according to the position when the house was bought, cash of £29 by the wife and an obligation of £431 by the husband, i.e., about fifteen to one in favour of the husband.

In 1882, when Parliament declared that a wife was entitled to have property of her own, it enacted that in any question between husband and wife as to the title to or possession of property the court was to decide the matter as it thought fit. Parliament laid down no principles for the guidance of the courts, but left them to work out the principles themselves. That is being done. In cases when it is clear that the beneficial interest in the matrimonial home or in the furniture belongs to one or other absolutely, or it is clear that they intended to hold it in definite shares, the court will give effect to their intention: see *Re Rogers' Question* (1), but when it is not clear to whom the beneficial interest belongs, or in what proportions, then, in this matter, as in others, equality is equity. In *Newgrosh v. Newgrosh* (2) some furniture was bought by the husband's father with his own money for the use of the couple, but the receipt was taken in the wife's name. WILLMER, J., held that the furniture belonged to them jointly, and his decision was affirmed by this court. In *Jones v. Maynard* (3) a banking account was in the husband's name but was fed by the moneys of both and treated as a joint account. VAISEY, J., held that, although the husband's contributions were much larger than the wife's, it belonged to them both jointly.

In the present case, I look on the money which was paid by the wife to the building society as money saved by their joint efforts and applied for their common benefit. I do not regard the £280 as wholly the wife's money. The wife here, like many wives, managed the family income. She used the husband's money to pay the housekeeping expenses and saved her own money, but she might equally well, and with more justice, have paid some of the housekeeping expenses out of her own money and saved a corresponding amount of the husband's money. If she had done that, some of the husband's money would presumably have gone to make up the £280 to repay the building society.

A While they were living together, the important thing was to pay off the mortgage and it did not matter out of whose money it was paid. When they separated, years afterwards, the husband must be given some credit for the £280, seeing that it was only by using his money for housekeeping that she was enabled to save so much of her own. It was really saved by their joint efforts, and not by hers alone. It is rather like the case when the husband only goes out to work and the wife looks after the house. If she manages to save money out of the housekeeping allowance sufficient to buy furniture for the home, which is intended to be a continuing provision for them both, that furniture does not belong to her absolutely even though it is bought in her name, nor does it belong absolutely to the husband even though he provides the housekeeping allowance. It is the result of their joint efforts and is presumed to belong to them jointly. I would refer in this connection to what I said in *Hoddinott v. Hoddinott* (6) ([1949] 2 K.B. 416), where there was no difference on the law, but only on the facts. Again, I do not regard the husband's obligation to pay £431 as being equivalent to a contribution by him of £431. It seems to me that when the parties, by their joint efforts, save money to buy a house which is intended as a continuing provision for them both, the proper presumption is that the beneficial interest belongs to them both jointly. The property may be bought in the name of the husband alone or in the name of the wife alone, but, nevertheless, if it is bought with money saved by their joint efforts and it is impossible fairly to distinguish between the efforts of one and the other, the beneficial interest should be presumed to belong to them both jointly. That is this case. I agree with my Lord that the proper presumption in regard to this house was that it was held jointly and the beneficial interest should be divided equally between them. The appeal should be allowed accordingly.

D **ROMER, L.J.:** I agree, and only add a word or two because this class of case is, I think, of very considerable importance to the people of this country. There has been a large number of these cases in recent years, and it may well be that there will be many others in future. I think the judgment of the county court judge is open to criticism only in that he approached the problem before him in rather too strict a way, and applied legal principles which, although perfectly right and accurate in a dispute as between strangers, require modification as between a husband and wife when the subject of dispute is the ownership of what was the matrimonial home. In effect, he held, as would certainly follow had this been a case as between strangers, that the wife's contribution to the building society's mortgage resulted in her being subrogated pro tanto to the society's rights. In other words, that by reducing the debt she took over to the extent of her contributions the security which the building society had. I do not think that is the result which can properly be reached in the light of the whole of the circumstances of this case.

E There are one or two points which must be borne in mind. The first point which fundamentally distinguishes this case from *Re Rogers' Question* (1) is that neither side in the present case, neither husband nor wife, specified or limited in any way or at any time their intended contribution to the home, whereas in *Rogers' case* (1) the wife apparently made it quite plain that her contribution was to be limited to £100. Secondly, the payment by the wife of the initial deposit of £29 seems to me to indicate a common intention that she was to have some kind of beneficial interest in the home and was not merely to be treated as a loan to the husband of that amount, and if the intention (or "belief" I suppose is a better word than "intention", because I do not suppose they formed an actual intention) was that she was to have a beneficial interest in the home, it is improbable in the extreme that her interest was to be in effect fixed as being that which £29 bore to the then value of the house. Further on this question of the £29 it is to be observed that when the husband had the property back after the mortgage had been paid off, he did not then

make (and, as far as I know, he never at any other time, earlier or later, made) any suggestion of paying this sum back or of giving his wife any security for it. Then, thirdly, why did the wife lay out this money, this £280, which she paid to the building society? It seems to me inconceivable that she paid it for the purpose of getting an investment, viz., getting part of the building society's mortgage. The obvious answer is that she made this contribution to the purchase of what was and what she hoped would continue to be the home of herself and her husband, just in the same way as she made her contribution to the furniture for the home. So much for the circumstances, apart from the actual contributions which she made, and on that it is enough to say that the wife contributed approximately two-thirds of the total money that was paid. The husband paid one-third, but also he assumed, which the wife was never subjected to, liability to the building society under the mortgage, and he remained under that liability for about ten years.

On those facts and figures and in the circumstances which I have mentioned it appears to me that justice is fully and amply done by giving effect to the views which my Lord and DENNING, L.J., have suggested, but I want to make quite plain what I think has already sufficiently emerged, that, if the respective contributions had been substantially different (e.g., if the facts had been similar in other respects, but the wife had contributed only £50, say, in addition to the deposit and the husband had paid off the rest, having been under this legal liability to pay off the mortgage), then it may be that the court would think that the best and most proper course would be to adopt the proportionate basis. However, on the findings of the contributions as they were and in view of the husband's liability to the society, I think that the division equally is the right solution. It seems to me that the only general principles which emerge from our decision are, first, that cases between husband and wife ought not to be governed by the same strict considerations, both at law and in equity, as are commonly applied to the ascertainment of the respective rights of strangers when each of them contributes to the purchase price of property, and, secondly, that the old-established doctrine that equity leans towards equality is peculiarly applicable to disputes of the character of that before us where the facts, as a whole, permit of its application. I agree with the order which has been proposed.

Appeal allowed.

Solicitors: *Mawby, Barrie & Letts*, agents for *Raymond A. Hipkins*, Southport (for the wife); *Hancock & Scott*, agents for *Bellis, Son & Co.*, Southport (for the husband).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Re DUNCAN GILMOUR AND CO., LTD.
THE COMPANY v. INMAN AND OTHERS.

[CHANCERY DIVISION (Wynn-Parry, J.), October 15, 1952.]

*Company—Winding-up—Rights of preference stockholders—Surplus assets—
Rights conferred by memorandum of association and special resolution—
Variation by articles.*

Clause 5 of the memorandum of association of a company, which was incorporated in 1891, provided: "The capital of the company is £125,000, divided into seven thousand five hundred preference shares and five thousand ordinary shares of £10 each. The holders of the said preference shares shall be entitled to a fixed cumulative preferential dividend at the rate of £6 per centum per annum on the amount for the time being paid up thereon, and to a preferential right in the distribution of the assets of the company in the event of a winding-up or otherwise. The company also takes power to increase its capital and to issue the whole or any of the shares in such increased capital, as ordinary, preference, or deferred shares, or with such other rights, privileges, or conditions attached thereto as the special resolution authorising the increase of capital may determine, subject to any special or fixed rights attaching to any of the existing shares issued prior to such increase of capital." By art. 45 of the company's articles new shares were to be issued "upon such terms and conditions, and with such rights and privileges annexed thereto, as by the special resolution creating the same shall be directed . . ." Article 160 provided: "If the company shall be wound up, and the surplus assets shall be more than sufficient to repay the whole of the paid-up capital, the excess shall be distributed among the members in proportion to the capital paid up or which ought to have been paid up on the shares held by them respectively at the commencement of the winding-up, and if the surplus assets shall be insufficient to repay the whole of the paid-up capital, such surplus assets shall be distributed so that as nearly as may be the losses shall be borne by the members in proportion to the capital paid up or which ought to have been paid up on the shares held by them respectively at the commencement of the winding-up. But this clause is to be without prejudice to the rights of the holders of cumulative preference shares or other shares issued upon special conditions". By a special resolution of the company passed in 1906 the capital of the company was increased "by the creation of twelve thousand second preference shares of £10 each, entitling the holders to a fixed cumulative preferential dividend at the rate of £6 per cent. per annum (free of income tax) on the amount for the time being paid up thereon, ranking after the fixed cumulative preferential dividend on the first preference shares, and carrying a preferential right in the distribution of the assets of the company in the event of a winding-up or otherwise over the remaining shares in the company other than and except the first preference shares . . ." The issued shares of the company were subsequently converted into stock. In the course of the preparation of a scheme of arrangement between the several classes of members, the question arose how the surplus assets of the company would be distributable in the event of its being put into liquidation.

HELD: (i) in construing the rights of the holders of preference shares in the assets of the company regard was to be had, first, to the company's memorandum, and the articles of association were to be referred to only to explain or to supplement the memorandum if it was ambiguous or silent on the point; on the true construction of cl. 5 of the memorandum the words "or otherwise" in the phrase "in the event of a winding-up or otherwise" must refer to the return of capital on a redemption thereof,

and the effect of those words was to indicate that the right purported to be conferred on the holders of the first preference shares (now the first preference stock) in the assets of the company was intended to be, and was, exhaustive; and, therefore, the court was not entitled to have regard to the company's articles, and the holders of the first preference stock had no right, through any distribution of assets, to receive more than the capital paid up or which ought to have been paid up on the first preference stock held by them respectively at the time.

Dicta of SIR GEORGE LOWNDES in *Angostura Bitters (Dr. J. G. B. Siegert & Sons), Ltd. v. Kerr* ([1933] A.C. 554) and of COTTON, L.J., in *Guinness v. Land Corpn. of Ireland* (1882) (22 Ch.D. 376), applied.

(ii) by cl. 5 of the memorandum and art. 45 of the articles the rights of the holders of the second preference shares (now the second preference stock) were contained in the special resolution of 1906 by which those shares were created, and, on the true construction of the resolution, it purported to confer exhaustive rights as to participation in profits and in assets, and so the court was not entitled to have regard to the company's articles in construing those rights and the holders of the second preference stock had no right, through any distribution of assets, to receive more than the capital paid up or which ought to have been paid up on the second preference stock held by them respectively at the time.

(iii) on its true construction, art. 160 was designed as an administrative provision to show how the surplus assets were to be distributed among the members, or classes of members, inter se; the word "rights" in the last sentence of the article referred to rights created outside the article, and the article, in itself, gave no right of priority in a distribution of surplus assets on a winding-up; therefore, assuming that the court was entitled to have regard to the article to ascertain the rights of the holders of the preference stock, the result would have been the same, and, in the event of a winding-up of the company, its surplus assets should be distributed among the holders of the ordinary stock in proportion to the capital paid up or which ought to have been paid up on the ordinary stock held by them respectively at the commencement of the winding-up.

AS TO RIGHTS OF PREFERENCE SHAREHOLDERS, see HALSBURY, 1949 Edn., Vol. 5, p. 156, para. 282; and FOR CASES, see DIGEST, Vol. 10, pp. 1002-1008, Nos. 6961-6989.

Cases referred to:

- (1) *Angostura Bitters (Dr. J. G. B. Siegert & Sons), Ltd. v. Kerr*, [1933] A.C. 550; 102 L.J.P.C. 161; 149 L.T. 313; Digest Supp.
- (2) *Harrison v. Mexican Ry. Co.*, (1875), L.R. 19 Eq. 358; 44 L.J.Ch. 403; 32 L.T. 82; 9 Digest 227, 1453.
- (3) *Re Wedgwood Coal & Iron Co., Anderson's Case*, (1877), 7 Ch.D. 75; 47 L.J.Ch. 273; 37 L.T. 560; 9 Digest 312, 1940.
- (4) *Guinness v. Land Corpn. of Ireland*, (1882), 22 Ch.D. 349; 52 L.J.Ch. 177; 47 L.T. 517; 9 Digest 84, 330.
- (5) *Re South Durham Brewery Co.*, (1885), 31 Ch.D. 261; 55 L.J.Ch. 179; 53 L.T. 928; 9 Digest 85, 337.

ADJOURNED SUMMONS to determine whether, on the true construction of the memorandum and articles of association of Duncan Gilmour and Co., Ltd., in the event of a winding-up of the company its surplus assets remaining after payment and discharge of all its debts and liabilities and the costs of the winding-up and the repayment of the capital of the first preference stock, the second preference stock and the ordinary stock, should be distributed (a) among the holders of the first preference stock, the second preference stock and the ordinary stock *pari passu* in proportion to the capital paid up or which ought to have been paid up on such stock held by them respectively at the commencement

of the winding-up, or (b) among the holders of the ordinary stock in proportion to the capital paid up or which ought to have been paid up on the ordinary stock held by them respectively at the commencement of the winding-up.

The company was a public company incorporated on Oct. 30, 1891, under the Companies Acts, 1862-1890, as a company limited by shares. The directors had recently had under consideration a proposed scheme of arrangement between the several classes of members which, inter alia, dealt with certain of the class rights and, in particular, the rights of the members to share in surplus assets in a winding-up. Doubts having arisen as to the position of the respective classes of members, this summons was taken out to obtain the directions of the court on the matter, on the ground that it was essential for these doubts to be resolved as a preliminary to any re-organisation, though there was no intention to wind-up the company.

K. W. Mackinnon for the company.

Harold Christie, Q.C., and *T. D. D. Divine* for a holder of first preference stock.

P. J. Sykes for a holder of second preference stock.

London, Q.C., and *G. W. H. Richardson* for a holder of ordinary stock.

WYNN-PARRY, J.: This summons raises a short question of construction of the memorandum and articles of association of Duncan Gilmour and Co., Ltd. The question is how the surplus assets of the company would be distributable in the event of its being put into liquidation. There is no intention of putting the company into liquidation, and the reason for bringing the question before the court is that there is a scheme in course of preparation and it is necessary, from the point of view of the interests of all concerned, that the rights of the various classes of shareholders inter se should be determined before the scheme takes its final form. There are three classes of shareholders concerned—the holders of the first preference stock, the holders of the second preference stock, and the holders of the ordinary stock (all the issued shares having been subsequently converted into stock). So far as the position of the holders of the first preference stock is concerned, I should say that apart from the original preference shares there were created subsequent preference shares ranking in all respects *pari passu* with the original preference shares, and I propose to treat all the preference shares which are now represented by the first preference stock on the same footing.

Clause 5 of the memorandum provides:

“The capital of the company is £125,000, divided into seven thousand five hundred preference shares and five thousand ordinary shares of £10 each. The holders of the said preference shares shall be entitled to a fixed cumulative preferential dividend at the rate of £6 per centum per annum on the amount for the time being paid up thereon, and to a preferential right in the distribution of the assets of the company in the event of a winding-up or otherwise. The company also takes power to increase its capital, and to issue the whole or any of the shares in such increased capital as ordinary, preference, or deferred shares, or with such other rights, privileges, or conditions attached thereto as the special resolution authorising the increase of capital may determine, subject to any special or fixed rights attaching to any of the existing shares issued prior to such increase of capital.”

A number of articles has been referred to, but, in my view, for the purpose of answering the question before me, I need refer only to art. 160 of the original articles of association (which is embodied, substantially in the same language, in art. 136 of the present articles, which were adopted by the company in 1941). Under the heading “Winding-up”, art. 160 reads:

“If the company shall be wound-up, and the surplus assets shall be more than sufficient to repay the whole of the paid-up capital, the excess shall be

distributed among the members in proportion to the capital paid up or which ought to have been paid up on the shares held by them respectively at the commencement of the winding-up, and if the surplus assets shall be insufficient to repay the whole of the paid-up capital, such surplus assets shall be distributed so that as nearly as may be the losses shall be borne by the members in proportion to the capital paid up or which ought to have been paid up on the shares held by them respectively at the commencement of the winding-up. But this clause is to be without prejudice to the rights of the holders of cumulative preference shares or other shares issued upon special conditions."

The first point for consideration is whether, in construing the rights of the holders of the first preference shares, I can go outside cl. 5 of the memorandum and refer to the language of art. 160 of the original articles, or whether I am confined to cl. 5 of the memorandum. In *BUCKLEY ON THE COMPANIES ACTS*, 12th ed. (1949), p. 25, there is a passage which, substantially, is reprinted from an earlier edition, edited by the learned author himself. That passage reads:

"But while the articles cannot (save as provided by the Acts) modify or alter the memorandum, yet, for purposes of construction upon points which the statute does not require to be contained in the memorandum as the dominant instrument, the memorandum and articles as contemporaneous documents are to be read together, and the articles may serve to explain that which is ambiguous in the memorandum, or to supplement it as to that upon which it is silent. Thus a power to mortgage future calls, or to issue preference shares, contained in the articles alone may be effectual."

That statement is, I think, borne out in *Angostura Bitters (Dr. J. G. B. Siebert & Sons), Ltd. v. Kerr* (1). Delivering the judgment of the Privy Council, *SIR GEORGE LOWNDES* said ([1933] A.C. 554):

"The learned chief justice thought it clear upon the terms of the memorandum that this fund was to be created for the benefit and security of the respondents, and that to accede to the contention of the appellants would be wholly destructive of this object. Under these circumstances he held it to be in accordance with a well established principle that the memorandum must prevail. Before their Lordships it has been argued that there is no such principle; and that, except in respect of such matters as must by statute be provided for by the memorandum, it is not to be regarded as the dominant document, but is to be read in conjunction with the articles: *Harrison v. Mexican Ry. Co.* (2); *Re Wedgwood Coal & Iron Co., Anderson's Case* (3); *Guinness v. Land Corp'n. of Ireland* (4); *Re South Durham Brewery Co.* (5). Their Lordships agree that in such cases the two documents must be read together at all events so far as may be necessary to explain any ambiguity appearing in the terms of the memorandum, or to supplement it upon any matter as to which it is silent."

In *Guinness v. Land Corp'n. of Ireland* (4), *COTTON, L.J.*, said (22 Ch.D. 376):

"Now the articles cannot in my opinion alter or vary that which would be the result of the memorandum standing alone."

Those passages show the limited area in which it is proper to refer to the articles of association, and, in my judgment, it emerges from those passages that the first thing I have to do is to endeavour to construe cl. 5 of the memorandum standing alone, and to say whether, on that construction, there is any material matter as to which, as regards the rights of the preference shareholders, that clause is silent. So far as the rights to capital are concerned, I will repeat them:

"... to a preferential right in the distribution of the assets of the company in the event of a winding-up or otherwise."

It is true that the sentence does not go on to say "but to no other rights to share in profits or assets". On the other hand, the use of the words "or otherwise" is, undoubtedly, significant, as they must refer to the return of capital on a redemption thereof, and it seems to me that the effect of those words is to indicate beyond any reasonable doubt that the right purported to be conferred on the holders of the preference shares in the assets of the company was intended to be, and is, indeed, exhaustive.

- A That would be sufficient to deal with the position of the first preference shares, now preference stock, but, in case I should be wrong in the conclusion to which I have come, I will refer to art. 160 of the original articles, assuming for this purpose that I am entitled so to do. There has been considerable debate as to the true construction of this article. In my judgment, it is designed as an administrative provision, to show how the funds to which reference is made in the article are to be distributed among the members, or classes of members, inter se. The fund which is first dealt with is the surplus assets which exist if there should be "more than sufficient to repay the whole of the paid-up capital", in which case the excess is to be

- C "... distributed among the members in proportion to the capital paid up or which ought to have been paid up on the shares held by them respectively at the commencement of the winding-up . . ."

The second contingency which is envisaged is that there is an insufficiency of such surplus assets. In that case the article says that it is to be

- D "... distributed so that as nearly as may be the losses shall be borne by the members in proportion to the capital paid up or which ought to have been paid up on the shares held by them respectively at the commencement of the winding-up".

- E As I understand that language, that must mean that the body of members who will have to be taken into contemplation, when applying the second part of the article, will be more limited as regards numbers, according to the degree of insufficiency. As an example, supposing there were insufficient surplus assets to repay the whole of the first preference capital, then, as I read the article, only those members who hold first preference stock would come into the picture. But the article still, to my mind, remains a purely administrative article, and the emphasis is to be placed on the phrase which is twice repeated in each branch of the article:

- F "... in proportion to the capital paid up or which ought to have been paid up on the shares held by them respectively at the commencement of the winding-up".

The matter, however, does not end there. The last sentence is important:

- G "But this clause is to be without prejudice to the rights of the holders of cumulative preference shares or other shares issued upon special conditions."

- H I agree with counsel for the ordinary shareholder that the word "rights" there refers to rights created outside the article, and, reading art. 160 as a whole, it is not, in my view, an article in which rights are to be said, as it is said of the right attached to the preference shares, to have a priority in a distribution in the winding-up. Therefore, it appears to me that, even if I were entitled to look at this article—which, for the reasons which I have already given, in my judgment I am not entitled to do—the result, in my view, would have been the same. Therefore, I come to the conclusion that, so far as the holders of the first preference stock are concerned, they have no right, through any distribution of assets, to receive more than the capital paid up, or which ought to have been paid up, on their share capital for the time being.

That leaves the question of the rights of the holders of the second preference stock. That preference stock is the result of the conversion of second preference shares, which were created by a special resolution of the company passed on June 25, 1906, and confirmed on July 19, 1906. By the resolution the capital of the company was increased

“ . . . by the creation of twelve thousand second preference shares of £10 each, entitling the holders to a fixed cumulative preferential dividend at the rate of £6 per cent. per annum (free of income tax) on the amount for the time being paid up thereon, ranking after the fixed cumulative preferential dividend on the first preference shares, and carrying a preferential right in the distribution of the assets of the company in the event of a winding-up or otherwise over the remaining shares in the company other than and except the first preference shares, and carrying the right to one vote for every twenty second preference shares.”

Article 45 of the original articles of association, which were then in force, reads:

“ The new shares shall be issued upon such terms and conditions, and with such rights and privileges annexed thereto, as by the special resolution creating the same shall be directed . . . ”

Therefore, by that article attention is directed immediately to the terms of the resolution by which the second preference shares were created, and my duty is then to construe that resolution and see whether, on the face of it, it purports to confer exhaustive rights both as to participation in profits and participation in assets. My view, having regard to the modern authorities, is that this resolution is exhaustive, and there is no ground for holding that those who are interested as holders of second preference shares have shown that there is any context to lead one to the conclusion that the rights conferred thereby are not exhaustive. Again, on the assumption that that is not the correct construction and that one should look at art. 160 of the articles of association, I cannot see that there is anything there to help the holders of the second preference shares, because I should feel bound to place the same construction on that article in respect of them as in respect of the holders of the first preference shares. It is purely a matter of construction, and I have come to the conclusion that, in answer to the question in the summons, I should make a declaration that, in the event of a winding-up of the company, its surplus assets remaining after payment and discharge of all its debts and liabilities, the costs of the winding-up, and the repayment of the capital of the first preference stock, the second preference stock and the ordinary stock, should be distributed among the holders of the ordinary stock in proportion to the capital paid up or which ought to have been paid up on the ordinary stock held by them respectively at the commencement of the winding-up.

Order accordingly.

Solicitors: *Allen & Overy*, agents for *Rodgers & Co.*, Sheffield (for the company); *Hatchett Jones & Co.* (for the holder of first preference stock); *Bell, Brodrick & Gray* (for the holder of second preference stock); *Parker, Garrett & Co.* (for the ordinary stockholder).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Re K (an infant). ROGERS AND ANOTHER v. KUZMICZ.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.JJ.), October 6, 7, November 3, 1952.]

Adoption—Dispensing with consent to order—Consent . . . unreasonably withheld—Adoption conducing to child's welfare—Child having been placed in care of foster-parents—Consent originally given, but later withdrawn—Adoption Act, 1950 (c. 26), s. 3 (1) (c).

Adoption—Guardian ad litem—Infant parent—County Court Rules, 1936, Ord. 5, r. 13, r. 14—Adoption of Children (County Court) Rules, 1949 (S.I., 1949, No. 2396), r. 1, r. 9.

The mother of an infant left her husband, the father of the infant, three weeks after the infant was born, and went to live with her parents. Later, she obtained an order of justices giving her the custody of the infant and directing the father to pay 15s. a week for its maintenance. The mother, wishing to go out to work, on the advice of the children's officer of the local authority, placed the infant in the care of foster-parents who received the 15s. from the father and a further 5s. a week from the mother who visited the infant from time to time. After about a year the mother began to live with a married man, intending, if and when it became possible, to marry him. The foster-parents approached the mother with a view to adopting the infant, and on Mar. 1, 1952, the mother consented in writing to the adoption, but on Apr. 28, 1952, she withdrew her consent. On an application by the foster-parents to the county court for an adoption order in respect of the infant, the county court judge held that in the circumstances the mother's consent had been unreasonably withheld within the meaning of s. 3 (1) (c) of the Adoption Act, 1950, and he made an interim order in favour of the applicants. At the date of the hearing of the application the mother was under twenty-one.

HELD: the withholding by a parent of consent to an adoption could only properly be held to be unreasonable in exceptional cases; in determining in the present case whether the mother's consent to the order was unreasonably withheld within the meaning of s. 3 (1) (c) the facts that the order, if made, would conduce to the welfare of the child, that the mother had seen fit to place the infant in the care of foster-parents (without in any way abandoning it), and that she had previously consented to the adoption were not evidence that her consent was unreasonably withheld, and, therefore, the county court judge had misdirected himself and his decision was wrong.

Hitchcock v. W.B. ([1952] 2 All E.R. 119), approved.

Per curiam: Under the Adoption of Children (County Court) Rules, 1949, rr. 1 and 9, read in conjunction with the County Court Rules, 1936, Ord. 5, rr. 13 and 14, it would seem that a guardian ad litem of an infant parent who is respondent in adoption proceedings ought to be appointed on its appearing on the face of or in the course of the proceeding that he or she is an infant. In the ordinary case where all that is necessary is that the judge should be satisfied of the parent's consent, no useful purpose would be served by the appointment of a guardian ad litem, but, where an infant parent opposes and an order is sought against the parent's will on the ground that his or her consent is unreasonably withheld, the question whether a guardian ad litem should be appointed is one in which the position should be made clear in the rules.

FOR THE ADOPTION ACT, 1950, s. 3 (1) (c), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 470.

Cases referred to:

- (1) *Re Hollyman*, [1945] 1 All E.R. 290; 172 L.T. 200; 109 J.P. 95; 2nd Digest Supp.
- (2) *Harris v. Hawkins*, [1947] 1 All E.R. 312; 111 J.P. 160; *sub nom. H. v. H.*, [1947] K.B. 463; [1948] L.J.R. 349; 176 L.T. 281; 2nd Digest Supp.
- (3) *Allen v. Allen*, [1948] 2 All E.R. 413; 112 J.P. 355; 2nd Digest Supp.
- (4) *Willoughby v. Willoughby*, [1951] P. 184; 2nd Digest Supp.
- (5) *Hitchcock v. W.B.*, [1952] 2 All E.R. 119; [1952] 2 Q.B. 561; 116 J.P. 401.
- (6) *Re A.B.*, [1949] 1 All E.R. 709; [1949] L.J.R. 1032; 113 J.P. 353; *sub. nom. Re D.X.*, [1949] Ch. 320; 2nd Digest Supp.

APPEAL by the respondent from an interim order under s. 6 (1) of the Adoption Act, 1950, made by His Honour JUDGE WILLES at Derby and Long Eaton County Court on May 29, 1952, on an application for an adoption order authorising the applicants to adopt the respondent's infant. The county court judge held that the respondent's consent to the adoption was unreasonably withheld, within the meaning of s. 3 (1) (c) of the Act of 1950.

Maude, Q.C., and *Gwynedd Lewis* for the respondent mother.

Carter, Q.C., and *Bush* for the applicants.

Harold Lightman for the Derby Education Committee as guardian ad litem of the infant.

Cur. adv. vult.

Nov. 3. JENKINS, L.J., read the following judgment of the court. This is an appeal by Mrs. Eva Florence Kuzmicz, the mother of a male infant born on Mar. 26, 1950, and, therefore, now a little over two and a half years old, from an interim order under s. 6 (1) of the Adoption Act, 1950, made by His Honour JUDGE WILLES in the Derby and Long Eaton County Court, and dated May 29, 1952, on an application under the Act by Mr. and Mrs. Rogers, for an adoption order authorising them to adopt the infant. The mother on Mar. 1, 1952, duly signed before a justice of the peace the prescribed statutory form of consent to the proposed adoption, but she withdrew such consent on Apr. 28, 1952, and was represented at the hearing by a solicitor (Miss Booth) who opposed the application on her behalf. For the reasons stated in his careful reserved judgment, which appears to have been delivered on June 14, 1952, the learned judge, nevertheless, held that in the circumstances of the case an adoption order could and should be made without the mother's consent, inasmuch as he was satisfied that her consent was unreasonably withheld within the meaning of the Act, and, accordingly, ought, in the exercise of his discretion, to dispense with such consent, the case being in all other respects a proper one for such order. The order actually made was, as mentioned above, not a full adoption order, but an interim order under s. 6 (1) of the Act, and its effect was merely to give the custody of the infant to the applicants for a probationary period of three months. As may be seen from his judgment, the learned judge made his order in this limited form in deference to the possibility, or probability, of the present appeal, and not on account of any doubt as to the suitability of the proposed adopters. That being so, and having regard to the terms of s. 6 (2) of the Act, the considerations bearing on the result of this appeal would seem to be precisely the same as they would have been if the order under appeal had been a full adoption order.

The appeal raises, in effect, two questions, the second of which need, strictly speaking, only be determined if the learned judge is held to have been right on the first. The two questions are: (i) Whether, having regard to the relevant provisions of the Act of 1950, the facts found by the learned judge afforded any evidence capable in law of satisfying him that the mother's consent was

unreasonably withheld, so as to empower him, if so satisfied, to dispense with such consent in the exercise of his discretion; (ii) if so, whether the proceedings before the learned judge were defective owing to the circumstance that the mother, who was born on Aug. 5, 1931, and thus throughout those proceedings was herself an infant, was not provided with a guardian ad litem?

Before going further into the facts, we may conveniently refer to some of the provisions of the Act of 1950. Section 1 provides:

- A “(1) Subject to the provisions of this Act, the court may, upon an application made in the prescribed manner by a person domiciled in England or Scotland, make an order (in this Act referred to as an adoption order) authorising the applicant to adopt an infant. (2) An adoption order may be made on the application of two spouses authorising them jointly to adopt an infant.”

B Section 2 provides:

- C “(4) Subject to the provisions of s. 3 of this Act, an adoption order shall not be made—(a) in any case, except with the consent of every person or body who is a parent or guardian of the infant or who is liable by virtue of any order or agreement to contribute to the maintenance of the infant; (b) on the application of one of two spouses, except with the consent of the other spouse . . . (6) An adoption order shall not be made in respect of any infant unless—(a) the infant has been continuously in the care and possession of the applicant for at least three consecutive months immediately preceding the date of the order . . .”

D Section 3 provides:

- E “(1) The court may dispense with any consent required by s. 2 (4) (a) of this Act if it is satisfied—(a) in the case of a parent or guardian of the infant, that he has abandoned, neglected or persistently ill-treated the infant; (b) in the case of a person liable by virtue of an order or agreement to contribute to the maintenance of the infant, that he has persistently neglected or refused so to contribute; (c) in any case, that the person whose consent is required cannot be found or is incapable of giving his consent or that his consent is unreasonably withheld . . . (3) The consent of any person to the making of an adoption order in pursuance of an application (not being the consent of the infant) may be given (either unconditionally or subject to conditions with respect to the religious persuasion in which the infant is to be brought up) without knowing the identity of the applicant for the order; and where consent so given by any person is subsequently withdrawn on the ground only that he does not know the identity of the applicant, his consent shall be deemed for the purposes of this section to be unreasonably withheld. (4) While an application for an adoption order in respect of an infant is pending in any court, any parent or guardian of the infant who has signified his consent to the making of an adoption order in pursuance of the application shall not be entitled, except with the leave of the court, to remove the infant from the care and possession of the applicant; and in considering whether to grant or refuse such leave the court shall have regard to the welfare of the infant.”

H Section 4 provides:

- “ (1) Where any person whose consent to the making of an adoption order is required by s. 2 (4) (a) of this Act does not attend in the proceedings for the purpose of giving it, then, subject to the provisions of sub-s. (3) of this section, a document signifying his consent to the making of such an order shall, if the person in whose favour the order is to be made is named in the document or (where the identity of that person is not known to the consenting party) is distinguished therein in the prescribed manner, be

admissible as evidence of that consent, whether the document is executed before or after the commencement of the proceedings. (2) Where any such document is attested by a justice of the peace (or, if executed outside the United Kingdom, by a person of any such class as may be prescribed), the document shall be admissible as aforesaid without further proof of the signature of the person by whom it is executed; and for the purposes of this sub-section, a document purporting to be attested as aforesaid shall be deemed to be so attested, and to be executed and attested on the date and at the place specified therein, unless the contrary is proved. (3) A document signifying the consent of the mother of an infant shall not be admissible under this section unless—(a) the infant is at least six weeks old on the date of the execution of the document; and (b) the document is attested on that date by a justice of the peace or, as the case may be, by a person of a class prescribed for the purposes of sub-s. (2) of this section.”

A

B

Section 5 (1) provides:

“The court before making an adoption order shall be satisfied—(a) that every person whose consent is necessary under this Act, and whose consent is not dispensed with, has consented to and understands the nature and effect of the adoption order for which application is made, and in particular in the case of any parent understands that the effect of the adoption order will be permanently to deprive him or her of his or her parental rights; (b) that the order if made will be for the welfare of the infant, due consideration being for this purpose given to the wishes of the infant, having regard to the age and understanding of the infant . . .”

C

D

Section 6 provides:

“(1) Subject to the provisions of this section, the court may, upon any application for an adoption order, postpone the determination of the application and make an interim order giving the custody of the infant to the applicant for a period not exceeding two years by way of a probationary period upon such terms as regards provision for the maintenance and education and supervision of the welfare of the infant and otherwise as the court may think fit. (2) All such consents as are required to an adoption order shall be necessary to an interim order but subject to a like power on the part of the court to dispense with any such consent. (3) An interim order shall not be made in any case where the making of an adoption order would be unlawful by virtue of s. 2 (6) of this Act. (4) An interim order shall not be deemed to be an adoption order within the meaning of this Act.”

E

F

Section 10 (1) provides:

“Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents or guardians of the infant in relation to the future custody, maintenance and education of the infant, including all rights to appoint a guardian and (in England) to consent or give notice of dissent to marriage, shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as if the infant were a child born to the adopter in lawful wedlock; and in respect of the matters aforesaid (and, in Scotland, in respect of the liability of a child to maintain his parents) the infant shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock.”

G

H

The facts on which the learned judge's decision was based will be best appreciated by reading at length from his considered judgment his own narrative of the facts as found by him, which is as follows:

“On Oct. 29, 1949, Mrs. Kuzmicz (Eva Florence Fewkes) an English

girl, whose parents live in Derby, married her husband, Mikolaj Kuzmiec, a Pole resident and working in Derby. At the date of this marriage, and, perhaps, explaining it, the wife was pregnant. Her child, Andre, the subject of this petition, was born on Mar. 26, 1950. He was just over two years of age when I heard the petition. A healthy, happy, and, for his age, very intelligent, baby, quite willing to play with people whom he knew, well able to distinguish and be distrustful or shy in the presence of strangers. Three weeks after the child was born, as she said in consequence of his attitude towards and treatment of her, Mrs. Kuzmiec left her husband. This misfortune, and its cause, resulted in a finding by the Mansfield justices that the mother was entitled to the custody of the child and the father liable to pay the sum of 15s. a week for its maintenance. The husband and wife (who had then been married for less than a year) seemed to have been temporarily reconciled because a second order to the same effect was made on the wife's application by the Derby justices on Nov. 7, 1950. When the mother was living with her parents, and because, though her baby was only a few months old, she wanted or had to go out to work, she approached Miss Kirk, the excellent and experienced children's officer for the borough of Derby. Though adoption may have been mentioned, at this time Miss Kirk, having regard to the mother's background and matrimonial history, considered that the proper and most helpful course to adopt was to get the child into the care of suitable and trustworthy foster-parents in the hope and belief that in the near future the recently married parties would become reconciled and the mother re-take and care for the child. Accordingly, Mrs. Kuzmiec was introduced by Miss Kirk to the present applicants, Mr. and Mrs. Rogers. Mr. Rogers is, I think, permanently employed in the office of the local housing authority. He and his wife were married in 1937. They have one child a girl, now thirteen years of age, but, to their mutual disappointment and especially to that of the adopting father, they have no son. Miss Kirk introduced them to Mrs. Kuzmiec because she had on other occasions invoked and obtained their temporary help as foster-parents in similar cases. As the result of a discussion with this baby's parents Mr. and Mrs. Rogers, who would not contemplate adopting the child, partly for financial reasons, but much more for the reason that the parents were hoped and expected to become reconciled, agreed to take Andre (five and a half months old) into their household and to care and provide for him, the father paying them 15s. a week to which the mother added from her own earnings a further sum of 5s. a week, making the total contribution £1. So matters continued for about a year. The mother called from time to time and saw her baby at intervals of about three weeks or less. I think these occasions were probably when she brought the money for his maintenance. She did not take the child out. It remained, and has always remained, in its home regarding and treating the Rogers as its parents. About August or September, 1951, Mrs. Kuzmiec commenced an association (which she described to me as 'courting') with another Pole, a married man, who was, I think, separated from his wife. I do not think that Mrs. Kuzmiec intended or wished to disguise or deny the real nature of this association. She frankly admitted that since last January she has lived as man and wife (I think in rooms) with this married Pole. She hopes to divorce or be divorced by her husband, and that the Pole she lives with will divorce or be divorced by his wife, and that, when these matrimonial re-adjustments have been duly effected, she will marry the Pole with whom she is now living. On Mar. 1, 1952, before a justice of the peace and in full compliance with all the relevant safeguards, Mrs. Kuzmiec signed her consent to the adoption. She told me that the magistrate had told

her that her consent so given could be withdrawn. The form itself indicates this in a reference to the use that may be made of the document. I am quite satisfied that she fully understood the consequences of an adoption order and that her consent to such consequences was required, and that with such knowledge she gave such consent, but I do not think it would be right or just to hold that, in doing so, she was not influenced by the knowledge she had or information she was given to the effect that her signed consent could be withdrawn before the hearing of the petition. Though I discussed the matter with Miss Booth, it was not suggested, nor could be suggested, that Mrs. Kuzmiec's signed consent was the result of pressure or undue influence by any person interested in obtaining it. I think the truth of what happened is this. After the child had been for over a year in the care of the Rogers it had got to love them and treat them as its parents and they had become very attached to the child. The position of the mother made it certain that reconciliation with her husband was impossible. Mrs. Rogers approached Mrs. Kuzmiec and discussed adoption, pointing out that the development and existing attitude of the child and the mother's then matrimonial position made it necessary in the interests of the child and of everybody concerned to consider and decide the question of its adoption. Mrs. Kuzmiec, no doubt, was in a difficulty in the sense that she could not re-take the child, but I think her decision to consent to its adoption was her free judgment of her child's interests. After she had signed the formal consent she tells me she had begun to have misgivings, and for that reason consulted her own father who told her that he thought her decision was right. She did not withdraw her consent to the adoption until she had consulted her solicitor, Miss Booth, who wrote to that effect on Apr. 28, 1952. The father, who, so far as I know, has taken no interest in the child since its birth, attended the hearing to support the petition, having given his formal written consent to the proposed adoption. No doubt, his attitude is not uninfluenced by the fact that an adoption order when made will relieve him of his liability to pay 15s. a week for the child's maintenance."

Earlier in his judgment, the learned judge discusses at length the effect, in relation to the parent of an infant, of the provision in s. 3 (1) (c) of the Act, under which the court may dispense with any consent required by s. 2 (4) (a) if satisfied "in any case" that the consent of the person whose consent is required "is unreasonably withheld". He refers to *Re Hollyman* (1) where the Court of Appeal held in a case under the Adoption of Children Act, 1926, that a parent's written consent to an adoption could be withdrawn at any time before the adoption order was actually made. He also refers to *Harris v. Hawkins* (2) where a King's Bench Divisional Court held that the general provision in s. 2 (3) of the Adoption of Children Act, 1926, enabling the court to dispense with the consent of any person "whose consent ought, in the opinion of the court and in all the circumstances of the case, to be dispensed with" extended to dispensing with the consent of a parent in a proper case, and, in effect, holds (as is clearly right) that the corresponding provision in s. 3 (1) (c) of the Act of 1950, notwithstanding its different language, has not altered the law in this respect. He expresses his view of the intention of s. 3 (1) (c) in these terms:

"I think the proviso in its present form was regarded [by the legislature] as creating and conferring on the court a judicial discretion to dispense with a consent otherwise required, in any case in which such consent was unreasonably withheld by the person withholding it, having regard to the welfare of the child, the subject of the adoption, and whose wishes the court is required to consider by the express terms of [s. 5] in which the duties and functions of the court are prescribed."

A little later in his preliminary discussion he amplifies this statement of the intention of s. 3 (1) (c) by the following definition of his duty under that provision:

A

"I am quite satisfied that in the discharge of my duty, and in the exercise of my discretion to dispense with the consent of a parent whose required consent to an adoption is withheld, I have to decide the question whether such consent is or is not unreasonably withheld in the light of the circumstances in which the adoption was applied for and the consent withheld, having regard to the interests and welfare and also (in a case where this is possible) to the wishes of the child whose adoption and whose future life hangs in the balance."

B

He then proceeds to discuss the circumstances in which the court could properly interfere with parental rights by making an adoption order against the will of the parent, and draws a distinction between cases in which the objecting parent "has got the child in her care and custody" and cases in which such care and custody is in other hands. Regarding cases of the latter class, he says this:

C

"I do not think the power to dictate the future or welfare of a child not in the actual possession of the parent, but which has from a very early age been entrusted by her to the loving care of foster-parents whom the child has learnt to love and treat as its father and mother, is uncontrollable in the sense that such a parent can withhold her consent to the adoption of her child by withdrawing a consent previously given in accordance with all the prescribed safeguards, whatever view the court may take of the welfare of the child whose adoption is in question."

D

He draws a further distinction between cases in which consent has been consistently refused by a parent from first to last and cases in which consent has been given, but later withdrawn. With regard to this distinction he says:

E

"In my view, though such a decision [i.e., to dispense with an objecting parent's consent] would obviously be a grave decision requiring exceptional justification, it is not legally impossible for the court to dispense with the consent required from a party, not falling within any of the above categories, who has always refused to give such consent. Be this as it may, and though all of these cases are necessarily serious questions for a court exercising discretionary powers, it is a different matter when the consent which the court is asked to dispense with has been given by a mother who afterwards withholds it in the exercise of the right judicially established by the Court of Appeal in 1945 in *Re Hollyman* (1)."

F

He then proceeds to state his findings of fact in the passage already quoted at length, and continues:

G

"In the light of these facts, as I understand the Adoption Act, 1950, it is my duty, treating the withdrawal of the mother's consent previously given as a withholding of such consent, to decide whether such consent is unreasonably withheld, having regard to the question whether the order, if made, would be for the benefit of the child."

H

Finally, the learned judge discusses the question of the infant's welfare, with particular reference to the fact that the infant had a settled home with Mr. and Mrs. Rogers whom he had come to regard as his parents, and of whose suitability as adoptive parents the learned judge had clearly formed a most favourable impression, and reaches the conclusion that an adoption order ought to be made in favour of Mr. and Mrs. Rogers, but (as already mentioned) confines himself for the time being to the making of an interim order only, in view of the possibility or probability of the present appeal. We should add that the learned judge, on the analogy of *Allen v. Allen* (3) and *Willoughby*

v. *Willoughby* (4), decisions concerning the custody of children (with respect to which the welfare of the infant is, under s. 1 of the Guardianship of Infants Act, 1925, the first and paramount consideration) held, in effect, that, inasmuch as those cases showed that comparable circumstances were no ground for holding that it would be contrary to the infant's welfare to allow a mother the custody of her child, he ought in arriving at his decision in the present case to disregard the irregular association formed by the mother with another man since parting with her husband. We agree with the learned judge that this matter should for the present purpose be disregarded, not, however, on account of the analogy drawn from custody cases, which we think misleading, but simply because this matter does not in itself have any bearing on the question whether the mother's consent to the adoption was or was not unreasonably withheld.

We may now return to the first question in the appeal, that is to say, whether, having regard to the relevant provisions of the Act of 1950, the facts as found by the learned judge afforded any evidence capable in law of satisfying him that the mother's consent was unreasonably withheld. In our opinion, this question should be answered in the negative. In our view, the learned judge misdirected himself and proceeded on wrong principles in holding that the case was one in which he could, and should in the exercise of his discretion, dispense with the mother's consent on that ground.

It is to be observed, first, that, as a general rule, the consent of the persons mentioned in s. 2 (4) (a) of the Act, and, in particular, of any parent of the infant, is indispensably necessary to the making of an adoption order under the Act. It is to be observed, secondly, that s. 3 (1), in conferring power to dispense with such consent, enables this to be done in certain specific cases, including the case of a parent if the court is satisfied that he has abandoned, neglected or persistently ill-treated the infant, and concludes (in para. (c)) with a general provision enabling consent to be dispensed with in any case if the court is satisfied, inter alia, that it is unreasonably withheld. It is to be observed, thirdly, that under s. 10 (1) of the Act the effect of an adoption order, put shortly, is to extinguish all the rights, duties, obligations and liabilities of the parent in regard to the infant, to vest those rights, duties, obligations and liabilities in the adopter, and to convert the infant into the legal equivalent of a child born to the adopter in lawful wedlock, to whom the natural parent becomes in the eye of the law a mere stranger.

It is, no doubt, true that s. 3 (1) (c) extends to the case of a parent and gives the court jurisdiction to dispense with the consent even of a parent who has not been guilty of any such misconduct or dereliction of duty towards the infant as is mentioned in s. 3 (1) (a), if satisfied that such parent's consent is unreasonably withheld. But we ask ourselves in what circumstances is a parent, not guilty of any such misconduct or dereliction of duty, to be held to have acted unreasonably in withholding his or her consent to an order the effect of which, if made, will be to extinguish once and for all his or her parental rights, duties and obligations in regard to the infant, and, indeed, the very relationship between them of parent and child, and to make the infant thenceforth the child of the adopters in substitution for, and to the utter exclusion of, its natural parents? Prima facie it would seem to me eminently reasonable for any parent to withhold his or her consent to an order thus completely and irrevocably destroying the parental relationship. One can imagine cases short of such misconduct or dereliction of duty as is mentioned in s. 3 (1) (a) in which a parent's withholding of consent to an adoption might properly be held to be unreasonable, but such cases must, in our view, be exceptional. It is unnecessary, undesirable and, indeed, impracticable to attempt a definition covering all possible cases of that kind. Each case must depend on its own facts and circumstances. But it is, at all events, possible to specify certain facts and

circumstances which plainly cannot suffice to make a parent's withholding of consent unreasonable.

A Pursuing this negative course and relating it to the facts and circumstances of the present case, we would say, first, that the withholding of a parent's consent to an adoption order cannot be held unreasonable merely because the order, if made, would conduce to the welfare of the child. Otherwise a parent in poor circumstances, but guilty of no misconduct or dereliction of duty towards his child, could be compelled against his will to submit to an adoption order being made in respect of that child in favour of any adopters who by reason of more affluent circumstances could make better provision for the child than he could ever hope to do.

B Secondly, we would say that such withholding of a parent's consent cannot be held unreasonable merely because the parent has, in circumstances such as those of the present case, placed the child in the care of foster-parents, without in any sense abandoning it, but on the contrary contributing towards its support and visiting it from time to time. Otherwise the remarkable consequence would ensue that foster-parents entrusted for reward with the care of a child by a parent not for the time being able to provide it with a suitable home could in due course confront the parent with an application to adopt the child which C the parent would be unable to oppose. We confess we do not appreciate the learned judge's reasoning on this aspect of the case. The mother, separated from her husband, found it necessary or desirable to go out to work, and, on the advice of the local children's officer, placed the child in the care of the applicants as "suitable and trustworthy foster-parents", visiting the child D at intervals of three weeks or less and contributing the weekly sum of £1 consisting of 15s. payable by her husband under the justices' order and 5s. added by herself. We wholly fail to see why this arrangement, continued though it was for a matter of two years, should make it unreasonable for the mother to withhold her consent to the adoption of the child by those same foster-parents. No doubt, the child was settled and happy with them, and his removal E might cause him temporary unhappiness. But that, so far as we can see, has no bearing whatever on the question whether the mother's withholding of consent to the adoption was or was not unreasonable. To treat it as relevant to that question, in our view, is to confound adoption with custody. If custody was in question, the fact that the child had a settled home with the foster-parents would, no doubt, be a consideration in favour of leaving him with them, F but, even so, it would in itself hardly outweigh the countervailing consideration that the best place for a young child is ordinarily with its mother. Be that as it may, the question here is not of custody but of adoption, which is an entirely different matter. In this connection we would refer to s. 2 (6) (a) of the Act, which prohibits the making of an adoption order unless the infant has been G immediately preceding the date of the order. That provision seems to us to be wholly inconsistent with the view that a parent's consent can be regarded as unreasonably withheld merely because the care of the infant has been in other hands for a substantial period.

H We would say, thirdly, that the withholding of a parent's consent to an adoption order cannot be held unreasonable merely because a documentary consent under s. 4 (1) of the Act has been given by the parent and subsequently withdrawn. It should be noted that s. 4 (1) only provides that the document is to be admissible evidence of the consent if the person concerned does not attend in the proceedings for the purpose of giving it. There is no suggestion that the document is to be conclusive evidence, still less that once given it cannot be withdrawn. We think the decision in *Re Hollyman* (1) to the effect that a parent's written consent to an adoption under the Adoption of Children Act, 1926, could be withdrawn at any time before the actual making of the order

is no less applicable to the Act of 1950. The possibility of a consent once given being subsequently withdrawn is, indeed, recognised in the Act of 1950 itself, for s. 3 (3), which enables the consent of any person to be given to an adoption order without knowing the identity of the applicant for the order, provides that

“ . . . where consent so given by any person is subsequently withdrawn on the ground only that he does not know the identity of the applicant, his consent shall be deemed for the purposes of this section to be unreasonably withheld.”

If in circumstances such as those of the present case a documentary consent given under s. 4 (1) and afterwards withdrawn were to be held against the parent who gave it and made a ground for regarding his or her subsequent withholding of consent as unreasonable, the result would be tantamount to making the documentary consent irrevocable, which it plainly is not intended to be by the Act, and which it is plainly stated not to be in the prescribed form, set out in the Adoption of Children (County Court) Rules, 1949 (S.I., 1949, No. 2396), sched. I, which contains the words:

“ I understand that, when the application for an adoption order in respect of [the infant] is heard by the judge, this document may be used as evidence of my consent to the making of the order unless I have notified the court that I no longer consent.”

That extract from the prescribed form strongly suggests that, in the event of notification that the consenting party no longer consents, the document is not to be used as evidence at all. If it can be so used, it can only be evidence of the fact that the person concerned, who at the time of the hearing is withholding consent, did at the date of signing the document consent to the proposed adoption, and has subsequently changed his or her mind. But why should a parent not change his or her mind on a vital question of this sort? The question for the judge at the hearing surely is whether in the circumstances as they then stand the parent's withholding of consent can properly be considered as unreasonable. To that question the fact that he or she on some earlier date signed a documentary consent since withdrawn seems to us to be wholly irrelevant. The mere fact that the previous consent was given by no means argues that it could not have been reasonably withheld, and if it could have been reasonably withheld it must be capable of being reasonably withdrawn. Our view on this aspect of the case is fortified by the special provision in s. 3 (3), to which we have already referred. In the special case dealt with by that provision of a consent to an order for adoption by an applicant of unknown identity, if the person giving such consent subsequently withdraws it on the ground only that he does not know the identity of the applicant, his consent is to be deemed to be unreasonably withheld. The special character of this provision seems to us to afford a strong indication, if indication be needed, that in cases not covered by it a person is not to be regarded as unreasonably withholding consent merely because he or she has previously given a consent which has been withdrawn prior to or at the hearing.

We have now dealt with the three grounds on which we take the learned judge's decision to have been based, and we find ourselves unable to regard them either individually or in combination as grounds capable in law of satisfying him that the mother's consent was in this case unreasonably withheld. This court has had the advantage, denied to the learned judge, of being referred to the case in the Queen's Bench Divisional Court of *Hitchcock v. W.B.* (5), which was decided only two days before the present case was heard by the learned judge and was probably not then available in any report. That decision, both in its result and in the reasoning on which it is based, accords with the reasons and conclusion above expressed, and we find ourselves in

complete agreement with it. It follows that, in our view, the first of the two questions posed above should be answered in the negative, and this appeal should, accordingly, be allowed.

A That being so, the second question, concerning the effect on the validity of the proceedings of the infancy of the mother herself and the omission to provide her with a guardian ad litem, need not strictly be answered, but, as it is a question of not uncommon occurrence, we may, perhaps, usefully make some reference to it. The appointment of a guardian ad litem of the infant proposed to be adopted is provided for in s. 8 (4) and (5) of the Act, and in rr. 6 to 9 of the Adoption of Children (County Court) Rules, 1949, which, under para. 11 of sched. V to the Act of 1950, have effect as rules made under that Act. In the present case the Derby Education Committee was so appointed, and was represented at the hearing of the appeal. No provision appears to be made in the Act for the case of an infant parent, except that s. 2 (1) (c) contemplates that an adoption order in respect of an infant may be made in favour of its mother or father although she or he is under the age of twenty-one. Cases in which the mother of the infant proposed to be adopted otherwise than by the mother herself is under the age of twenty-one have been of frequent occurrence, and in such cases the practice under the Act of 1926, and, no doubt, also under the Act of 1950, has been to accept the consent of the infant mother as a valid consent for the purposes of those Acts, rather than to treat the mother as "incapable" of giving consent under s. 3 (1) (c) of the Act of 1950 or the corresponding provision in s. 2 (3) of the Act of 1926: see *Re A.B.* (6). We think this is clearly right. It would surely be monstrous to dispense with an infant mother's consent on the ground that infancy amounts to incapacity for this purpose, especially as under s. 5 (1) (b) of the Act of 1950 the wishes of the infant child (necessarily of far more tender age) are to be considered.

E The learned judge in the present case was not informed of the infancy of the mother until after the hearing of May 29, 1952, at which the order under appeal was made. In his considered judgment of June 14, 1952, he referred to *Re A.B.* (6), and after mentioning Ord. 5, r. 13, of the County Court Rules, 1936, as suggesting, in conjunction with the provisions of the Adoption of Children (County Court) Rules, 1949, under which the mother, as a parent, is made a respondent in the proceedings, that an infant mother should be provided with a guardian ad litem and saying that he thought it very desirable that the matter should receive consideration from the Court of Appeal, he decided

F "to follow what appeared to be the prevailing practice and ignore from a procedural and technical point of view the fact that the respondent mother was and had at all material times been an infant."

G We have inquired as to the practice followed in the Chancery Division where infant parents are concerned, and understand that it is not the practice in that Division to appoint a guardian ad litem of an infant parent. Under the Adoption of Children (High Court) Rules, 1950 (S.I., 1950, No. 80), the only parties to the application are the proposed adopter as applicant and the infant proposed to be adopted as respondent: see r. 2. A parent receives notice of the application under r. 9 and r. 13, and under r. 14 is entitled to appear before H the judge to show cause why an adoption order should not be made. But as he or she is not a party to the proceedings the appointment of a guardian ad litem of an infant parent is not considered necessary. The guardian ad litem of the infant proposed to be adopted (ordinarily the Official Solicitor: see r. 5) is charged (see r. 10) with duties of investigation which include interviewing the parent or parents. It is thought (no doubt rightly) that in all ordinary cases the judge, assisted by the Official Solicitor's investigations, and himself interviewing any infant parent when it appears proper to do so, is

well able to safeguard the interests of the infant parent without the interposition of a guardian ad litem, which, in view of the confidential character of the proceedings, would be an undesirable complication. We are told that in exceptional cases such as the present case, in which an infant mother opposes the application and the applicants seek to obtain an order against her will on the ground that her consent is unreasonably withheld, suitable arrangements could without difficulty be made for her representation by counsel.

We find nothing to criticise in the practice of the Chancery Division on this point. The Adoption of Children (County Court) Rules, 1949, are differently framed. The material difference for the present purpose is that under rr. 1 and 9 a parent is not only served with notice of the application, but is made a respondent in the proceedings. By r. 27 it is provided:

“Subject to these rules, the County Court Rules shall apply to proceedings under the Adoption of Children Acts, 1926 to 1949 [now the Act of 1950] so far as they are applicable.”

Order 5, r. 13 and r. 14, of the County Court Rules, 1936, contain provisions which require the appointment of a guardian ad litem, as to r. 13, where it appears on the face of the proceedings that a defendant is an infant, and as to r. 14, where it appears in the course of the proceedings that a defendant is an infant. Under Ord. 49, r. 2, “defendant” includes “respondent”. It is, therefore, difficult to resist the conclusion that, under the Adoption of Children (County Court) Rules, 1949, as they stand, a guardian ad litem of an infant parent who is a respondent in adoption proceedings ought to be appointed on its appearing on the face of or in the course of the proceedings that he or she is an infant. In the ordinary case where all that is necessary is that the judge should be satisfied of the parent’s consent, and should, where there is any doubt, personally ascertain the real wishes of the parent in the matter, no useful purpose would be served by the appointment of a guardian ad litem, for the order will not be made unless the parent does consent, but in rare cases of the present kind, where an infant parent opposes and an order is sought against that parent’s will on the ground that his or her consent is unreasonably withheld, the question whether a guardian ad litem should be appointed or the High Court practice followed *mutatis mutandis* is one in regard to which the position should be made clear in the rules.

Appeal allowed.

Solicitors: *Gibson & Weldon*, agents for *Miss M. A. Booth*, Derby (for the mother); *Maddisons & Lambs*, agents for *Irving, Sitdown & Co.*, Derby (for the applicants); *Sharpe, Pritchard & Co.*, agents for *E. H. Nichols*, town clerk, Derby (for the education committee).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

METCALF AND ANOTHER v. WELLS.

[CHANCERY DIVISION (Roxburgh, J.), October 31, 1952.]

Legal Aid—Costs—No order made as to costs—Settlement by parties during trial—No term in settlement as to costs—Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), reg. 18 (3).

A After purchasing a house from the defendant, the plaintiffs, who were assisted persons under the Legal Aid and Advice Act, 1949, brought an action against him alleging, inter alia, fraudulent misrepresentation and breach of warranty in regard to a right of way over a yard adjoining the premises. The action was settled by the parties after the commencement of the hearing and before the case for the plaintiffs was completed, a term of the settlement being that the plaintiffs would accept an offer which had been made to them by the owner of the yard before the commencement of the action. The settlement contained no term in regard to the costs of the proceedings. On applying to the court for a consent order, counsel for the plaintiffs asked for an order for taxation of the plaintiffs' costs as between solicitor and client for the purposes of the Act of 1949.

C HELD: as the court was not asked to make any order for the payment of the costs of the proceedings the Legal Aid (General) Regulations, 1950, reg. 18 (3), did not apply, and the court was not bound to make any order for taxation of the plaintiffs' costs.

D FOR THE LEGAL AID (GENERAL) REGULATIONS, 1950, reg. 18 (3), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 5, p. 218.

Case referred to:

(1) *Magor & St. Mellons Rural District Council v. Newport Corpn.*, [1951] 2 All E.R. 839; [1952] A.C. 189; 115 J.P. 613; 2nd Digest Supp.

E APPLICATION for an order for taxation of the plaintiffs' costs as between solicitor and client for the purposes of the Legal Aid and Advice Act, 1949 the parties having settled the action after it had come on for trial and having applied to the court for a consent order.

F The plaintiffs, a husband and wife, bought a boarding-house from the defendant. Behind the house was a shed, large enough to hold a motor car. The shed opened on to a yard which belonged to a third party. Before the sale was completed, it was discovered that there was no right of way from the shed over the yard to and through some gates giving access to the highway, but, notwithstanding the discovery, the sale was completed. The owner of the yard offered to grant to the plaintiffs certain rights over the yard, but the offer was not accepted. After completion, the plaintiffs, both of whom were assisted persons, brought an action against the defendant, alleging, inter alia, fraudulent misrepresentation and breach of warranty in regard to the right of way, the question whether or not they had reserved their rights in the matter, notwithstanding the completion of the sale, being one of the issues in the action. After the action came on for hearing and before the presentation of the plaintiffs' case was completed, the plaintiffs and the defendant settled the action on the terms that the plaintiffs should accept the offer made earlier by the owner of the yard. The settlement contained no term in regard to the costs of the proceedings. The defendant did not ask for costs, but counsel for the plaintiffs asked for an order for taxation of the plaintiffs' costs for the purposes of the Legal Aid and Advice Act, 1949.

Ferns for the plaintiffs.

H. C. Easton for the defendant.

ROXBURGH, J., stated the facts and continued: The only regulation under the Legal Aid and Advice Act, 1949, which deals with any obligation

to make an order for taxation of the plaintiffs' costs is the Legal Aid (General) Regulations, 1950, reg. 18 (3), which says:

"Any order for the payment of the costs of any proceedings to which an assisted person is a party shall include a direction that his costs are (in addition to any other direction as to taxation contained in the order) to be taxed as between solicitor and client in accordance with the provisions of sched. III to the Act."

But I am not making any order for the payment of any costs. I have not been asked to do so. It is no term of the settlement that I should make any order for the payment of the costs of these proceedings. Therefore, it seems to me that reg. 18 (3) plainly does not apply. I should not be ready to look far in the Act for an implied obligation on myself to make an order in the circumstances of this case, because reg. 18 (3) deals with the subject-matter that is now in dispute and expressly limits my obligation to the case where I am making an order for payment of costs. Therefore, I think that it would not be easy to find any implication in any other section imposing a duty on me to do so now. It is said that this may be a gap in the legislation. I think that it probably is, but in *Magor & St. Mellons Rural District Council v. Newport Corpn.* (1), LORD SIMONDS explained ([1951] 2 All E.R. 841) what is the duty of the court where there are gaps. In the circumstances of the consent order, which makes no reference to costs, I find no obligation under the Act of 1949 to make any order as regards the plaintiffs' costs.

[The learned judge gave reasons why, in the exercise of his discretion, he did not propose to make any such order, but that part of the case does not call for report.]

Solicitors: *Bracewell & Leaver*, agents for *William E. Gill, Shepherd & Co.*, Blackpool (for the plaintiffs); *Gibson & Weldon*, agents for *T. & F. Wylie Kay, Hodgson & Adshead*, Blackpool (for the defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

SCOTT v. SCOTT.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), November 5, 1952.]
Divorce—Alimony—Pendente lite—Death of husband—Abatement of order for alimony.

Execution—Charging order—Order nisi—Death of judgment debtor—Discharge of order nisi—Judgments Act, 1838 (c. 110), s. 15.

The husband and the wife were married on Aug. 12, 1947, the husband being then eighty-three and the wife forty-two years of age. They separated shortly afterwards, and on Nov. 17, 1947, the wife filed a petition for restitution of conjugal rights. On Jan. 21, 1948, she was granted an order for alimony pendente lite. The husband did not comply with the order, and on May 21, 1949, a charging order nisi was made on stock held by the bank in his name. On May 20, 1950, the husband died. On June 16, 1952, on the application of the administrator of the husband's estate, the registrar discharged the order of Jan. 21, 1948, and also the charging order nisi. On appeal by the wife,

HELD: (i) the wife's suit for restitution of conjugal rights abated on May 20, 1950, the date of the husband's decease; the order for alimony pendente lite also came to an end on that date; and, therefore, there was no order for the registrar to discharge on June 16, 1952, and his order of that date must be set aside;

(ii) without deciding whether it was proper in the circumstances that a charging order nisi should have been made, the wife was not now able to serve on the husband as judgment debtor notice of her application to make

the charging order absolute, and, therefore, the order nisi had rightly been discharged.

Observations of SIR NATHANIEL LINDLEY, M.R., in *Stewart v. Rhodes* ([1900] 1 Ch. 401), applied.

AS TO ALIMONY PENDENTE LITE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 714-720, paras. 1086-1100; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 485-500, Nos. 4246-4431.

AS TO CHARGING ORDERS ON STOCKS AND SHARES, see HALSBURY, Hailsham Edn., Vol. 14, pp. 120-129, paras. 189-205; and FOR CASES, see DIGEST, Vol. 21, pp. 647-658, Nos. 2262-2370.

FOR THE JUDGMENTS ACT, 1838, s. 15, see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 367.

B Cases referred to:

(1) *Stewart v. Rhodes*, [1900] 1 Ch. 386; 69 L.J.Ch. 174; 82 L.T. 337; 30 Digest, Replacement, 147, 14.

(2) *Finney v. Hinde*, (1879), 4 Q.B.D. 102; 48 L.J.Q.B. 275; 40 L.T. 193; 21 Digest 647, 2262.

(3) *Haly v. Barry*, (1868), 3 Ch. App. 452; 37 L.J.Ch. 723; 18 L.T. 491; 21 Digest 655, 2332.

APPEAL by the wife against two orders of Mr. Registrar LONG dated June 16, 1952, whereby he ordered (i) that an order in the wife's favour for alimony pendente lite made on Jan. 21, 1948, be discharged as from May 20, 1950, the date of the husband's death; and (ii) that a charging order nisi dated May 21, 1949, be discharged. The facts appear in the headnote.

Petrie for the wife.

J. P. Brookes for the administrator of the husband's estate.

BARNARD J., stated the facts and continued: Dealing first with the order that the registrar has made discharging the order for alimony, I think that it is important to realise exactly what alimony pending suit is in this Division, and I cannot do better than read the following passage from *RAYDEN ON DIVORCE*, 5th ed., p. 273, note (a):

"The ecclesiastical courts enforced orders for alimony by pronouncing a party contumacious and so, through the Court of Chancery, committing him for contempt, and from then onwards the purely personal character of alimony has been recognised continuously, and in consequence the court has maintained its complete control of the enforcement of all arrears of alimony."

In the present case the husband died on May 20, 1950. The suit then abated. The order for alimony pending suit came to an end, and, therefore, in my view, it was unnecessary and wrong for the registrar to make any order discharging the order for alimony pending suit, and I have come to the conclusion that the order he made to that effect should be set aside. There was no order for alimony pending suit in existence for him to discharge.

The point arising out of the second order made by the registrar is more difficult. It is doubtful whether a charging order should ever have been made, but I do not propose to go into that, and counsel for the administrator does not press that point because he has a much better one. Therefore, beyond saying that there is some doubt whether this charging order should ever have been made, I do not propose to deal with that matter. According to its terms, the charging order was made in respect of arrears of alimony which then amounted to some £312, those arrears being charged against £1,060 of 3½ per cent. war stock which was held by the bank in the name of the husband. The charging order goes on to say that the husband has to show cause by July 1, 1949, why the bank should not still be restrained from parting or dealing in any way with that stock. The

wife now says that, in spite of the fact that the husband is dead, I should make that charging order absolute. That would involve discharging the registrar's order which, in its terms, discharged the charging order.

I think that this matter is covered by the Judgments Act, 1838, s. 15, which formerly began:

"And in order to prevent any person against whom judgment shall have been obtained from transferring, receiving, or disposing of any stock, funds, annuities, or shares hereby authorised to be charged for the benefit of the judgment creditor under an order of a judge . . ."

These words were repealed by the Statute Law Revision (No. 2) Act, 1890, and the section now provides (as it continues):

"Every order of a judge charging any government stock, funds, or annuities, or any stock or shares in any public company, under this Act, shall be made in the first instance *ex parte*, and without any notice to the judgment debtor, and shall be an order to show cause only . . . and further . . . unless the judgment debtor shall within a time to be mentioned in such order show to a judge of one of the said superior courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute: Provided that any such judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit."

I should have thought that the words of that section were perfectly clear, but I have been referred to *Stewart v. Rhodes* (1) which, I think, is very much in point. There, SIR NATHANIEL LINDLEY, M.R., said ([1900] 1 Ch. 401):

"This section shows that it is necessary for the application of the Act and for obtaining of a charging order to have a person against whom a judgment has been entered, and the procedure shows that that person is the 'judgment debtor,' who must be in a position to show cause why the charging order should not be made absolute. In other words, he must be alive."

Counsel for the wife said that the charging order is only one order and that the wife obtained that order against the judgment debtor (the husband) when he was alive, but I think the latter part of his argument fails because he went on to say that the making of this order absolute, the husband having failed to show cause by the date named in the order, is purely automatic. I do not think I could possibly read that into s. 15 of the Act. That section makes it perfectly clear that before the order can be made absolute there must be proof of notice to the judgment debtor, his attorney or agent, of the application to make the charging order absolute. The wife cannot give the husband notice because he died before she took any steps to make this charging order absolute—an omission she has sought to put right by giving notice to the administrator. I have been referred to two other cases, but I do not think it is necessary for me to deal with them. They were different cases from *Stewart v. Rhodes* (1); one was *Finney v. Hinde* (2), referred to by SIR NATHANIEL LINDLEY, M.R. ([1900] 1 Ch. 401) in his judgment in *Stewart v. Rhodes* (1), and the other, also referred to by the Master of the Rolls (*ibid.*, 403) in his judgment, was *Haly v. Barry* (3). Counsel for the wife relied on *Haly v. Barry* (3), but it does not seem to me that the case helps him because there the charging order was made in the first instance against the executrix of the estate and a different question arose as to whether that charging order should be made absolute or be discharged. I have, therefore, come to the conclusion that the order made by the registrar on the application of the deceased husband's administrator to discharge the charging order nisi was correct, and that order should stand.

Order accordingly.

Solicitors: *A. L. Bryden & Williams* (for the wife); *A. G. Freeman & Son* (for the administrator of the husband's estate).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

BIRCH v. WIGAN CORPORATION.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.), October 16, 17, November 3, 1952.]

Housing—Closing order—“Part of a building”—Terrace house unfit for human habitation—Demolition undesirable as likely to render adjoining houses unfit—Power to make closing order—Housing Act, 1936 (c. 51), s. 11 (4), s. 12 (1).

Three dwelling-houses in a block of six terraced houses became unfit for human habitation and were not capable at a reasonable expense of being rendered fit. They could not, however, be demolished without making the remaining three houses uninhabitable. Having regard to the shortage of housing accommodation, the local authority refrained from making an order for the demolition of the three unfit houses, under the Housing Act, 1936, s. 11 (4), but purported to make a closing order relating to them under s. 12 (1). The owner claimed to have the order quashed.

HELD (DENNING, L.J., dissentiente): each of the three houses in question was a “house” within s. 11 (1) and (4), and the local authority were bound to make an order for their demolition under s. 11 (4); the authority had no option to proceed under s. 12 (1), which on its true construction related to part of a building and not to a house, the two sections being mutually exclusive; and, therefore, the order made by the local authority was ultra vires.

FOR THE HOUSING ACT, 1936, s. 11 and s. 12, see HALSBURY’S STATUTES, Second Edn., Vol. 11, pp. 460-463.

Cases referred to:

- (1) *Richards v. Rose*, (1853), 9 Exch. 218; 23 L.J.Ex. 3; 22 L.T.O.S. 104; 18 J.P. 56; 156 E.R. 93; 19 Digest 42, 223.
- (2) *Hedley v. Webb*, [1901] 2 Ch. 126; 84 L.T. 526; 65 J.P. 425; *sub nom. Webb v. Knight, Hedley v. Webb*, 70 L.J.Ch. 663; 41 Digest 3, 5.
- (3) *Magor & St. Mellons Rural District Council v. Newport Corpn.*, [1951] 2 All E.R. 839; [1952] A.C. 189; 115 J.P. 613; 2nd Digest Supp.

APPEAL by Wigan Corporation from an order of His Honour JUDGE BROWN sitting at the Wigan County Court, dated July 4, 1952, allowing an appeal of the owner against an order made by the corporation on Apr. 9, 1952, under the Housing Act, 1936, s. 12, for the closing of the dwelling-houses Nos. 241, 247 and 249, Wigan Lane, Wigan.

Rigg for the corporation.

W. D. T. Hodgson for the owner.

Cur. adv. vult.

Nov. 3. SIR RAYMOND EVERSLED, M.R.: In my judgment, the appeal in this matter should be dismissed for the reasons stated in the judgment which ROMER, L.J., will deliver, which I have had the advantage of seeing, and to which I feel I can usefully add nothing.

DENNING, L.J., read the following judgment. In a street in Wigan there is a block of six houses built about two hundred years ago. Each house in the block is separated from the next one by a dividing wall or partition. All six are owned by the same owner, Mrs. Birch. Three of them are unfit for human habitation and cannot be made fit by any reasonable expense. The other three are still fit to live in. Two of the unfit houses are at one end of the block. The one other unfit house is in between two fit ones. The question is whether the three unfit houses should be demolished and pulled down, or whether they should only be closed and remain empty. The difficulty about demolishing the bad three is that it cannot be done without making the good three uninhabitable. Each house depends on the next for support. Even if the good three were shored

up, their stability would be so impaired that they could not safely be occupied. That is an admitted fact.

In this situation the Wigan Corporation say that the three unfit houses should not be demolished, but should only be closed and remain empty. They say that, by so doing, the three good houses will provide living quarters for three families which is very desirable in view of the housing shortage. So they have made an order, not to demolish, but only to close the three unfit houses. On the other hand, Mrs. Birch, the owner of the six houses, says that all six should be demolished. She says that none of them is fit for human habitation and she would welcome a demolition order for the whole block, so that she could get the tenants out and build a new block altogether. Unless a demolition order is made, the statutory restrictions prevent her from evicting the tenants. I think there is much to be said for Mrs. Birch's point of view. The closing of three of the houses can at best be only a temporary expedient. Once closed, they will rapidly fall into ruin, their bad condition will affect the others, and it cannot be long before the whole block will have to be demolished. So why not demolish them all now? This is, however, a question for the corporation, not for us. It depends very much on the housing situation in Wigan. The corporation are the people to decide it, not the courts. If the corporation do not choose to make a demolition order for all six houses, this court cannot compel them.

The owner now counters with a shrewd legal blow. She contends that the corporation have no power to make a closing order for the three bad houses. The judge has upheld this contention, and has quashed the closing order. He does not suggest that the corporation must make a demolition order for all six, but he does suggest—and this is what I wish to emphasise—that the corporation must make a demolition order for the three bad houses. According to the judge's reasoning, once the corporation are satisfied (as they are here) that three of the houses are fit and three unfit, there is only one course open to the corporation. They must make a demolition order for the three unfit houses. They have no alternative. The statute, he says, is imperative on the point. The three unfit houses must be demolished, even though it makes the other three unsafe and uninhabitable.

I cannot believe that Parliament intended to enact anything so absurd, and I do not think they have. The question depends on the true interpretation of the Housing Act, 1936, s. 11 and s. 12. Section 11 provides that, in the case of a "house" which is unfit, the corporation must make a demolition order. Section 12 provides that, in the case of "part of a building" which is unfit, they must make a closing order. Into which category do these three unfit houses fall? Is each of them a "house" within s. 11, or is it a "part of a building" within s. 12? At first sight one might be tempted to say that each house was both a "house" and also "part of a building", but the wording of the sections precludes such a solution. The sections are mutually exclusive. These three houses must be put in one category or the other. Each of them is either a "house" or a "part of a building". It cannot be both. The solution of the problem is to be found, I think, by supposing that the six houses were all in different ownership, as, for instance, if each occupier owned his own house. If an order is made for the demolition of the three unfit houses, what is to happen to the owners of the three fit ones? They are clearly entitled at law to support from the neighbouring houses: see *Richards v. Rose* (1). Can it be supposed that Parliament intended to take away their right of support without any protection for their houses and without any compensation for the damage done to them? Yet that is what it means if the judge is right. The Act contains no provision for the protection of the adjacent houses at all. It does not say that anyone is to do any shoring up, even if shoring up would be of any avail, or to treat the dividing wall or partition so as to make it weatherproof. It does not give the owners of the good houses any remedy if the demolition renders their houses damp or unsafe,

and I do not see that they would have any remedy—not, at any rate, if the demolition were carried out with reasonable care. The statutory authority to demolish would be a bar to any action by the neighbouring owners. The absence of any provision for their protection leads me to the conclusion that Parliament did not contemplate that one house out of a block should be demolished any more than one flat out of a block of flats should be demolished.

A In this situation there is a simple solution which commends itself to me. It is this: When several houses are in one block, separated from one another only by party walls—so that one cannot be pulled down without taking away the support of the other—they can properly be said to be part and parcel of one building. They then come within s. 12 and not within s. 11. Each house in the block is “part of a building” within s. 12. It is not a “house” within s. 11. B If some of the houses in the block are unfit and others are fit, the only proper order is a closing order against the unfit ones, not a demolition order. If all of the houses in the block are unfit, they still do not come within s. 11. The proper procedure then is for them to be declared a clearance area within s. 25 and demolished under s. 26. That is the procedure which was, in my own experience, often adopted before the war, and I think it is the right procedure. C This interpretation is supported by s. 18 of the Act, which contemplates that a closing order can be made in respect of a house, and also by *Hedley v. Webb* (2), where it was held that a pair of semi-detached houses constituted “one building only”, whence it is right to say that each of them was part of a building.

The argument to the contrary, as I understand it, is this: According to the ordinary meaning of words, a house in a block is a “house” and not “part of a building”. Even if this leads to absurdities, or even to injustice, so be it. It is D the fault of Parliament. The courts wash their hands of it. I do not think we should approach an Act of Parliament in such a way. We should not thwart the intention of Parliament by holding them to the letter of what they have said. When there is a fair choice between a literal interpretation and a reasonable one—and there usually is—we should always choose the reasonable one. Such is, I believe, the true principle, and I do not find anything in *Magor & St. Mellons E Rural District Council v. Newport Corpn.* (3), to throw doubt on it. I am, therefore, of opinion that the Wigan Corporation were entitled to make a closing order for the three unfit houses, and I would allow the appeal.

ROMER, L.J., read the following judgment. The three houses in question,

F Nos. 241, 247 and 249, Wigan Lane, Wigan, form part of a row or terrace of six houses, the other three being numbered 239, 243 and 245 respectively. Mrs. Birch is the owner of the whole of this terrace. It is not disputed that the houses in respect of which the corporation purported to make the closing order are unfit for human habitation and incapable of being rendered fit at reasonable expense, and, indeed, in the view of the owner, the whole row could properly be made the subject of a demolition order under s. 11 of the Act of 1936. G The corporation, however, think that the three houses which were unaffected by their order are reasonably fit to be lived in, and, having regard to the shortage of housing accommodation, they are not prepared to make an order for the demolition of the whole of the property. It appears to have been agreed that, if the three houses to which the closing order related were demolished, the other three would collapse because of the resulting withdrawal of lateral support, and H it is for this reason that the corporation do not wish to make an order for a partial demolition. No oral evidence was called before the learned judge. He found that each of the six houses is (subject to the walls other than the gables being party walls) a self-contained unit in the sense that there is no internal means of communication between them, and this finding was not challenged in argument before us. The judge said further that he understood that the six houses constituted one block and that it had been suggested they were about two hundred years old. He assumed that they must all have been built at the

same time and presumably as part of one operation, but there was no finding as to this. We were given to understand that the dwellings are of a small and somewhat humble character.

The question whether or not the corporation had authority to make a closing order in respect of Nos. 241, 247 and 249, Wigan Lane, depends on the true interpretation and effect of the Housing Act, 1936, s. 11 and s. 12, as amended by the Housing Act, 1949. So far as material, they provide as follows:

" 11. (1) Where a local authority, upon consideration of an official representation, or a report from any of their officers, or other information in their possession, are satisfied that any house is unfit for human habitation and is not capable at a reasonable expense of being rendered so fit, they shall serve upon the person having control of the house, upon any other person who is an owner thereof, and, so far as it is reasonably practicable to ascertain such persons, upon every mortgagee thereof, notice of the time (being some time not less than twenty-one days after the service of the notice) and place at which the condition of the house and any offer with respect to the carrying out of works, or the future user of the house, which he may wish to submit will be considered by them, and every person upon whom such a notice is served shall be entitled to be heard when the matter is so taken into consideration. (2) A person upon whom notice is served under the foregoing sub-section shall, if he intends to submit an offer with respect to the carrying out of works, within twenty-one days from the date of the service of the notice upon him, serve upon the authority notice in writing of his intention to make such an offer and shall, within such reasonable period as the authority may allow, submit to them a list of the works which he offers to carry out. (3) The authority may if, after consultation with any owner or mortgagee, they think fit so to do, accept an undertaking from him, either that he will within a specified period carry out such works as will in the opinion of the authority render the house fit for human habitation, or that it shall not be used for human habitation until the authority, on being satisfied that it has been rendered fit for that purpose, cancel the undertaking. (4) If no such undertaking as is mentioned in the last foregoing sub-section is accepted by the authority, or if, in a case where they have accepted such an undertaking, any work to which the undertaking relates is not carried out within the specified period, or the house is at any time used in contravention of the terms of the undertaking, the authority shall forthwith make a demolition order requiring that the house shall be vacated within a period to be specified in the order, not being less than twenty-eight days from the date on which the order becomes operative . . . "

Section 12 provides:

" (1) A local authority may under this Part of this Act take the like proceedings in relation to any part of a building which is used, or is suitable for use, as a dwelling or in relation to any underground room which is for the purposes of this section to be deemed to be unfit for human habitation, as they are empowered to take in relation to a house, subject, however, to this qualification that, in circumstances in which, in the case of a house, they would have made a demolition order, they shall make a closing order prohibiting the use of the part of the building or of the room, as the case may be, for any purpose other than a purpose approved by the local authority, but— (a) the approval of the authority shall not be unreasonably withheld; and (b) the authority shall determine the closing order on being satisfied that the part of the building or the room to which it relates has been rendered fit for human habitation. (2) A room the surface of the floor of which is more than three feet below the surface of the part of the street adjoining or nearest to the room, or more than three feet below the surface of any ground within nine

feet of the room, shall for the purposes of this section be deemed to be unfit for human habitation . . . ”

As stated by the judge, there are no definitions to be found in the legislation which are of any assistance in the solution of the present problem and, indeed, I think that none of the other provisions to which our attention was directed has any bearing on it save, perhaps, s. 18 of the Act of 1936 which (so far as relevant) enacts:

A “ A local authority may pay to any person displaced from a house, to which a demolition order made under this Part of this Act, or a closing order, applies, such reasonable allowance as they think fit towards his expenses in removing, and to any person carrying on any trade or business in any such house they may pay also such reasonable allowance as they think fit towards the loss which, in their opinion, he will sustain by reason of the disturbance of his trade or business consequent on his having to quit the house . . . ”

B In my judgment, the order of the learned judge was right and I agree with the reasons on which it was founded. The respective contentions on each side may be shortly summarised as follows. For the corporation it was argued, as I understood it, that a demolition order ought only to be made under s. 11 of the Act in relation to a house which does not form part of an entire block or building; that each house in a terrace (such as the one in the present case) forms part of one building, viz., the terrace itself; and that in regard to houses of that kind a local authority has the option of making a closing order under s. 12 instead of a demolition order under s. 11. On the other hand, it was argued on behalf of the owner that s. 11 and s. 12 are mandatory and are mutually exclusive, and that the former section deals with every building which constitutes a house and the latter section is confined in its operation to parts of buildings other than houses.

D There are four considerations which, at least in combination, seem to me to support very strongly the decision at which the learned judge arrived. First, it is quite clear that whether or not the three uninhabitable dwellings in question fall within s. 12 of the Act, they come fair and square within the provisions of s. 11. They are “ houses ” to which the conditions specified in s. 11 admittedly attach. What, then, is the result ? It is, on the clear language of s. 11, that the local authority became bound—for the section is compelling in this regard—to set in motion the prescribed machinery for their demolition. In other words, s. 11 on the face of it provides a comprehensive and compulsory code for the position which did in fact arise. Secondly, if, notwithstanding the precise applicability to the matter of s. 11, the legislature intended to give the corporation the alternative of making a closing order under s. 12, then an option is impliedly introduced which is inconsistent with the obligation imposed in unequivocal terms by s. 11. The fact that no such words as “ subject to the provisions of s. 12 ” are to be found in s. 11 suggests strongly to my mind that no such option was intended. Thirdly, just as the provisions of s. 11 are mandatory when a position arises for their application, so also are those of s. 12 in cases which fall within their scope. On the corporation’s contention, the three houses under discussion fall within both of the sections and, in the absence of such an option as that which I have mentioned (and for which, in my judgment, there is no sufficient warrant) a local authority would be bound to make both a demolition order and a closing order in relation to them—a conception which tends with some force to show that s. 11 and s. 12 are mutually exclusive. Fourthly, inasmuch as the position of “ houses ” is fully and completely dealt with by s. 11, the natural expectation surely is that the object of s. 12 is to deal with something else. To my mind, that expectation is sufficiently fulfilled by the fact that in s. 12 there is a most significant change in language. The word “ house ” disappears from the scene and a different word, the word “ building ”, is used in its place—“ any part of a building which is used, or is suitable for use, as a dwelling ”. This in itself, I should have thought, sufficiently confirms the expectation that s. 12 is dealing with something different from that with which

s. 11 has already dealt. If, however, any doubt on the matter still remained, it is, as I think, removed by the subsequent mention, for referential purposes only, of houses. The power conferred by s. 11 is to order demolition, and it is conferred in relation to "houses". Section 12 expressly enacts that in regard to a "part of a building" or "any underground room" which is unfit for habitation the local authority may take the like proceedings as they are empowered to take "in relation to a house", but subject to the qualification that where "in the case of a house" they would have made a demolition order, they shall make a closing order instead. Whatever else, therefore, "any part of a building" may include, these references, in my judgment, establish conclusively that it does not include a house.

In view of the above considerations, I am of opinion that any building that is a "house" (as each of those in question before us undoubtedly is) falls exclusively within s. 11 and the local authority is bound to apply to it (if the relevant conditions exist) the provisions of that section. No doubt, for some purposes and in other contexts two "houses" may also constitute one building. *Hedley v. Webb* (2) decided that two semi-detached houses were a single building for the purpose of determining whether there was a sewer within the meaning of the Public Health Act, 1875, s. 4, but the essential dichotomy with which we are concerned was absent from the section considered in that case, and, so far as s. 11 and s. 12 of the Act now in question are concerned, each dwelling is to be treated, not as a part of a building but as a house, a conception which, I venture to suggest, is in conformity with ordinary ideas on the subject.

Some reliance was placed by counsel for the corporation on s. 18 of the Act of 1936, the language of which shows, in his submission, that the legislature envisaged the making of a closing order in relation to a house as a whole. It seems to me that this aspect of s. 18 is quite insufficient to disturb the effect of the language in which s. 11 and s. 12 are couched. Moreover, it is to be observed that a closing order does in fact apply to a house, although it only affects a part of it. Apart from the points with which I have already dealt, it was suggested by the corporation that the effect of s. 11 and s. 12 of the Act of 1936 might be that a dwelling in a terrace could be treated as a "house" if it could be demolished without bringing its neighbour to the ground, but as "part of a building" if it could not. This result, I think, can only be reached by taking remarkable liberties with the sections. Apart, however, from that, it would presumably also involve the gradual degradation of a dwelling which was a "house" when it was new to the status merely of a part of a building when it grew old. The precise point of time in its life when this humiliation would occur would in many cases give rise to controversy and uncertainty, and I am quite unable to accept an argument which is unsupported by the language of the sections and which leads to such an extraordinary result. Finally, it was urged that it would lead to the gravest inconvenience if a local authority could not make a closing order in relation to a derelict house the demolition of which would bring about the destruction of adjoining houses which are fit to live in. To what extent this result will follow, I do not know. It is common knowledge that during the recent war even old houses in terraces or rows of rather flimsy dwellings frequently survived the destruction of those which adjoined them, so, possibly the fears which were expressed on this score may be somewhat over-rated. Be that as it may, if s. 11 and s. 12 of the Act, on their true construction, require that a certain meaning and effect should be attributed to them, the fact (if fact it be) that one of the results may be unexpected and inconvenient is a matter for the legislature and not for the courts. For the above reasons, the appeal should, in my opinion, be dismissed.

Appeal dismissed.

Solicitors: *Ruston, Clarke & Ruston*, agents for *Allan Royle*, town clerk, Wigan (for the corporation); *Gregory, Rowcliffe & Co.*, agents for *Hall, Brydon & Co.*, Manchester (for the owner).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

DOMINANT SITES, LTD. v. HENDON BOROUGH COUNCIL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Finnemore and McNair, JJ.),
October 23, 24, November 7, 1952.]

Town and Country Planning—Advertisement—Advertisement in area to which planning scheme under Town and Country Planning Act, 1932, applied—Display before Aug. 1, 1948—Validity of enforcement notice under Town and Country Planning (Control of Advertisements) Regulations, 1948 (S.I., 1948, No. 1613), reg. 23.

Pursuant to the Town and Country Planning Act, 1932, the respondents, as the responsible authority, made a planning scheme which came into operation on Aug. 29, 1936, and which inter alia specified certain land as land protected in respect of advertisements under s. 47 of the Act. The Town and Country Planning Act, 1947, which came into operation on July 1, 1948, gave, by s. 31 (1), a new power to the local planning authority for the control of advertisements and by s. 31 (5) enabled regulations to be made "so as to apply to advertisements which are being displayed on the date on which the regulations come into force". This Act repealed the Act of 1932, except that by sched. X, para. 7 (c), any scheme made under the Act of 1932, so far as it related, inter alia, to the control of advertisements under s. 47 of that Act remained in force and the provisions of the Act of 1932 should "have effect in relation to any such scheme accordingly". On July 8, 1948, the appellants erected advertisement hoardings on land specified in the scheme. On Aug. 1, 1948, the Town and Country Planning (Control of Advertisements) Regulations, 1948, made under s. 31 (5) of the Act of 1947, came into operation. On Aug. 17, 1949, the respondents to, whom the local planning authority had delegated its powers in that respect, required the appellants to make application, in accordance with the regulations, for express consent for the retention on the land of the advertisements. Application was duly made, but consent was refused. On June 1, 1951, the respondents served on the appellants two enforcement notices under reg. 23 against which the appellants now appealed.

HELD (FINNEMORE, J., dissentiente): s. 31 (5) of the Act of 1947 enabled regulations to be made to apply to advertisements which were in existence when the regulations came into force in an area to which a scheme under the Act of 1932 applied; there was no conflict between the powers of the local planning authority under the regulations and the powers of a responsible authority under the scheme and the Act of 1932; either authority could exercise the power possessed by it under the respective enactments; and, therefore, the respondents were entitled to serve the enforcement notices in their capacity as agents for the local planning authority, and the notices were valid and effective.

FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 31, and sched. X, para. 7, see HALSBURY'S STATUTES, Second Edn., Vol. 25, pp. 538, 655.

CASE STATED by Middlesex Quarter Sessions.

At the County of Middlesex Quarter Sessions on Dec. 19, 1951, the appellants, Dominant Sites, Ltd., appealed against the dismissal by a court of summary jurisdiction sitting at Hendon on Oct. 11, 1951, of two complaints, preferred by them against the respondents, Hendon Borough Council, by way of appeal under the Town and Country Planning (Control of Advertisements) Regulations, 1948, reg. 23 (4), against two enforcement notices dated June 1, 1951, served on the appellants under reg. 23 (1), requiring them to discontinue the use of certain land for the display of advertisements, to remove therefrom two advertisement hoardings, and to restore the land to its condition before the display of advertisements was begun.

It was proved or admitted that the Hendon Planning Scheme, No. 1, made under the Town and Country Planning Act, 1932, s. 47, became operative on Aug. 29, 1936, and had continued in force in accordance with the Town and Country Planning Act, 1947, sched. X, para. 7, and not been determined by the Minister. The land on which the two advertisement hoardings were erected was within the area to which the scheme related. The hoardings were erected on July 8, 1948, and before the coming into operation of the Town and Country Planning (Control of Advertisements) Regulations, 1948. The hoardings were erected without express consent obtained under the regulations, and were subject to the period of grace conferred by reg. 7. By notices dated Aug. 17, 1949, the respondents, to whom the Middlesex County Council as the local planning authority, pursuant to the Act of 1947, had delegated their powers in this respect, required the appellants to make application for express consent for the retention of the hoardings. On Aug. 30, 1949, the appellants made application, but, by notices dated Oct. 26, 1949, and Nov. 1, 1949, the respondents refused such consent. On Nov. 7, 1949, the appellants appealed against such refusal to the Minister of Town and Country Planning, who, on Nov. 16, 1950, dismissed the appeals. On June 1, 1951, the respondents, as the duly authorised agents of the Middlesex County Council, served on the appellants two enforcement notices under reg. 23 (4) of the regulations of 1948.

It was contended on behalf of the appellants that the regulations did not apply to the advertisements; that the Hendon Planning Scheme, No. 1, made under the Act of 1932, s. 47, was preserved by the Act of 1947, sched. X, para. 7 (c); that the rights of an advertiser under this scheme to erect his advertisements without consent first obtained, subject to challenge on the ground that it seriously injured amenity and to an appeal against such challenge to a court of summary jurisdiction on the merits, were also preserved; and that the regulations did not confer on a local planning authority a dual jurisdiction over advertisements by means of the machinery of the said regulations. It was contended on behalf of the respondents that the scheme and the regulations of 1948 were not mutually exclusive; that the power given by the regulations was permissive and discretionary; that the responsible authority under the scheme was not the local planning authority under the Act of 1947; and that the scheme was still in force and the jurisdiction under it preserved while the regulations in certain respects enlarged it. Quarter sessions were of the opinion that the regulations were supplementary to the powers under the Act of 1932, that there was no conflict between them, and that the respondents were entitled to elect whether they would take action under the Act of 1932 and the scheme or under the Act of 1947 and the regulations. They, accordingly, dismissed the appeals and the appellants now appealed to the High Court.

Lyons, Q.C., and S. W. Magnus for the appellants.

Molony for the respondents.

Cur. adv. vult.

Nov. 7. The following judgments were read.

McNAIR, J. : By two enforcement notices dated June 1, 1951, made by the respondents under the Town and Country Planning (Control of Advertisements) Regulations, 1948, the appellants were required to discontinue the use of certain land situate at Northway Circus, Mill Hill, for the display of advertisements and to remove therefrom two advertisement hoardings. On June 26, 1951, the appellants, pursuant to reg. 23 (4) of these regulations preferred two complaints by way of appeal against these enforcement notices. These complaints were heard by the justices sitting at the Gore petty sessional court, Hendon, and were dismissed. These dismissals were, on appeal, confirmed by the justices of the County of Middlesex Quarter Sessions on Dec. 19, 1951, and the appellants now appeal to this court by way of Case Stated against that decision.

In order that the question of law which is raised in this appeal may be appreciated it is necessary to set out the following facts which were proved or admitted together with a summary of the relevant statutory provisions. Pursuant to powers contained in the Town and Country Planning Act, 1932 (hereinafter referred to as the Act of 1932) a town planning scheme known as the Hendon Town Planning Scheme, No. 1, 1935, was made by the respondents and approved subject to modification by the Minister of Health. This scheme became operative on Aug. 29, 1936. By cl. 51 (1) of this scheme the respondents specified certain land, including the land in question, as land protected in respect of advertisements under s. 47 of the Act of 1932. So long as this part of the scheme and s. 47 of the Act of 1932 remains in force the respondents have power to serve on the owner of any advertisement or hoarding (other than advertisements or hoardings the display of which they have authorised pursuant to cl. 51 (2)) a notice requiring him to remove it within a specified period subject to the right of any person aggrieved to appeal to a court of summary jurisdiction. On any such appeal the court, if satisfied that the advertisement or hoarding does not *seriously injure the amenity* of the land specified in the scheme, is required to allow the appeal. By the Town and Country Planning Act, 1947 (hereinafter referred to as the Act of 1947), which, so far as is material for the purpose of this case, came into force on the appointed day, namely, July 1, 1948, the Act of 1932 was repealed, but, by virtue of s. 113 and sched. X, para. 7, it was provided that:

“Notwithstanding the repeal by this Act of the Act of 1932, any scheme made under that Act . . . being a scheme which is in force immediately before the appointed day shall, so far as it relates [to] (c) the control of advertisements in areas protected under s. 47 of the Act of 1932 . . . continue in force until it is determined, in relation to any such matter as aforesaid, by an order made by the Minister, and the provisions of that Act . . . shall have effect in relation to any such scheme accordingly”.

No order has been made by the Minister determining the scheme in relation to the control of advertisements. By s. 31 of the Act of 1947 a new power for the control of advertisements was enacted. That section enacts that:

“ . . . provision shall be made by regulations under this Act for . . . regulating the display of advertisements so far as appears to the Minister to be expedient in the interests of amenity or public safety, and . . . any such regulations may provide . . . (d) for enabling the local planning authority to require the removal of any advertisement which is being displayed in contravention of the regulations . . . ”

On July 8, 1948, the advertisement hoardings in question were erected. On Aug. 1, 1948, the Town and Country Planning (Control of Advertisements) Regulations, 1948, made under s. 31 of the Act of 1947, came into operation. By these regulations the control of advertisements was placed in the hands of the local planning authority, the local planning authority for the area in question being the Middlesex County Council, but provision was made for granting a limited exemption for existing advertisements subject to the right of the local planning authority to require the owner of any existing advertisement to apply within a specified period of grace for express consent to the continuance of any existing advertisements. But, whereas under s. 47 of the Act of 1932 a person aggrieved by such a notice had a right of appeal to a court of summary jurisdiction which, if satisfied that the advertisement or hoarding did not seriously injure the amenity of the land in question, was required to allow the appeal, under these regulations the appeal lies to the Minister, and, if the appeal is disallowed by the Minister, a person aggrieved has no opportunity of satisfying a court of summary jurisdiction that the advertisement or hoarding does not, in fact, interfere with the amenities of the land.

[His LORDSHIP stated the facts and continued:] Had it been necessary for the determination of this appeal to reach a conclusion on the question whether the effect of the provisions of sched. X to the Act of 1947 was to preserve cl. 51 of the scheme, and, in particular, s. 47 of the Act of 1932, I would have desired to hear further argument as I have difficulty in seeing how it can be said that s. 47 is a provision which has effect in relation to a scheme. But, as it was conceded before us by counsel for the respondents that this was the effect, I am prepared for the purpose of this appeal to assume that it is so. Nevertheless, it seems to me to be quite clear as a matter of construction that regulations may be made under s. 31 of the Act of 1947 so as to apply to advertisements and hoardings on land which has been specified in a scheme made under the Act of 1932 as land protected under that section. Section 31 (5) is in the following terms:

"Subject as hereinafter provided, regulations made under this section may be made so as to apply to advertisements which are being displayed on the date on which the regulations come into force, or to the use for the display of advertisements of any site which was being used for that purpose on that date: Provided that any such regulations shall provide for exempting therefrom—(a) the continued display of any such advertisement as aforesaid; and (b) the continued use for the display of advertisements of any such site as aforesaid, during such period as may be prescribed in that behalf by the regulations, and different periods may be so prescribed for the purposes of different provisions of the regulations."

In my judgment, the express power to make regulations

"so as to apply to advertisements which are being displayed on the date on which the regulations come into force",

coupled with the express exemptions mentioned in the proviso, excludes any possibility of any implied exemption in respect of advertisements covered by an existing town planning scheme. Furthermore, the fact that "the responsible authority" under s. 47 of the Act of 1932 is a different body from the "local planning authority" under s. 31 of the Act of 1947 and the regulations made thereunder is, in my view, fatal to any argument based on the apparent inconsistency between the two schemes, and for the purpose of this point of construction it is immaterial that the local planning authority may have delegated their powers to a body which is also a responsible authority under the Act of 1932. I can see no conflict or inconsistency between the two sets of powers. In my judgment, the justices came to a correct conclusion in this matter and the appeals should be dismissed.

FINNEMORE, J. (read by LORD GODDARD, C.J.): I have come to the view that these appeals should be allowed. The land on which the hoardings were erected was land subject to the Hendon Planning Scheme, No. 1 (made under the Town and Country Planning Act, 1932), and this scheme has never been revoked by the Minister. In my opinion, therefore, the regulations made under the Town and Country Planning Act, 1947, never applied to this land at all. If that is so, it is conceded that the respondents were wrong, as they proceeded under the latter Act.

Under the Act of 1932 the respondents gained powers of control over advertisements by virtue of s. 47. Under that section the respondents could serve a notice requiring the removal of an advertisement or a hoarding which "seriously" injured the amenity of the land, and the owner who received such a notice could appeal to a court of summary jurisdiction and thence to quarter sessions. These powers applied where the respondents made a scheme, and they duly made the Hendon Planning Scheme, No. 1, which came into force on Aug. 29, 1936. Clause 51 applied the provisions of s. 47 of the Act of 1932 in respect of advertisements. In 1947 a new Town and Country Planning Act was passed

which gave wider and additional powers of control over the use of land, including advertisements and hoardings. For the land in question the local planning authority was the Middlesex County Council which, as it was entitled to do, delegated its powers under Part III (which includes s. 31) to the respondents to act on its behalf. Section 31 provides for regulations to restrict or regulate advertisements

A “so far as appears to the Minister to be expedient in the interests of amenity or public safety . . . ”

B This is a wider power than in the Act of 1932, where the phrase “seriously injures the amenity” is used, and there is no longer any appeal to the courts, but only to the Minister himself. Regulations were duly made entitled the Town and Country Planning (Control of Advertisements) Regulations, 1948, and it was under these regulations that the respondents proceeded. The appellants claimed that these did not apply at all, as the land was subject to the scheme of 1936 made under the Act of 1932. No doubt, these regulations were intended in due course to apply generally and to supersede the provisions of the Act of 1932. While, however, the Act of 1932 was repealed by the Act of 1947, it was expressly enacted by sched. X, para. 7, that any scheme made under the former Act and still in force immediately before the appointed day should continue in force until determined by an order made by the Minister and that the provisions of the Act of 1932 should continue to apply. It is agreed that the scheme has not been determined. It is, therefore, by virtue of the schedule, still in force. Do the regulations of 1948 nevertheless apply, or is the land subject only to the scheme and must the procedure laid down in the scheme and s. 47 of the Act of 1932 apply? If the former, then the appellants fail, and if D the latter, they succeed.

E It was argued in this court, and so held in the court below, that both the scheme under the Act of 1932 and the regulations under the Act of 1947 applied to this land. With respect I cannot see how this can be. I do not think that two different provisions on the same subject—and there are differences in both substance and procedure—can apply at one and the same time to the same land. One or the other must prevail. Either the regulations of 1948 apply to the exclusion of the scheme, or the scheme applies with the full benefit of s. 47. If the regulations are, in fact, the governing force, then it seems to me to be almost beyond argument that the scheme is dead. What then becomes of sched. X, para. 7? This paragraph expressly keeps alive the scheme, which is to continue in force until determined by the Minister. If, in spite of this, the regulations F overrule or take precedence of the scheme (presumably at the will of the respondents) I am unable to give any meaning to what seem to me to be the plain words of sched. X, para. 7. On the other hand, if the appellants’ contention is accepted, I see no difficulties. Section 31 of the Act of 1947 applies in general terms to land within the Act except that expressly excluded by the same Act, namely, land already comprised in a scheme under the Act of 1932. G When the Minister determines any such scheme, then the land is at once brought within the ambit of s. 31 of the Act of 1947. Until such determination, it is governed only by the scheme, and the regulations of 1948 do not affect it. Accordingly, I would allow the appeals with the usual consequences.

H LORD GODDARD, C.J.: I do not pretend that I have found this case easy of decision, but I have come to the conclusion that the decision of the appeal committee of quarter sessions was right, and generally I agree with the judgment of McNAIR, J. In view of the provisions of s. 31 of the Act of 1947, and more especially of sub-s. (5), it is difficult to understand the provisions of sched. X, para. 7, relating to advertisements, and still more why the Minister has not after the lapse of the period of grace granted by the sub-section exercised his power of ending the 1932 scheme so far, at any rate, as it affects advertisements. I share the doubt which I understand McNAIR, J., feels whether it was

intended that the paragraph in the schedule to which I have referred should preserve s. 47 of the Act of 1932, but, as counsel on either side presented their arguments on the basis that it is preserved at least inferentially, I will assume that it is still in force. That section, however, deals with the powers of a responsible authority, which is a different body from a local planning authority. The former were the respondents acting under powers given to them by the Act; the latter is the county council which, however, delegates its powers to the respondents who serve the enforcement notices as agents for the county council. It appears to me to be a somewhat unfortunate complication that the same body can act in regard to advertisements in two different capacities, and that, if they serve notices in the capacity of principals, certain results as to appeal follow, while, if they serve them in pursuance of delegated powers, other consequences ensue, especially as it does not appear that the county council had intervened and actually directed the notices in this case to be served. But the fact remains that the regulations under which these notices were served were made under the Act of 1947 and conferred powers, not on a responsible authority under the Act of 1932, but on the new local planning authority created by the Act of 1947. Then, when it is seen that by s. 31 (5) of the Act of 1947 a special provision is made as to existing advertisements, which has been carried into effect by reg. 7 of the regulations of 1948, I find it impossible to hold, despite the provisions of sched. X, that those regulations are not effective with regard to advertisements which existed when they were made. Let it be conceded that the respondents might have acted under their powers as a responsible authority; in this case they have served the notice as the delegates of the local planning authority. These Acts are complicated enough in all conscience, and, if this case comes to the attention of the Minister, it is to be hoped that he will exercise his powers to tidy up what, whichever view ultimately prevails, is an untidy situation. I would dismiss the appeals.

Appeals dismissed.

Solicitors: *Hall, Brydon, Egerton & Nicholas* (for the appellants); *Leonard Worden*, town clerk, Hendon (for the respondents).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

RICHARDS v. RICHARDS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Davies, J.), October 23, 1952.]

Justices—Husband and wife—Persistent cruelty—Res judicata—Dismissal of summons—Fresh summons—Admission of evidence of incidents prior to first summons.

On Jan. 31, 1952, justices dismissed the wife's summons alleging persistent cruelty by the husband. On May 27, 1952, the wife issued a further summons on the same grounds.

HELD: the conduct which was alleged to have occurred after Jan. 31 could only be judged in the light of the whole of the husband's course of conduct, and, therefore, on the hearing of the second summons the wife was entitled to adduce evidence of physical violence which occurred prior to the dismissal of her first summons on Jan. 31, 1952, even though on that date the conduct of which evidence was then given was held not to amount to persistent cruelty.

Molesworth v. Molesworth ([1947] 2 All E.R. 842), applied.

AS TO SUMMARY JURISDICTION IN RELATION TO PERSISTENT CRUELTY, see HALSBURY, Hailsham Edn., Vol. 10, p. 838, para. 1339; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 699-701, Nos. 6692-6702.

Cases referred to:

- (1) *Molesworth v. Molesworth*, [1947] 2 All E.R. 842; 112 J.P. 65; 27 Digest, Replacement, 712, 6794.
- (2) *Stokes v. Stokes*, [1911] P. 195; 80 L.J.P. 142; 105 L.T. 416; 75 J.P. 502; 27 Digest, Replacement, 712, 6796.
- (3) *Jones v. Jones* (Oct. 25, 1951), unreported.

A APPEAL by the wife against the dismissal on July 3, 1952, by the justices for the city of Coventry of her summons alleging persistent cruelty by the husband.

The parties were married in 1938. On Jan. 5, 1952, the wife took out a summons alleging persistent cruelty. This summons was heard by the justices on Jan. 31, 1952, when the wife gave evidence of physical violence on occasions dating from 1944 onwards. The summons was dismissed. On May 27, 1952, the wife took out the present summons, also alleging persistent cruelty. At the hearing of B this summons on July 3, 1952, the justices refused to allow the wife to adduce evidence of physical violence between 1944 and Jan. 31, 1952, on the ground that the allegations relating to that period had been disposed of and that there was not sufficient evidence of cruelty since Jan. 31, 1952, to justify them in considering evidence of events that had taken place before that date. The wife's evidence was, therefore, limited to incidents which had occurred between C Jan. 31, 1952, and the issue of the present summons on May 27, 1952, at the end of which it was submitted on behalf of the husband that there was no case to answer and the justices accepted the submission and dismissed the summons.

D. R. Ellison for the wife.

Moylan for the husband.

D LORD MERRIMAN, P. : This is a wife's appeal from the dismissal on July 3, 1952, by justices for the city of Coventry, of her summons on the ground of persistent cruelty. That summons is dated May 27, 1952, but there had been an earlier summons, which was issued on Jan. 5, 1952, and came to trial on Jan. 31, before a court in the same petty sessional division. This earlier summons also alleged persistent cruelty. It was dismissed, and the point in this appeal E is whether, on July 3, the justices were entitled to refuse to hear evidence of any alleged ill treatment by the husband of the wife antecedent to the dismissal of her first summons.

[HIS LORDSHIP stated the facts and continued:] The question is whether the justices have so seriously misdirected themselves and so improperly rejected evidence that it is impossible for us to uphold the decision, in spite of the improper F rejection of evidence, on the ground that no substantial miscarriage of justice has occurred. I think that this is a very serious misdirection, which goes to the root of the case. The same sort of point has been before the Divisional Court more than once in recent years, and our attention has been drawn to *Molesworth v. Molesworth* (1). That case related to an alleged estoppel in connection with a charge of wilful neglect to maintain by the withdrawal of that charge in favour G of a summons for desertion. If I may quote from my own judgment, with reference to a decision of SIR SAMUEL EVANS, P., in *Stokes v. Stokes* (2), in which he had laid down the principle that a cause of complaint which had been adversely determined against the complainant could not be raised again by her in a court of summary jurisdiction, and to his statement that the fact that desertion is a continuing offence made no difference because desertion must be referable to H some particular time when it began, I said that, if it was sought to apply that passage to all possible cases of desertion it would go too far, and I am reported as having said ([1947] 2 All E.R. 844):

"It makes all the difference in the world in certain circumstances for precisely the same reason that in a charge of persistent cruelty the conduct which is alleged, within the period of the summons which is being dealt with, to amount to persistent cruelty can only be judged in the light of the

whole course of conduct, and the mere fact that at an earlier stage, when the conduct was only partly completed, a court has adjudged that at that point it does not amount to persistent cruelty, does not shut that evidence out for ever, any more than it does in certain cases of desertion."

It is truly said that that reference to a charge of persistent cruelty was obiter dictum in the case with which we were then dealing, but our attention has been called to an unreported case, *Jones v. Jones* (3), heard on Oct. 25, 1951, by this court [LORD MERRIMAN, P., and COLLINGWOOD, J.], which appears to me to raise substantially the point which we are now asked to decide. That was a case of constructive desertion. In November, 1950, the wife had taken out a summons, which was dismissed, and when the matter came before the same justices on another summons in September, 1951, they refused to go into the history antecedent to the dismissal of the summons in November, 1950. In the present case counsel for the wife submitted that he was entitled to call the evidence of incidents prior to Jan. 31, 1952, but the bench held there was not sufficient evidence of cruelty "to allow the revival of previous evidence of matters which had become *res judicata*". The same sort of phraseology was used in *Jones v. Jones* (3), and in my judgment I said:

"The justices do not say that they do not believe the wife. If they had said that, of course, there would have been no more to argue about. But they begin by saying that a complaint by the wife had been inquired into on a summons heard in November, 1950, and dismissed. As a matter of history that is true. They then go on to say that nothing of a substantial character or of any gravity had taken place which would revive what had gone before to justify the wife leaving her husband again in February, 1951."

That differentiated the case from *Stokes v. Stokes* (2). We were dealing, not with the same period and the same separation, but with a different separation. I continued:

"It is clear that the use of the word 'revive' is wrong in that context, but I do not want to make too much of that by itself. I think the plain explanation of it is what COLLINGWOOD, J., suggested in the course of the argument, namely, that there was nothing which had occurred since her return in December to justify the justices in considering what had happened before the dismissal of the summons in November. Now, that must be wrong. Equally, of course, it is wrong to talk about 'revival' as if some offence had been committed and condoned and there was the question whether there was enough to revive it. If there had been an offence, for example, if cruelty had been established up to November, the use of the word 'revive' would have been right, because she had condoned it by coming back. But it was not. It is not a case of reviving an offence which had been committed, because they found none had been committed at the time. If, on the other hand, what they are saying is: 'What happened afterwards was not enough to justify us in considering anything else', then, in my opinion, they are plainly wrong. And that is what I think they have said. Unless the case in November was disposed of on the footing that the wife was not telling the truth at all and they did not believe a word of what she said, of which there is no suggestion, this is plainly a case in which the whole history, including, no doubt, the dismissal of the summons, is relevant up to the moment of the last hearing. To put it another way, the mere fact that in November, 1950, the court thinks that there has not been a sufficient accumulation of facts to justify the wife in withdrawing from cohabitation, and that she has, so to speak, struck too soon, does not disentitle her to bring those facts into consideration three months later and say: 'Now look what has happened in the meantime. It is impossible to say I have struck too soon now'."

Although *Molesworth v. Molesworth* (1) was not cited to us, so far as I can see, looking at my note of that appeal, that is exactly the same reasoning as actuated me when I said in that case ([1947] 2 All E.R. 844):

A "... in a charge of persistent cruelty the conduct which is alleged, within the period of the summons which is being dealt with, to amount to persistent cruelty can only be judged in the light of the whole course of conduct, and the mere fact that at an earlier stage, when the conduct was only partly completed, a court has adjudged that at that point it does not amount to persistent cruelty, does not shut that evidence out for ever ..."

B In my opinion, we have no option in the present case but to send the matter back to the justices to hear the wife's case. It is impossible for us to judge whether, on the course of conduct as a whole, a charge of persistent cruelty has or has not been made out. That must be determined by the court of summary jurisdiction on evidence of the whole course of conduct which is alleged to constitute the persistent cruelty.

DAVIES, J.: I agree.

Appeal allowed.

C Solicitors: *Thompson, Quarrell & Megaw*, agents for *Blythe, Owen George & Co.*, Coventry (for the wife); *Sharpe, Pritchard & Co.*, agents for *S. G. Ansell & Co.*, Coventry (for the husband).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

D SMITH v. JONES.

[QUEEN'S BENCH DIVISION (Streatfeild, J.), November 5, 1952.]

Sale of Land—Contract—Purchase price—Price to include "cost of roads, sewers and other services"—Cost of making up roads to satisfaction of local authority not included—Public Health Act, 1875 (c. 55), s. 150.

E *Building Control—Licence—Construction with application—House to be sold at price "including cost of roads, sewers and other services"—Cost of making up roads to satisfaction of local authority not included—Public Health Act, 1875 (c. 55), s. 150.*

F In completing a form of application, dated Nov. 23, 1945, for a licence to build a house, the defendant, a builder, stated that the site was to be developed with the roads and sewers. A footnote to the form stated: "The selling price of a house of the maximum size of one thousand square feet ... must not in any case exceed £1,200 freehold including cost of roads, sewers and other services ..." with proportionate prices according to size. The description of the houses covered by the licence granted by the local authority contained the words: "According to application dated Nov. 23, 1945", and a condition that "the licensee does not sell the house ... at a price in excess of £1,170 less leasehold charges". The leasehold charges and a subsequent increase in the authorised price made the controlled selling price fixed by the government £1,065. The defendant sold the house, with roads and sewers and other services made up, under an agreement providing that the contract price should be the controlled price. In 1949 the local authority served notice on the purchaser requiring him to make up the road under s. 150 of the Public Health Act, 1875, and, having executed the work themselves under the power contained in that section, demanded payment of £49 3s. 4d. as the purchaser's share of the cost. In an action by the purchaser to recover the £49 3s. 4d. from the builder under the contract of sale,

H HELD: the terms of the licence being unambiguous, there was no reason to look at the form of application for the licence to explain how the price of

£1,170 stated in it was arrived at; even if the licence should be read with the form of application, the reference in the form to the "cost of roads, sewers and other services" referred to the cost incurred by the defendant and did not include the estimated cost of making up the road to the satisfaction of the local authority under a notice subsequently served under the Public Health Act, 1875, s. 150; and, therefore, the defendant was not liable to reimburse the purchaser for such cost falling on the purchaser.

FOR THE PUBLIC HEALTH ACT, 1875, s. 150, see HALSBURY'S STATUTES, A Second Edn., Vol. 19, p. 70.

ACTION for a declaration that the defendant was bound to indemnify the plaintiff in the sum of £49 3s. 4d., to recover that sum, and for damages for breach of contract.

On Nov. 23, 1945, the defendant, Mr. Robert Jones, a builder, made an application to Sheffield City Council for a licence to build certain houses, and he answered questions in the application form as follows: B

"4. Is the site developed with the roads and sewers?—Yes . . . 9 (2). If the house is to be sold, state (a) Selling price of the house.—£1,050. (b) If not sold freehold, amount of ground rent proposed to be charged and period of the lease.—£7 per annum. (c) If sold subject to additional charges for roads, etc., estimated amount of charges." (No answer was given, question C 4 being answered in the affirmative).

A footnote (No. 5) was as follows:

"The selling price of a house of the maximum size of one thousand square feet (in the case of a one-storey house or flat 930 square feet) must not in any case exceed £1,200 freehold including cost of roads, sewers and other services and there may be a lower maximum selling price in some areas." D

The footnote further dealt with proportionate prices according to the size of the house. On Dec. 27, 1945, Sheffield City Council granted the defendant a licence for the erection of houses in the following terms: E

"Subject to the conditions hereinafter set out, licence is hereby granted to erect twenty-eight dwelling-houses as plan No. 39682 approved by Sheffield City Council Sept. 21, 1945 (excluding garages). (Floor area 968 feet super). According to application dated Nov. 23, 1945."

By condition No. 1 of the licence:

"This licence is granted on condition that the licensee does not sell the houses the erection of which is hereby authorised at a price in excess of £1,170 less leasehold charges." F

The leasehold charges to be deducted were £140, and the authorised price was later increased by £35. The controlled selling price was, therefore, £1,065. On Apr. 20, 1947, the defendant sold one of the houses built under the licence to the plaintiff under an agreement which provided that the contract price should be the controlled price fixed by the government at the time of completion, less a sum to be agreed in respect of the leasehold interest in the property. On Mar. 22, 1949, Sheffield City Council served notice under the Public Health Act, 1875, s. 150, on the plaintiff and owners and occupiers of other premises in the same road, requiring them to make up the road to the satisfaction of the council. On July 5, 1950, having done the work themselves under the power contained in the section they assessed the plaintiff for his share of the cost in the sum of £49 3s. 4d. On Oct. 9, 1950, they demanded that sum from the plaintiff. G

The plaintiff contended that, in ascertaining "the controlled price fixed by the government" under the contract, the terms of the licence to build the house should be looked at, that the licence should be read together with the application H

form, including the notes thereto, and that, as note No. 5 stated that the maximum price must not exceed £1,200, including the costs of the roads, sewers and other services, the defendant was required to answer the questions in the application form, and, in particular, question 9 (2) (c), in such a way as to cover, not only the cost of the roads, sewers, and other services which he himself had incurred in the process of developing the site, but also an estimate of the likely cost per house of making up the roads to the standard required by the local authority on the assumption that they would require owners to make up the roads to their satisfaction before they were taken over. He claimed, therefore, the cost of making up the road. The defendant contended that the words: "According to the application dated Nov. 23, 1945" in the licence were mere matters of description of the actual houses and types of houses to be erected, and that the application form should not be looked at. He submitted, further, that the cost of developing the roads and sewers referred to in the application form meant only the cost of developing the roads and sewers and other services as carried out by himself.

C. Lawson for the plaintiff.

Sir Lynn Ungood-Thomas, Q.C., and F. B. Alcock for the defendant.

STREATFEILD, J. : This is a test action by one of several householders who purchased property in Sheffield from the defendant. [HIS LORDSHIP stated the facts and continued:] Counsel for the plaintiff argues that, to ascertain the meaning of the licence, I must read with it the application on the faith of which it was granted. Counsel for the defendant has argued that the words: "According to application dated Nov. 23, 1945" are mere matters of description of the actual houses and the types of houses which are authorised to be erected. Counsel for the plaintiff, on the other hand, argues that the presence of those words in the licence authorises me to look at the application in order to interpret the meaning of the licence.

I have come to the conclusion that on that point the defendant's argument is right. I do not think that there is any ambiguity on the face of the licence. The conditions are perfectly plain. The licence is granted

"on condition that the licensee does not sell the houses the erection of which is hereby authorised at a price in excess of £1,170 less leasehold charges."

There is no ambiguity in those words calling for explanation, and nothing which on the face of the document obliges me to ascertain how the £1,170 is arrived at. The mere fact that the words, "According to application dated Nov. 23, 1945", appear following the description of the houses authorised to be erected, to my mind, does not entitle me to look at the application any further than would be necessary if anything turned on it to determine what was the description of the houses which were to be erected. Nothing does turn on that, and, in my view, those words add nothing to the licence itself save by reference as to the description of the property concerned. Even assuming that I am entitled to read the two documents together, I am still not satisfied that the argument of counsel for the plaintiff is sound. The effect of his argument is that a builder, answering question 9 (2) (c) in the application, must assume that at some time thereafter—how long after he has no means of knowing—the local authority, under their powers under the Public Health Act, 1875, will call on the owners and occupiers to make up the roads to their required standard before taking them over, and that he must estimate as best he can the likely price per house of doing that work. That would mean that in 1945 the defendant ought to have been gifted with such foresight that he was able to estimate what was likely to be the ultimate charge made by the local authority five years later. I do not take that view. Even if I am wrong in rejecting counsel's argument that I should look at this application form and assuming for the moment that I am entitled to look at it, I do not think

that the reference to the cost of developing the roads and sewers in the particular context of that application form refers to anything more than the cost of developing the roads and the sewers and other services as carried out by the builder himself. It may be that he has not completed his work, and that is, perhaps, the reason for question 9 (2) (c). It may be that, if the builder according to proper standards ought to have spent more money on the work, provided the question is answered properly, the local authority will know how much to deduct from the total permitted price to allow, under note 5, for the costs of roads, sewers, and other services. In my view of that note, it is not contemplated that the dedication charges, which may or may not be made years afterwards, are to be included. Accordingly, even if the application is read as one with the licence, I do not think that it assists the plaintiff. A

I have come to the conclusion that, in determining the meaning of cl. 2 of the agreement—"the contract price should be the controlled price fixed by the government"—I am entitled to look back to the grant of the licence, and that the licence, even read together with the application form, clearly means that the controlled price shall be £1,170, less the leasehold charges, plus £35 as subsequently allowed by the local authority. In those circumstances I do not think that the local authority's notice to the owners to pay these dedication charges for the levelling and making up of the roads to their requirements prior to being taken over by the local authority was contemplated by this agreement at all. It follows that the plaintiff here did not receive something which was £49 3s. 4d. less than he had contracted to pay for. This action fails and there will be judgment for the defendant with costs. B

Judgment for the defendant.

Solicitors: *Wingfields, Halse & Trustram*, agents for *Wing, Keer & Bolsover*, Sheffield (for the plaintiff); *Bell, Brodrick & Gray*, agents for *Russell & Creswick*, Sheffield (for the defendant). D

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

BRIDGES (INSPECTOR OF TAXES) v. WATTERSON. E

[CHANCERY DIVISION (Harman, J.), October 17, 20, November 6, 1952.]

Income Tax—Pension—Right of personal representative to receive after taxpayer's death difference between amount of sums paid as pension and amount of contributions made by taxpayer—Income Tax Act, 1918 (c. 40), sched. D, Case V, r. 2. F

The taxpayer was entitled to a pension payable during the period of his life, under the pension scheme of a foreign company by which he had been employed. By r. 20 of the scheme, if his pension ceased through his death before his pension payments equalled the amount of his contributions, the difference was to be paid to his personal representatives. The taxpayer was assessed to income tax under Case V of sched. D (the pension being a foreign possession) on the amount of his pension. He contended that the pension represented return of contributions, and was not assessable to tax, until the amount received equalled the aggregate of his contributions. G

Held: the right to demand the difference between the pension payments and the contributions paid was a right which belonged to the taxpayer's personal representatives and not to the taxpayer, his right being only to a pension, and not to the return of his contributions, and, accordingly, the whole of his pension was assessable to tax. H

Perrin v. Dickson ([1930] 1 K.B. 107), distinguished.

Sothern-Smith v. Clancy ([1941] 1 All E.R. 111), applied.

FOR THE INCOME TAX ACT, 1918, sched. D, Case V, r. 2, see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 172.

Cases referred to:

- (1) *Sothorn-Smith v. Clancy*, [1941] 1 All E.R. 111; [1941] 1 K.B. 276; 110 L.J.K.B. 189; 164 L.T. 210; 24 Tax Cas. 1; 2nd Digest Supp.
- (2) *Inland Revenue Comrs. v. Wesleyan & General Assee. Society*, [1948] 1 All E.R. 555; [1948] L.J.R. 948; 30 Tax Cas. 11; 2nd Digest Supp.
- (3) *Perrin v. Dickson*, [1929] 2 K.B. 85; 98 L.J.K.B. 447; *affd.* C.A., [1930] 1 K.B. 107; 98 L.J.K.B. 683; 142 L.T. 29; 14 Tax Cas. 608; Digest Supp.

CASE STATED by the General Commissioners of Income Tax for the division of Ormskirk in the county of Lancaster.

The taxpayer appealed against an assessment to income tax made on him under Case V of sched. D in the sum of £166 for the year 1949-50 paid to him under a pension scheme of a company resident abroad. Rule 20 of the pension scheme provided:

“When the pension payments made under these rules cease by reason of the death of a contributor . . . before the amount of the pension payments (including the proportion voluntarily contributed by the company) has equalled the amount of contributions made by said contributor, the difference shall be paid to the contributor’s legal personal representatives . . . ”

Before the commissioners the taxpayer contended that that part of each pension payment which the company paid out of his contributions to the pension scheme (the figures being agreed between the taxpayer and the Crown) represented a return of contributions and was not assessable to tax. The commissioners upheld the taxpayer’s contention. The Crown appealed, and on appeal the taxpayer abandoned his contention, which had been successful before the commissioners, that an apportioned part of each pension payment was non-assessable, and contended instead that no part of any pension payment was assessable until the amount received exceeded the aggregate of his contributions.

Graham-Dixon, Q.C., and *Sir Reginald Hills* for the Crown.
Pennyquick, Q.C., and *E. W. Griffith* for the taxpayer.

Cur. adv. vult.

Nov. 6. The following judgment was read.

HARMAN, J.: This is an appeal by the Crown from a decision of the general commissioners for the division of Ormskirk in the county of Lancaster whereby they discharged in part an assessment to tax made on the taxpayer under Case V of sched. D to the Income Tax Act, 1918, in the sum of £166 for the year 1949-50 in respect of a pension paid to him under a pension scheme of the Canadian Pacific Railway Company. The commissioners came to the conclusion that a part of the assessment made on the taxpayer was wrong and that the assessment should be reduced accordingly. I need not, I think, go into the reasoning behind this decision because in this court no attempt was made to support it. Instead, the taxpayer relied on a new point, of which he duly gave notice to the Crown, arguing that the whole assessment ought to be discharged because the sum in question represented a partial repayment to him of his contributions to the pension fund, and that, until the aggregate of the sums paid to him by way of pension exceeded the aggregate of his contributions, no income tax was or would become payable. It was admitted, however, that any payment made to the respondent by the company in excess of his contributions to the fund must be treated as income under the case [*Sothorn-Smith v. Clancy* (1)] referred to by the commissioners and be liable to tax accordingly. The result, if this be right, is an odd one because payments made periodically by the company to the taxpayer change their nature at the point indicated, ceasing to be repayments of capital and taking on the form of annual payments of income.

The matter turns on the proper construction of the rules governing the pension scheme referred to. A copy of these rules is annexed to the Case, in which a

summary of them is set out, and I need not, I think, rehearse them here. It is a truism to say that the court is not bound by the label which parties to a contract choose to give to a payment made under it. The fact that this payment to the taxpayer is, in the contract under which it is paid, described as a pension allowance will not be permitted to control the income tax liability if, in truth, the sum paid is a repayment of capital. If authority be needed for this proposition it will be found stated by VISCOUNT SIMON in his speech in *Inland Revenue Comrs. v. Wesleyan & General Assce. Society* (2). It is the duty of the court to ascertain what, on the true construction of the rules, is the true nature of this payment made by the company to the taxpayer. In the first place, the scheme is contributory. Under r. 11 employees are bound to contribute three per cent. of their salaries or wages for so long as they serve the company, these contributions being collected by deduction from each wage payment. Contributions are to cease when an employee reaches the age of sixty-five, and, if, before the employee retires on pension, he leaves the service of the company or dies, the aggregate of his contributions will be refunded under r. 11 (g). Payment of pension starts normally when an employee retires at the age of sixty-five, but it may be made earlier or later under r. 15. The amount of pension is calculated under r. 18 and is based on the period of service and the rate of wage during the last ten years of it under a formula familiar in such cases, and a pension may be extended at the pensioner's request to his widow. These contributions are thus not a measure of the pension. The crucial rule for the present purpose is r. 20, which is set out in full in the Case Stated, and provides, in effect, a kind of guarantee by the company that the contributor (or he and his widow together as the case may be) shall receive no less from the company than the aggregate amount of the contributions paid during his service. This is brought about by providing that the personal representatives are to be entitled to a lump sum equal to the difference between the aggregate of the pension allowances paid and the contributions made if the latter have exceeded the former. This, too, is a familiar feature of pension schemes of this kind.

The taxpayer retired in March, 1948, having during his service made contributions amounting in the aggregate to £219 3s. During the next year he received by way of pension allowance a sum of £166 17s., this being calculated as I have said by reference to his length of service and the rate of his wages. He had not, therefore, during the first year after his retirement received back a sum equal to the aggregate of his contributions so that, if he had died at that moment, the difference between the two sums would have been payable to his personal representatives. The £166 so paid is the sum on which tax is demanded. It is said on his behalf that he is entitled to two rights, namely, a right to a refund of his contributions and a right to a pension over and above those contributions, if he lives long enough to obtain it, and that, so long as he enjoys the former right, payments made to him in deference to it do not attract income tax. I cannot take this view at all. In my judgment, the sums paid to the taxpayer are, in truth, what they affect to be, namely, payments of a pension allowance. That allowance will continue during the rest of his life, but, if he should die before the amount so paid to him reaches the aggregate of his contributions, his personal representatives will acquire a new right, namely, to demand payment of the deficiency. That right, as it seems to me, never belongs to the taxpayer at all. If the matter were free from authority I should have no hesitation in holding that the assessment made on the taxpayer was correct, the pension, having regard to the fact that the company is resident abroad, being a possession outside the United Kingdom to which Case V of sched. D and r. 2 of the rules applicable to that Case apply.

It was, however, urged on me by both sides that I was bound by authority in this matter, each party citing authority which he submitted to be conclusive in his favour. Of these the earlier in time relied on by the taxpayer was the decision

in 1929 of the Court of Appeal in *Perrin v. Dickson* (3). That case decided, as I understand it, that payments made by an assurance company to an assured on what is commonly known as an education policy did not attract tax because they were mere repayments of capital. Under that policy the taxpayer had subscribed yearly between 1912 and 1917 sums of money in consideration of which the society covenanted to pay him as guardian of his son annual sums for the seven years from 1920 to 1926 if the son should so long live. These sums were equal to

A the payments made by the assured, with compound interest. The policy further provided that, if the son did not survive payment of all the premiums, repayment should be made to the assured of a sum which, together with any sums already paid, would equal the amount of his contributions, but without interest. It is to be observed that there was no element of insurance in this transaction. The society agreed to repay a fixed sum in consideration of the payment of a fixed
B sum, the two being either equal or the second representing the first with the addition of compound interest. It is not surprising to find that the Court of Appeal looked on these payments as repayments of capital to the assured not attracting tax, and it is at once apparent that there is a crucial distinction between that case and the present in that in the present case the liability of the company may in the upshot exceed by many times the pensioner's contributions
C to the fund. This is essentially a feature of the purchase of an annuity. It is true that the two cases have this in common, that the contributor can in no case receive less than his contributions. I ignore for this purpose the feature in *Perrin's* case (3) that repayment in one event would have been a voluntary act on the part of the insurance company. It was pressed on me that this case governs the present, and counsel for the taxpayer submitted that in the case of
D any contract whereby A pays to B contributions in return for B's obligation to make payments to A in future, then, if the amount paid by A is a measure of B's liability, payment made in pursuance of that liability is not taxable. I am, of course, bound by *Perrin v. Dickson* (3), and, if the present case were one of a terminable annuity, it would be on all fours with it, but I have already pointed out that that is not the case and that the indefinite liability of the company
E makes, in my view, the whole difference. In my judgment, apart altogether from the authority to be mentioned below, I am not bound in this case to follow *Perrin v. Dickson* (3).

The case relied on by the Crown was also a decision of the Court of Appeal, that in *Sothorn-Smith v. Clancy* (1). The court in that case was at pains to distinguish *Perrin v. Dickson* (3). The contract in question was one whereby in consideration
F of a single premium an insurance company agreed to pay a man an annuity during his life, and guaranteed if he died before the annuities paid equalled the amount of the single premium to make up the deficiency. Thus, the insurance company's liability could not be less than the amount of the single premium received but might be more, and this was the fact that distinguished the case from *Perrin v. Dickson* (3). I find SIR WILFRID GREENE, M.R., saying this ([1941] 1 All E.R.
G 117):

“ If the law were that, in the ordinary case of an annuity for a term of years, the nature of the financial calculation involved stamped part of the payment as a capital payment, leaving only the interest element to be taxed, on the ground that an annuity is taxable only in so far as it is a profit, the position would be simple, and perhaps not unjust. In truth, there is a basic
H distinction between such an annuity and a life annuity, since, in the latter case, the sum of the payments which fall to be made may prove to be less or greater than the sum paid by the annuitant, while, in the former case, it will be the same as the amount paid together with an addition for interest. Upon this basis, *Perrin's* case (3) would have been a clear one. However, I do not feel myself at liberty in this court to adopt any such principle. I feel bound to regard the purchase of an annuity of the kind to which I have

referred as the purchase of an income, and the whole of the income so purchased as a profit or gain, notwithstanding the way in which the payments are calculated. The sum paid for the annuity has ceased to have any existence, and the fact that, at the end of the annuity period, the recipient will have received an amount equal at least to what he paid I feel bound to treat as irrelevant."

CLAUSON, L.J., is even more explicit (*ibid.*, 120):

"It was said that, if the premiums or the sum of the premiums paid by the so-called annuitant must, under the terms of the contract, in any event be returned to him, that circumstance must be taken to show that the transaction is not the purchase of an annuity, but is a mere investment of capital money with the company, to be repaid in due course, with, in certain events, interest or other benefits. The payments made by the so-called annuitant were, it was said, capital, of which it was not true to say that it never had ceased to exist. It retained throughout its character of capital which passed away for a period from the so-called annuitant, but was in due course returned to him. It was a mere loan to the company repayable on terms, and the sums paid (or rather, it was said, repaid) to the so-called annuitant were, to the extent of the sums paid by him, payments (or rather repayments) of capital. Any moneys in excess of that amount paid under the contract might well be profits and taxable. In my judgment, it is not possible to treat the present contract as one of mere investment".

If, therefore, I had felt difficulty about the decision in *Perrin v. Dickson* (3), *Clancy's* case (1) would have resolved it by pointing the true distinction. In my judgment, on the true construction of these rules, the pension allowances paid and payable to the taxpayer are what they are stated to be and nothing else, and cannot be treated as repayments of capital simply because in a certain event the company's liability may be measured by the amount of the taxpayer's contributions. I, therefore, allow the appeal and restore the assessment.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Jaques & Co.*, agents for *Thomas R. Jones*, Liverpool (for the taxpayer).

[Reported by C. N. BEATTIE, Esq., 'Barrister-at-Law.']

COODEN ENGINEERING CO., LTD. v. STANFORD.

[COURT OF APPEAL (Somervell, Jenkins, and Hodson, L.JJ.), October 9, 10, November 3, 1952.]

Contract—Penalty—Hire-purchase agreement—Full balance of unpaid instalments payable and agreement determinable on breach of agreement and other events.

A By cl. 1 of an agreement in writing made between the plaintiffs and the defendant the plaintiffs ("the owners") agreed to let and the defendant ("the hirer") agreed to hire a motor car for the term of thirty months from July 19, 1947 (subject to determination as thereafter provided), and the hirer agreed to pay to the owners in respect of such hire the sum of £412 7s. 6d., payable as to £25 on or before taking delivery of the vehicle and as to the balance in monthly instalments of £12 18s. 3d. By cl. 10: "The
B hirer shall be at liberty at any time during the continuance of the said term to return the vehicle to the owners . . . and thereupon all liability on the part of the hirer for the payment of the said monthly instalments shall cease and absolutely determine, and the hirer shall be under no further liability, except that he shall forthwith pay to the owners (a) all instalments which have fallen due prior to the date of such return and are then unpaid and (b)
C such a sum as represents forty per cent. of the total amount of the monthly instalments which have not then fallen due (this sum being payable in lieu of compensation for agreed depreciation in the market value of the vehicle between the date of this agreement and the date of the return of the vehicle) . . . " By cl. 11: "If the hirer shall . . . fail to make any payment under this agreement on the day on which it is due or demanded as the case may be or shall die the owners may by twenty-four hours previous notice in writing determine the hiring or if the hirer shall commit any act of bankruptcy or if a receiving order shall be made against the hirer or if he shall make any arrangement or composition with his creditors or (in the case of the hirer being a company) if a petition to wind-up be presented or a resolution for voluntary liquidation be passed or if the hirer shall
E commit or suffer any analogous act or procedure in Scotland or if an execution or distress or legal process shall be levied or threatened upon the vehicle or if the hirer shall fail to observe or perform any agreement or condition herein contained the hiring shall ipso facto be determined and on any such determination by notice or otherwise the full balance then remaining unpaid of the sum mentioned in cl. 1 of this agreement, together with all costs charges and expenses whatsoever which the owners may incur or for which they may become liable in exercise of their powers under this and/or any other clause in this agreement and/or which they may be required to pay in order to regain possession of the vehicle shall at once become payable to and be recoverable by them . . . " Clause 12
F provided that, if the hirer should duly make all such payments as aforesaid and strictly observe and perform all the terms and conditions on his part
G contained in the agreement, he should have the option of purchasing the vehicle for the sum of 10s., but that no such option should arise in case of termination of hiring under cl. 10 and 11. The vehicle was delivered to the defendant, and it remained in his possession for nearly two years during which period he paid, in addition to the initial instalment of £25, seven of the monthly instalments of hire. By a letter dated Feb. 19, 1949, the
H plaintiffs gave notice to the defendant determining the hire under the provisions of cl. 11, and on June 17, 1949, they possessed themselves of the vehicle. On a claim by the plaintiffs for the arrears of instalments together with the balance of payments under cl. 11, the defendant contended that, as under the clause the plaintiffs were entitled to receive the full price of the car and the car itself, the sum claimed was excessive and amounted to a penalty.

HELD: (i) the sum payable under cl. 11 was excessive save in the exceptional case where the car had become valueless, and, therefore, in point of amount it was a penal sum ;

(ii) (JENKINS, L.J. dissentiente): the fact that cl. 11 provided for the determination of the hire in a number of events where the hirer was not guilty of a breach of contract did not prevent the sum payable under the clause being a penalty;

(iii) therefore, the sum was a penalty and not recoverable by the plaintiffs A from the defendant.

Principles laid down by LORD DUNEDIN in *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage & Motor Co., Ltd.* ([1915] A.C. 86, 87), applied.

Re Apex Supply Co., Ltd. ([1941] 3 All E.R. 473), considered.

AS TO LIQUIDATED DAMAGES OR PENALTY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 141-145, paras. 183-185; and FOR CASES, see DIGEST, Vol. 17, pp. 136-153, Nos. 422-546. B

Cases referred to:

- (1) *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage & Motor Co., Ltd.*, [1915] A.C. 79; 83 L.J.K.B. 1574; 111 L.T. 862; 17 Digest 138, 426.
- (2) *Re Apex Supply Co., Ltd.*, [1941] 3 All E.R. 473; [1942] Ch. 108; 111 C L.J.Ch. 89; 166 L.T. 264; 2nd Digest Supp.
- (3) *Elsey & Co., Ltd. v. Hyde*, (1926), JONES AND PROUDFOOT'S NOTES ON HIRE PURCHASE LAW, 2nd ed., p. 107.
- (4) *Chester & Cole, Ltd. v. Wright*, (1930), JONES AND PROUDFOOT'S NOTES ON HIRE PURCHASE LAW, 2nd ed., p. 124.
- (5) *Kemble v. Farren*, (1829), 6 Bing. 141; 7 L.J.O.S.C.P. 258; 130 E.R. 1234; D 17 Digest 144, 474.
- (6) *Roadways Transport Development, Ltd. v. Browne & Gray*, (1927), JONES AND PROUDFOOT'S NOTES ON HIRE PURCHASE LAW, 2nd ed., p. 118.
- (7) *Associated Distributors, Ltd. v. Hall*, [1938] 1 All E.R. 511; [1938] 2 K.B. 83; 107 L.J.K.B. 701; 158 L.T. 236; Digest Supp.
- (8) *Mussen v. Van Diemen's Land Co.*, [1938] 1 All E.R. 210; [1938] Ch. E 253; 107 L.J.Ch. 136; 158 L.T. 40; Digest Supp.
- (9) *Re Dagenham (Thames) Dock Co. Ex p. Hulse*, (1873), 8 Ch. App. 1022; 43 L.J.Ch. 261; 38 J.P. 180; 10 Digest 1174, 8328.
- (10) *Kilmer v. British Columbia Orchard Lands, Ltd.*, [1913] A.C. 319; 82 L.J.P.C. 77; 108 L.T. 306; 20 Digest 517, 2439.
- (11) *Steedman v. Drinkle*, [1916] 1 A.C. 275; 85 L.J.P.C. 79; 114 L.T. 248; F 20 Digest 517, 2440.
- (12) *Willson v. Love*, [1896] 1 Q.B. 626; 65 L.J.Q.B. 474; 74 L.T. 580; 17 Digest 137, 423.

APPEAL by the defendant from an order of CROOM-JOHNSON, J., made on Mar. 31, 1952, awarding the plaintiffs £297 0s. 9d. alleged to be due to them under a hire-purchase agreement dated July 19, 1947, made between themselves and the defendant. G

By the agreement (cl. 1) the plaintiffs (therein called "the owners") agreed to let and the defendant (therein called "the hirer") agreed to hire a 1935 model Ford (eight horse-power saloon) motor car (therein referred to as "the vehicle") for the term of thirty months from July 19, 1947 (subject to determination as thereafter provided) and the hirer agreed to pay to the owners in respect of such hire the sum of £412 7s. 6d. payable as to £25 on or before taking delivery of the vehicle and as to the balance in monthly instalments of £12 18s. 3d. payable on the nineteenth day of each succeeding calendar month, the first instalment to be paid on Aug. 19 then next, and it was provided that in default of payment of any instalment within seven days of the same becoming due the hirer should pay to the owners interest thereon at the rate of ten H

per cent. per annum from the due date until actual payment, without prejudice to the other rights of the owners thereunder. Clause 3 contained numerous undertakings by the hirer with respect to the vehicle. These included undertakings by him not to attempt to sell or otherwise part with possession of the vehicle; not to let it pass out of Great Britain or Northern Ireland; not to permit it to be used in contravention of any of the statutes and regulations in reference to motor vehicles or otherwise contrary to law, or to be driven by an unlicensed, A unqualified or incompetent driver; to keep it properly housed and in good repair; and not to change its permanent garage without previous notice in writing to the owners. The same clause also contained a declaration that the vehicle was only let on hire to the hirer and should remain the exclusive property of the owners until the hirer exercised the option contained in cl. 12 after becoming entitled so to do. Under cl. 6 the hirer was to pay all licence duties, fees B and regulation charges payable in respect of the vehicle while the agreement was in force, and to repay to the owners on demand with interest thereon at ten per cent. per annum until payment any such duties, charges or fees paid by them. Under cl. 7 the hirer undertook to insure and keep insured the vehicle with an insurance company approved by the owners against all such risks as they might require, to pay all premiums in respect of such insurance, and to C repay to the owners on demand any premiums paid by them with interest thereon at the rate of ten per cent. per annum until payment. Under cl. 9 the hirer was not to represent the vehicle to be his own property or allow himself to be held out as the true owner thereof. Clauses 10 and 11 provided:

“ 10. The hirer shall be at liberty at any time during the continuance D of the said term to return the vehicle to the owners carriage paid at the Cooden Engineering Co.'s premises, Cooden, Bexhill-on-Sea, together with the registration book, licence and insurance certificate and thereupon all liability on the part of the hirer for the payment of the said monthly instalments shall cease and absolutely determine, and the hirer shall be under no further liability except that he shall forthwith pay to the E owners (a) all instalments which have fallen due prior to the date of such return and are then unpaid and (b) such a sum as represents forty per cent. of the total amount of the monthly instalments which have not then fallen due (this sum being payable in lieu of compensation for agreed depreciation in the market value of the vehicle between the date of this agreement and the date of the return of the vehicle) and (c) such a sum as F represents the cost of putting the vehicle into proper repair and working condition as required by cl. 3 of this agreement and (d) all other moneys which may be payable to the owners pursuant to cll. 6 and 7 of this agreement and (e) any damages, compensation, costs and expenses which the hirer may become liable to pay to the owners in respect of the breach or non-observance by him of the provisions of this agreement (f) in default G of payment of any amount due to the owners under this clause upon an account stated within fourteen days of demand for payment having been made upon the hirer by the owners, such amount due under this present clause shall carry interest thereon at the rate of ten per cent. per annum from the date above mentioned until actual payment. 11. If the hirer shall have made any incorrect or untrue statement or suppressed any information H in the said hire-purchase proposal or shall fail to make any payment under this agreement on the day on which it is due or demanded as the case may be or shall die the owners may by twenty-four hours previous notice in writing determine the hiring or if the hirer shall commit any act of bankruptcy or if a receiving order shall be made against the hirer or if he shall make any arrangement or composition with his creditors or (in the case of the hirer being a company) if a petition to wind up be presented or a resolution for voluntary liquidation be passed or if the hirer shall

commit or suffer any analogous act or procedure in Scotland or if an execution or distress or legal process shall be levied or threatened upon the vehicle or if the hirer shall fail to observe or perform any agreement or condition herein contained the hiring shall ipso facto be determined and on any such determination by notice or otherwise the full balance then remaining unpaid of the sum mentioned in cl. 1 of this agreement, together with all costs charges and expenses whatsoever which the owners may incur or for which they may become liable in exercise of their powers under this and/or any other clause in this agreement and/or which they may be required to pay in order to regain possession of the vehicle shall at once become payable to and be recoverable by them. All moneys payable under the provisions of this clause by the hirer to the owners shall carry interest at the rate of ten per cent. per annum from the date of the same becoming due from the hirer or from the date of the same being expended by the owners under the provisions of this clause until payment thereof by the hirer to the owners."

The case was argued on the basis that the owners had determined the hiring by twenty-four hours' notice on the ground that payments had not been made on the due day. Clause 12 provided that, if the hirer should duly make all such payments as aforesaid and strictly observe and perform all the terms and conditions on his part contained in the agreement, he should have the option of purchasing the vehicle for the sum of 10s., but that no such option should arise in case of termination of hiring under cl. 10 and 11. By cl. 13 the agreement was declared to be personal to the hirer and not assignable by him and not to be charged.

The vehicle was duly delivered to the defendant, and it remained in his possession for nearly two years during which period he paid, in addition to the initial instalment of £25, only seven of the monthly instalments of hire. On Feb. 19, 1949, therefore, the defendant was substantially in arrear with his instalments, and by letter of that date notice was given to him on behalf of the plaintiffs determining the hire under the provisions of cl. 11. The plaintiffs could not then take possession of the vehicle without an order under the Courts (Emergency Powers) Act, 1943. On June 17, 1949, they obtained the necessary order under that Act, and on or about the same date they possessed themselves of the vehicle. On a claim by the plaintiffs for the arrears of instalments together with the balance of payments under cl. 11, the defendant contended that, as under the clause the plaintiffs were entitled to receive the full price of the car and the car itself, the sum claimed was excessive and amounted to a penalty. For the plaintiffs it was contended that as the sum was payable on the happening of one or other of several events, some of which were breaches of the agreement and some not, it could not be a penalty in one case if it was not in another. CROOM-JOHNSON, J., held that the sum was not a penalty and made the order stated above.

Percy Lamb, Q.C., and Frank Whitworth for the defendant.
B. Finlay for the plaintiffs.

Cur. adv. vult.

Nov. 3. The following judgments were read.

SOMERVELL, L.J.: In this case the plaintiffs claimed some £297 as due under a hire-purchase agreement the subject-matter of which was a second-hand motor car. The defence is that the sum claimed is in law a penalty and irrecoverable. To this the plaintiffs submit, first, that on the true construction of the agreement the question whether this is a penalty or a pre-estimate of damages does not arise. In other words, it does not fall to be considered as a sum stipulated to be paid on a breach or breaches of contract. The plaintiffs submit, secondly, that if it has to be so considered it is a pre-estimate of damages

and not a penalty. The plaintiffs' first contention is said to be supported by authority and the learned judge so held. The defendant submits that those authorities are distinguishable, or that, if the principle derived from them is applicable to this case, they are wrong. [His LORDSHIP stated the relevant terms of the agreement and continued:] The defendant was admittedly a very bad payer and considerable indulgence was given him by the plaintiffs. He had the car for nearly two years during which he only paid some seven or eight instalments. It is, however, clear from the decision in *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage & Motor Co., Ltd.* (1) that the question whether a sum is a penalty or a pre-estimate of damages, if it arises, has to be considered as at the date of the contract and having regard to its terms and not on the particular breach or breaches on which the claim is based: see LORD DUNEDIN's proposition 3 ([1915] A.C. 86).

The first issue is: Does the question arise? The learned judge held that it did not, basing himself on a decision of SIMONDS, J., in *Re Apex Supply Co., Ltd.* (2). SIMONDS, J., followed and applied what was said by SALTER, J., in *Elsey & Co., Ltd. v. Hyde* (3), and by GREER, L.J., in *Chester & Cole, Ltd. v. Wright* (4). These were both decisions of a Divisional Court, LORD HANWORTH, M.R., sitting with GREER, L.J., in the second case. Neither of these two cases are reported in any law report, but the judgments are set out in NOTES ON HIRE-PURCHASE LAW by JONES and PROUDFOOT, from which citations are made by SIMONDS, J. In these three cases it would appear that the measure of the hirer's liability was the same whether (i) he exercised an option to return the car and terminate the hiring as he could do under cl. 10 of the present agreement, (ii) some event happened such as the commission of an act of bankruptcy or the levy of execution on the car, (iii) the owner exercised a right similar to that in cl. 11 to terminate the hiring for a breach of the agreement. In *Elsey's* case (3) the hirer was in arrear with his payments as here. In *Chester & Cole's* case (4) the hirer had died, but I gather from the report that the claim was not based on any express provision as to death, but on the fact that, perhaps in consequence of the death, payments were not made. It is also clear in these cases that the sum to be paid was less than the total purchase price. In both cases both judges considered whether the sum was a penalty under that branch of the law and decided that it was not, but was a reasonable pre-estimate of damages due to depreciation of the vehicle. In *Elsey's* case (3) FRASER, J., who was sitting with SALTER, J., based his decision solely on this point, as did LORD HANWORTH, M.R., in *Chester & Cole's* case (4). In the *Apex Supply* case (2) SIMONDS, J., indicated very clearly that, if the question had arisen, he would have regarded the sum claimed as a pre-estimate of damages and not as a penalty.

The reasoning which was adopted by SIMONDS, J., in the *Apex Supply* case (2) is to be found in observations in the judgments of SALTER, J., and GREER, L.J. SIMONDS, J., citing SALTER, J., said ([1941] 3 All E.R. 479):

“ ‘Supposing the hirer exercises his right to terminate this hiring, how can it be said that this sum of money, which it is agreed shall be paid, is a penalty or that it is a case in which either the agreed sum or liquidated damages must be paid? If the hirer terminates this agreement, what right does that give the owner to recover any damages against him? He has done him no wrong, he has broken no contract, and I am quite unable to see that this sum would or could give a penalty if it were claimable in those circumstances. It appears to me to be a strange conclusion, if this money is to be regarded as a penalty where it was payable in one event and not regarded as a penalty where it was payable in another event. I think, therefore, as it is to my mind not a penalty where it is payable on the return of the article by the hirer, it ought not to be regarded as a penalty where it was payable on the re-taking of the article by the owner.’ ”

In dealing with *Chester & Cole's* case (4), SIMONDS, J., citing GREER, L.J., who summarised a later portion of the judgment of SALTER, J., said (*ibid.*, 480):

"The second question to be determined is a little more difficult: it is whether the sum of £95, diminished by the amounts already paid, is to be deemed to be a penalty for breach of contract, and not damages, or, as may well be, that it is neither one nor the other, that it is neither a penalty nor is it liquidated damages, but it is a sum which in consideration of getting the use of this car, the hirer promised to pay in a certain event, that event being the determination in one way or another of the hiring agreement. There is no reason in law why, for a sufficient consideration, there should not be on the same document two contracts, one a contract to hire the motor car on the terms of the agreement, and another, a contract that if that agreement comes to an end, then a certain sum will be payable by the hirer; and it may very well be that the view which is, I think, the view of SALTER, J., in *Elsey's* case (3), which was cited before us, is the right way to look at this clause, namely, that it is not either liquidated damages or a penalty, but it is a sum payable in respect of one event, namely, the determination and end of the hiring agreement, whether that end of the hiring agreement arises from the hirer delivering the car back again, or whether it arises from the owner taking it out of the possession of the hirer in the events in which he is entitled to take it out'."

These passages suggest two lines of reasoning. The first is that, if a sum is payable on the happening of one or other of two events, if it is not a penalty in the one case it cannot be in the other. If this is suggested by SALTER, J., I cannot, with respect, accept it. The events may, in fact, be so similar that a conclusion on one decides the other. The sum payable if the buyer desires to return the car may so clearly be a reasonable figure to cover depreciation that it would also be a reasonable pre-estimate if the owner exercises any right he has to terminate the agreement on a breach. But it cannot, I think, follow as a matter of law that a sum exigible for a breach or breaches cannot in law be a penalty because it is made payable on the happening of some other event which is not a breach. The second line of reasoning is put, if I may say so, very clearly in the passage cited from the judgment of GREER, L.J. It is that the law as to penalties is inapplicable if the owner under the agreement is entitled to "determine" the agreement as the result of any breach. If in a contract of this kind, without the special provisions of cl. 11, the hirer committed a breach going to the root of the contract, the owner would be entitled to treat this as a repudiation, to re-take possession of the car, to be free from all further obligations to let the hirer have possession of the car, and to sue for damages. In other words, to determine the contract and claim damages. The effect of the words we are considering is, I think, to give the same rights in the event of any failure to make punctual payment. The effect of this clause is, first, to make punctual payment a condition of the contract, and then to provide for the financial consequences to the hirer if the owner treats that breach as a repudiation giving him the right to free himself from all further obligations and claim money. No objection can be taken to the former, but, as it seems to me, the law as laid down in *Dunlop's* case (1) is applicable to the financial consequences which are plainly a sum to be paid in consequence of the breach.

It was further argued that the question of penalty or a reasonable pre-estimate of damages did not arise because the sum to be paid was the balance of the agreed figure for thirty months' hire, notwithstanding that the right to determine could on the clause be exercised if there was one day's delay in the first instalment. This cannot be right. One may take as an example a sale of twelve hundred tons of coal for £6,000, the coal to be delivered by monthly instalments of one hundred tons, £500 to be paid within seven days of each delivery. It is further provided that, if payment is not made within that period, the seller

shall be free of all obligations as to further deliveries. If the contract went on to provide that the buyer should be liable to pay the cost of the outstanding instalments for subsequent deliveries which he would ex hypothesi not receive, I cannot see how this way of arriving at the sum to be paid could affect the question whether it was a reasonable pre-estimate of damages or a penalty. I am, therefore, of opinion that the court has got to consider whether, applying the principles laid down in LORD DUNEDIN's speech in *Dunlop's* case (1), the

A payment of the full balance is a penalty.

Counsel for the defendant put his argument in three ways. First, he emphasised that on the clause as drafted a trivial breach, a delay of a day through inadvertence or illness, would enable this right to be operated. The hirer, so far from wishing to repudiate, might be able and anxious to fulfil all other terms of the contract and to complete it. He cited *Kemble v. Farren* (5), in

B which TINDAL, C.J., held a sum of £1,000 agreed for any breach, however trivial or inadvertent, to be a penalty, although in respect of the actual breach sued on the jury had assessed the damages at £750. Secondly, he relied on cl. 10. The forty per cent. under cl. 10 of the amount outstanding, being the amount which the owners were willing to take if the car was returned at any time must, he submitted, be regarded as a maximum figure for a pre-estimate of damages

C due to depreciation if the agreement was terminated. We are not concerned with this clause except on this argument. In the cases to which I have referred the sum payable in similar circumstances was, as I have said, related to the number of instalments already paid. This seems logical. If the vehicle is in proper repair and 29/30ths of what is, in effect, the agreed purchase price have been paid, the owner would normally be more than covered for depreciation.

D Thirdly, the owner is getting back his car which he is free to sell, plus the agreed purchase price less the 10s. In other words, this will be excessive in all cases unless the car has become valueless. There is, I think, force in all these arguments. Although it cannot be said that the amount exceeds the greatest loss that could possibly follow on the breach, taking words from para. 4 (a) of

E LORD DUNEDIN's summary of the law in *Dunlop's* case (1) ([1915] A.C. 87), it will exceed it in all except the exceptional case where the car has become of no value. LORD DUNEDIN (*ibid.*) lays down a further proposition in para. 4 (c):

“There is a presumption (but no more) that it is penalty when ‘a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage.’”

F The presumption referred to plainly arises here, and having regard to the second and third arguments to which I have referred I have come to the conclusion that this sum is a penalty and irrecoverable.

In conclusion, I would like to emphasise that we are dealing with a case in which the right to determine and claim payment is based on a breach of contract.

G The part of the clause with which we are concerned also provides that if the hirer died, for example, a few days after he had taken delivery the owners could re-take possession of the car and claim the balance of the £412 7s. 6d. This obviously raises a different point from that with which we have to deal where the claim is made as the result of a breach. In the *Apex Supply* case (2) the claim was based on the hiring company having gone into liquidation. Though

H it may well be that the conclusion would be the same, it might fall to be considered on equitable rather than on common law principles. If anyone desires to argue that the conclusion should be different in the case of deaths or an event such as bankruptcy or liquidation, so far as my judgment is concerned I desire to make clear that that point is open. I, therefore, would allow the appeal.

During the course of the hearing it became clear that the defendant would have no defence to a claim for the sums in arrear. We indicated that, if the

plaintiffs were undertaking to make no further claim under other clauses, it might be reasonable to allow an amendment to the sum claimed. Such an application has been made and the defendant does not resist it. The effect, therefore, of allowing the appeal will be to enter judgment for the plaintiffs for £142 0s. 9d., the defendant to have the costs here and below.

JENKINS, L.J., stated the facts and continued: It is not disputed that the sum of £297 0s. 9d. awarded to the plaintiffs by the judgment under appeal was in the events which had happened due and payable to the plaintiffs according to the expressed terms of cl. 11. The sole defence and the sole ground of appeal was and is that the sum so expressed to be payable is in the nature of a penalty and, therefore, irrecoverable.

This contention raises, in effect, two questions: (i) Is the sum expressed to be payable on determination of the hiring under the provisions of cl. 11 a penalty in the relevant sense (i.e., a penal sum which the hirer undertakes to pay to the owners in the event of, and in respect of, some breach by the hirer of the terms of the hire-purchase agreement) on the assumption that it is penal in amount, i.e., on the assumption that, when compared with the actual damage to the owners which could possibly flow from such breach, and judged in accordance with the principles stated in the *Dunlop* case (1), it will be found to have been imposed in terrorem as distinct from having been fixed as a genuine pre-estimate of damages? (ii) If so, is it penal in amount? Both questions have been discussed in the courts in relation to somewhat similar clauses in other hire-purchase agreements. Three of these cases appear to be unreported elsewhere than in Appendix "A" to JONES AND PROUDFOOT'S NOTES ON HIRE PURCHASE LAW, namely, *Elsey & Co., Ltd. v. Hyde* (3), *Roadways Transport Development, Ltd. v. Browne & Gray* (6), and *Chester & Cole, Ltd. v. Wright* (4).

Elsey & Co., Ltd. v. Hyde (3) was heard in the King's Bench Divisional Court by SALTER, J., and FRASER, J. In that case four hire-purchase agreements had been entered into each in respect of one box carrier tricycle, the tricycle in each case being hired out for a deposit of £5 and monthly instalments of £2 2s. with an option to purchase for £30 4s. less the amount of the deposit and instalments previously paid, the purchase taking place automatically on the total paid in deposits and instalments reaching that figure, a process which would take about 12½ months if payments were not anticipated. Each of the agreements contained clauses under which the hirer could terminate the hiring by returning the tricycle to the owners, and the owners could in certain events determine the hiring and re-take the tricycle. There was also a clause to the effect that, on determination of the hiring by either party under the provisions to which I have just referred before the expiration of eight months from the date of the agreement, the hirer should pay the owners "such further sum as with the total amount previously paid under cl. 1 and 2 hereof" (i.e., in respect of deposit and instalments of hire) "will equal the sum of £25—by way of compensation for depreciation of the said article". The hirer being in arrear with his instalments under all four agreements, the owners determined the hire, and sued the hirer in the county court to recover under each of the four agreements (so far as material) arrears of hire, and, in addition, the difference between the total consisting of the deposit plus instalments of hire paid or in arrear and the sum of £25. The county court judge dismissed the owners' claim to this difference on the ground that it was a penalty. The Divisional Court allowed the owners' appeal, SALTER, J., saying towards the end of his judgment (JONES AND PROUDFOOT, 2nd ed., p. 114):

"For these reasons I think, first, that this is not a case for penalty at all, and next, if it is, the learned judge took an erroneous view of the agreement and decided that this declaration was oppressive and extortionate in law, whereas in my opinion it is a very reasonable one."

FRASER, J., agreed, without adding any observations of his own except on the question of amount. In giving his reasons earlier in his judgment for the view that "this was not a case for penalty at all", SALTER, J. said (*ibid.*, 111):

- "As I understand, the question whether the sum of money which the parties have agreed shall, in certain events, be paid by one to the other, is a penalty or not, and whether that agreement is, therefore, enforceable is a question which arises, in cases where the contract provides that if one party has done something which he ought not to do and which had pre-judged the other, it would give the other a right to damages against him. Then where the parties have purported to fix the amount of damages, the question is whether that is a genuine agreement liquidating the damage, or whether it is an oppressive thing and not, as has been called, a genuine pre-estimate of damage. But those questions arise, as I understand, in cases where the person who is to pay has broken a contract with the other or done something which entitles the other to damages against him. This question is whether the person injured can sue on the contract for the agreed sum or whether he should be remitted to his rights and show what damage he has sustained, which may of course be more or may be less than the agreed sum."
- The learned judge then adverted to the circumstance that under the agreements he had to consider (differing in this respect from the agreement in the present case) the sum payable on termination of the hiring was the same whether it was determined by the hirer or by the owner, and said (*ibid.*, 112):

- "If the hirer terminates this agreement, what right does that give the owner to recover any damages against him? He has done him no wrong, he has broken no contract, and I am quite unable to see that this sum would or could give a penalty if it were claimable in those circumstances. It appears to me to be a strange conclusion, if this money is to be regarded as a penalty, where it was payable in one event and not regarded as a penalty where it was payable in another event. I think, therefore, as it is to my mind not a penalty where it is payable on the return of the article by the hirer, it ought not to be regarded as a penalty where it was payable on the re-taking of the article by the owner."

- Whatever may be thought of this part of the learned judge's reasoning, it has no application to the present case, for the amount payable by the hirer under cl. 10 in the event of his returning the vehicle is different from the amount payable by him in the event of determination of the hiring by the owners under cl. 11. The succeeding passage in the judgment is more pertinent to the present case, for the learned judge goes on to say (*ibid.*):

- "Then the next case I take is where the money is paid on the determination of the hiring by the owner, not as in this case in consequence of the conduct of the hirer which is a breach of contract, but in consequence of the happening of an event which is not a breach of the contract. For example, supposing the owner justifies his right to re-take under cl. 8, because execution has been issued against the hirer. There is no wrong done by the hirer to the owner, and it is no breach of any contract which the hirer has made with the owner. How could that event give to the owner of the goods any right to recover damages against the hirer, liquidated or unliquidated? It appears to me that no question of penalty could arise in such a case, and if this sum is not a penalty where it is payable on the determination of the hiring by the owner, by reason of the levy of execution, it seems to me it would be a strange result if it were to be held a penalty where it is payable on the termination of the hiring by the owner on the ground of non-payment of rent by the hirer. That is this case. Then there is a third case I take, and that is this one, where the hire is determined by the owner, because the

hirer is in arrear with his payments. It is proved that this is a breach of this contract, and it is proved that that breach, apart from any termination of the hirer, would give the owner a right to damages against the hirer. But what would those damages be? They would be interest on the amount unpaid and nothing more. The fact that the hirer is in arrear with his payments will not entitle the owner to any damages for depreciation of these things. The reason that they have suffered is that they have second-hand goods put on their hands before they have received very much money in respect of them. That is not the result of the hirer's breach of contract, in being late in his payments, it is the result of their own election to determine the hiring, and it appears to me, even in this case, there is no question of penalty at all, and there is no question whether the sum paid shall be regarded as liquidated damages or a penalty."

It should be noted that *SALTER, J.*'s reasoning on his "third case" is to some extent based on the description of the sum payable as "compensation for depreciation of the said article", a consideration obviously quite irrelevant to the breach of contract constituted by the hirer's being in arrear with his instalments and to such damages (if any) as might be said to flow from that breach. But his reasoning as a whole, as I think, makes it sufficiently plain that, in his view, where under an agreement of this type the owner has power to determine the hiring in any one of a variety of events, some involving breaches of contract by the hirer and others not, and on determination of the hiring by the owner in exercise of such a power a given sum is made payable by the hirer to the owner, the sum so payable cannot be a penalty in the relevant sense. As to the question of amount, *SALTER, J.*, expressed the view, in effect, that the clause under consideration in that case was not oppressive, but on the contrary "most reasonable and business-like", as a proper protection of the owners against the loss they might suffer through having a second-hand and depreciated article thrown back on their hands.

In *Roadways Transport Development, Ltd. v. Browne & Gray* (6), a case in the Court of Appeal, the second question only (i.e., the question of amount) appears to have been dealt with. The agreement there under consideration (the terms of which are not stated in detail) concerned a motor car and seems to have contained a provision to the effect that on termination of the hiring by the owners the hirer was to pay them as compensation for depreciation of the car the difference between the instalments down to the date of termination and the sum of £100, a difference which would on the figures be extinguished by the payment of the first six months' hire or thereabouts. *BANKES, L.J.* (*ibid.*, 121), said:

"The other point was that this £100 penalty which he is asked to pay, and which is provided for in cl. 5 of the agreement, is a penalty and not damages; with respect of that argument, it seems to me that this is essentially a case in which it is reasonable to say that there was a genuine pre-estimate of damage. It is not a case where the sum of money was made payable upon the happening of any one of a number of events which were of varying degrees of importance. It is the happening of only one event. It is quite true the event may happen either because the hirer might wish to terminate the agreement or because he failed to pay an instalment punctually; but the event was the determining of the agreement, and there is a provision as to what is to happen in that event. As has been pointed out during the argument the money is payable in order to make up £100, taking into account the number of monthly payments that have been made, and if six monthly payments have been made, practically £100 would have been paid or very nearly. Therefore, this clause only comes into operation on the assumption that it will happen at some time during the first six months of the hiring. Under these circumstances it seems to me that it is

quite reasonable to arrive at a figure such as £100 as representing what might reasonably be expected to represent the damage or what I would call the damage to the car of the decrease in the value of the car which would happen during any part of this period of months, it being quite uncertain whether the event would happen in the earlier part or the later part of the period, but more probably it would happen in the later than in the earlier."

SCRUTTON, L.J. (*ibid.*, 122) referred to the *Dunlop* case (1), and said:

A "It seems to me that on these principles this is clearly a genuine pre-estimate of damage and that being so the guarantor must pay."

ATKIN, L.J. (*ibid.*, 123) said:

B "On the question of penalty, I have nothing to add to what has been said. It seems to me this was in every way a genuine pre-estimate of damage. The particular damage is expressed in the contract to be by way of compensation for depreciation of the car. It is true that the deposit is forfeited, but as a matter of fact if you are merely dealing with a depreciation of the car the evidence in this particular case is that the car did depreciate by more than £100, though the relations were resumed after these first instalments had become due. That makes it all the more difficult to say C that the pre-estimate of damage in this case could not be genuine or based upon good grounds."

In *Chester & Cole, Ltd. v. Wright* (4) LORD HANWORTH, M.R., and GREER, L.J., sitting in the Divisional Court as additional judges of the King's Bench Division, had to consider a hire-purchase agreement in respect of a car under which on return by the hirer or re-taking by the owners of the car within ten months from the date of the agreement the hirer was to pay to the owners the difference D between £95 and the amount of his previous payments "by way of compensation for depreciation of the said motor". On the question of amount, the court came to the same conclusion as was reached in the earlier cases to which I have referred, i.e., that the amount was not such as to make the payment a penalty. But GREER, L.J., dealt also with the question whether this payment, irrespective E of amount, could properly be regarded as a penalty at all, and (*ibid.*, 130) he said this:

"The second question to be determined is a little more difficult: it is whether the sum of £95, diminished by the amounts already paid, is to be deemed to be a penalty for breach of a contract, and not damages, or, as may well be, that it is neither one nor the other, that it is neither a penalty, nor F is it liquidated damages, but it is a sum which, in consideration of getting the use of this car, the hirer promised to pay in a certain event, that event being the determination in one way or another of the hiring agreement. There is no reason in law why, for a sufficient consideration, there should not be on the same document two contracts, one a contract to hire the motor car on the terms of the agreement, and another, a contract that if that G agreement comes to an end, then a certain sum will be payable by the hirer; and it may very well be that the view which is, I think, the view of SALTER, J., in *Elsey's* case (3), which was cited before us, is the right way to look at this clause, namely, that it is not either liquidated damages or a penalty, but it is a sum payable in respect of one event, namely, the determination H and end of the hiring agreement, whether that end of the hiring agreement arises from the hirer delivering the car back again, or whether it arises from the owner taking it out of the possession of the hirer in the events in which he is entitled to take it out. But even treating it as a payment which has reference to a breach of contract, I am inclined to think, upon the authorities, though the point is not free from difficulty, that it is not right to say that it is a penalty. One must remember that a sum which happens to turn out to be large damages in the events which have happened, is not necessarily

a penalty, and that it is perfectly lawful for people who do not know what the damage arising from a breach of contract is likely to be, to agree beforehand to put an agreed figure upon those damages; and, dealing with the hire of motor cars, it may well be that it is impossible to say what the loss of the owner will be if a second-hand car comes back on his hands, even if it is only a month after the sale. It is not, one would think, always very easy to sell a second-hand car, even if it has been only through one hand before it is offered for sale; it is probably a little more difficult to sell a second-hand car which has been through more hands than one, and it is impossible in advance to say what at any moment the position of the motor car market will be, and therefore it may happen in some circumstances that it is a dead loss to the owner who had hired out a motor car on the terms of the agreement in question in this action, it may mean something very like a total loss if he gets it back again, because events may have happened in the meantime which will prevent him from finding a purchaser at all."

In *Associated Distributors, Ltd. v. Hall* (7), the Court of Appeal had to consider the question whether a sum payable by a hirer under a hire-purchase agreement relating to a bicycle on his exercising an option to terminate the hiring by returning the bicycle was, as the learned county court judge had held, a penalty, and decided that it was not. SLESSER, L.J., said ([1938] 1 All E.R. 513):

"He [the hirer] has exercised an option, and the terms on which he may exercise the option are those set out in cl. 7. The question, therefore, whether these payments constitute liquidated damages or penalty does not arise in the present case for determination."

It is to be observed that this decision left the question open as regards sums payable on determination of the hiring by the owner under a power reserved to him by a hire-purchase agreement, and that SCOTT, L.J., in agreeing, said in terms that the court was expressing no opinion at all on three other cases, not before the court, in which the hiring had been determined by the owner and the same learned county court judge had held a sum payable by the hirer in that event to be a penalty.

The three unreported cases to which I have referred were considered by SIMONDS, J., in *Re Apex Supply Co., Ltd.* (2), where the learned judge had to deal with comparable provisions in a hire-purchase agreement comprising certain machinery under which, in effect, on termination of the hiring by the hirer or the owners within nine months from the date of the agreement, the hirer was to pay to the owners a sum representing the difference between the payments already made by him and the sum of £1,020 12s. After referring to the reasoning of SALTER, J., in *Elsey & Co., Ltd. v. Hyde* (3) and to the passage I have quoted from the judgment of GREER, L.J., in *Chester & Cole, Ltd. v. Wright* (4) the learned judge continued ([1941] 3 All E.R. 481):

"At any rate, GREER, L.J., does not dissent from, but rather gives his approval to, the reasoning of SALTER, J., in *Elsey's* case (3) in construing an agreement which in no material way differs from that which I have to construe. Accordingly, whatever my own view might be, I should feel bound to give this document the same meaning, and to come to the conclusion that here no question of penalty against liquidated damages arises, that here there is a contract for the payment of a certain sum in a certain event, and that, that event having happened, that sum is payable. I would only add that, if I had to come to a conclusion on the second question as to whether this was a penalty or a pre-estimate of damages, then, guided by the line of reasoning which influenced the Court of Appeal in *Roadways Transport Development, Ltd. v. Browne & Gray* (6), I should come to the conclusion here that this was a case, not of penalty, but of genuine pre-estimate of damage."

He added a reference to *Associated Distributors, Ltd. v. Hall* (7) and pointed out that in that case there was no word of disapproval of the reasoning of *SALTER, J., in Elsey & Co., Ltd. v. Hyde* (3).

- Returning in the light of these authorities to a consideration with reference to the particular agreement now before the court of the two questions involved in the present appeal, I find it convenient to deal first with the second question, that is to say, on the assumption that the sum payable under cl. 11 is capable in
- A other respects of constituting a penalty in the relevant sense, is it in point of amount a penal sum as distinct from a genuine pre-estimate of damages? It is to be observed that in all the cases to which I have referred this question was answered in the negative. But the clauses there under consideration were different. None of them purported to exact the full amount of the hire which would have been payable if the hiring had run its full course. In each case the
- B hirer was only required to pay some minimum proportion of the total hire and it was hardly possible to say that the minimum sum made payable, in so far as it exceeded the hire attributable to the actual period for which the hiring continued, was other than a genuine pre-estimate of the unpredictable amount of the loss which the owners might suffer by depreciation of the article hired and to which the sum payable was expressly referred. Here the sum payable by the
- C hirer on determination by the owners under cl. 11 extends to the full amount, so far as not previously paid, of the hire which would have been payable if the hiring had run its full course, whereas on determination by the hirer under cl. 10 his liability so far as instalments of hire are concerned is limited to hire accrued due down to the date of determination plus forty per cent. of the hire which would have accrued due thereafter if the hiring had run its full course.
- D The form of cl. 11, whereby the hiring is determinable by the owners, or determined automatically, in a variety of events, some of which are breaches by the hirer of stipulations of widely varying importance, and others of which involve no breach of contract at all, makes it difficult to discern any relevant liability in damages by reference to which the reasonableness or otherwise of the amount made payable under cl. 11 can be assessed, and this difficulty in a sense
- E foreshadows the answer which I think should be given to the first question. But for the immediate purpose I propose to take as the standard of comparison the owners' position as it would have been if the hiring had been carried through for the full period of thirty months and the option had then been exercised by the hirer. In that event the plaintiffs would have received under the agreement in all £412 17s. 6d. and the defendant would have become the owner of the
- F vehicle, whereas on determination of the hiring under cl. 11 the provisions of that clause, if enforced in their full rigour, would entitle the plaintiffs not only to receive (apart from interest on arrears) a total of £412 7s. 6d. (i.e., within 10s. of the full purchase price), but to keep the vehicle as well. The penal character of cl. 11 becomes still more apparent when the possibility is considered of determination under that clause after (say) only one month's hiring, in which event
- G the hirer would on full compliance with the provisions of the clause have paid a total of £412 7s. 6d. (i.e., the cash purchase price of the vehicle at the date of the agreement loaded with interest to allow for payment spread over a period of thirty months) for one month's use of the vehicle. So far as I can see, the application of cl. 11 according to its expressed terms, must have the effect of making the owners better off by at least the value of the car at the date of re-possession
- H (less, of course, the 10s. option money) than they would have been if the hirer had carried out the whole agreement without any default and had ended by exercising the option. The earlier the determination of the hiring by the owners under cl. 11, the greater their gain, in so far as the depreciation of the vehicle will probably be smaller, the owners will so much the sooner be free to sell or otherwise turn it to profitable account again, and the amount of future hire payable immediately without any discount in respect of the interest element

included in the instalments will be so much the larger. It is, of course, possible to imagine a case in which before re-possession by the owners the value of the car had been reduced to nothing, as, for example, if it had become a total loss in circumstances in which the owners could collect no insurance money, but apart from that exceptional case, which I think can for the present purpose reasonably be ignored, it seems that the sum payable under cl. 11 on the owners' determination of the hiring must always exceed to the extent I have mentioned any damage to the owners which could flow from any breach of contract on the part of the hirer on which a determination by the owners under cl. 11 might be founded.

Therefore, ignoring the exceptional and improbable case I have mentioned, I think the sum payable on determination under cl. 11 can, in point of amount, fairly be brought within the intention, though not strictly within the letter, of the first test of a penalty given by LORD DUNEDIN ([1915] A.C. 87) in the *Dunlop* case (1) in para. 4 (a) as being a sum which is

"...extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach."

It is, of course, obvious, if the sum payable on any determination under cl. 11 is, whenever such determination is founded on some breach of contract by the hirer, to be treated as payable in respect of such breach, that whereas the sum payable is uniformly fixed by reference to the number of instalments remaining to be paid, the breach in respect of which it is payable may be any one of a number of possible breaches, substantial or trivial, and may in itself, accordingly, occasion damage serious or trifling, and a presumption that the sum payable under cl. 11 is a penalty is, therefore, raised on the principle stated in para. 4 (c) of LORD DUNEDIN's judgment in the *Dunlop* case (1). For these reasons, I would answer the second of the two questions posed above in the affirmative.

It remains to consider the first and more difficult question whether (being, as I have held, penal in point of amount) the sum payable on determination of the hiring under cl. 11 is a penalty in the relevant sense at all. In order to be such the sum in question must, as I understand the law, be (as I have already described it) a sum which the hirer undertakes to pay to the owners in the event of, and in respect of, some breach by the hirer of the terms of the hire-purchase agreement. If the agreement contains a provision of that description, and a breach on the part of the hirer ensues and the owners sue for payment of the sum stipulated to be paid in respect of such breach, then, no doubt, arises the question of penalty or no penalty, turning on a comparison between the stipulated sum and the damages capable of flowing from the breach or breaches in respect of which the stipulated sum is, according to the terms of the agreement, expressed to be payable. But the provision here in question does not appear to me to answer that description. Clause 11 provides for the determination of the hire in a number of different events and in some of these events it enables the hiring to be determined by a specified notice from the owners to the hirer, while in others of them it causes the hiring to determine automatically. The events in which the hiring may be determined by notice include failure by the hirer to make any payment under the agreement on the due date (which would, of course, be a breach of contract), but they also include the death of the hirer (which would, of course, not be a breach of contract). The events bringing about automatic determination include failure by the hirer to observe or perform any agreement or condition contained in the agreement, but they also include the hirer's bankruptcy, the making of a receiving order against him, his making a composition with his creditors, the presentation of a winding-up petition against the hirer if a company, none of which is a breach of contract. On the determination of the agreement by notice or otherwise and whether the event on which the notice was founded or which brought about the automatic determination was a breach

of contract on the part of the hirer or not, the sum prescribed by cl. 11 becomes payable. It is not payable because the hirer has committed a breach of contract (which he need not necessarily have done), but because the hiring has been determined. Supposing the sum prescribed by cl. 11 became payable on a determination by notice founded on the death of the hirer or on an automatic determination due to the presentation of a winding-up petition against the hirer (being a company), no question, so far as I can see, of the sum being a penalty in the relevant sense could arise, and, that being so, it seems to me impossible to invest the same sum with the character of a penalty where the determination by reason of which it becomes payable happens to be brought about by notice founded on or automatically by some breach of contract on the part of the hirer.

My conclusion on this aspect of the case is supported by the reasoning of *SALTER, J., in Elsey & Co., Ltd. v. Hyde* (3), which, although it turned partly on the circumstance, absent from the case now before us, and to my mind of doubtful relevance to the point at issue, that the same sum was there made payable on determination by the hirer, seems to me to be applicable in its essentials to the provisions of the hire-purchase agreement in the present appeal. The reasoning of *SALTER, J., in the case just cited* appears to have commended itself to *GREER, L.J., in Chester & Cole, Ltd. v. Wright* (4) (*JONES AND PROUDFOOT*, p. 130), and for my part I find it convincing. I may add that in *Re Apex Supply Co., Ltd.* (2), *SIMONDS, J.*, while finding it his duty as a judge of first instance to follow *SALTER, J.*, whatever his own view might be, said nothing to suggest that his own view would have been different. Under the agreement here in question the consideration moving from the hirer was the sum of £412 7s. 6d. payable as to £25 at once and as to the balance by thirty equal monthly instalments, plus the sum of 10s. payable in the event of his becoming entitled to exercise, and exercising, the option. The consideration moving from the owners was the lending to the hirer of the vehicle for a period of thirty months subject to determination as thereafter provided, and the granting to him of the option of purchase. In the event of the hirer determining the hire under cl. 10 by returning the vehicle, his liability for payment of the monthly instalments was to cease, but he was to pay all unpaid instalments which had fallen due prior to the return of the vehicle and, *inter alia*, forty per cent. of the total amount of the monthly instalments which had not then fallen due, or in other words, forty per cent. of the unpaid balance of the £412 7s. 6d. remaining after payment of all instalments in arrear. In the event of the hiring being determined under cl. 11, the hirer was not to be relieved from payment of any part of the balance then remaining unpaid of the £412 7s. 6d., and the whole of such balance was to become immediately payable. In other words, the full sum of £412 7s. 6d. was to be paid in respect of the hiring whether it ran its full course or not, and whether the hirer became entitled to exercise the option or not, except that, in the event of the hirer returning the vehicle under cl. 10, his liability was to be limited to the extent therein mentioned. An agreement in such terms may be thought unfair and oppressive to the hirer, but I cannot see that it involves a penalty in the relevant sense. As *FARWELL, J.*, said in *Mussen v. Van Diemen's Land Co.* (8) ([1938] Ch. 263) where relief was unsuccessfully sought from a provision for the forfeiture of instalments paid under a contract for the sale of land and avoidance of the contract in the event of default being made in the payment of any of the instalments on the ground that this amounted to a penalty:

“It should be observed that this is not strictly a case of a penalty at all since the payment in question was an integral part of the principal contract.”

Although, in the view I take, the sum payable under cl. 11 is not a penalty in the sense contended for in the present appeal, it might, I suppose, conceivably have been argued that the provision in question is a penal provision in the sense that it is so oppressive and unconscionable that equity should grant relief from it on equitable terms: cf. *Re Dagenham (Thames) Dock Co. Ex p. Hulse* (9);

Kilmer v. British Columbia Orchard Lands, Ltd. (10), and *Steedman v. Drinkle* (11), cases in which relief was successfully sought from provisions for forfeiture of instalments of purchase money in contracts for the sale of land comparable for the present purpose to the one considered by FARWELL, J., in *Mussen v. Van Diemen's Land Co.* (8); and note FARWELL, J.'s explanation ([1938] Ch. 261) in the last-mentioned case of the principle on which those cases proceeded. But if that argument were tenable here at all—and I express no opinion one way or the other about that, for no such argument has been raised in the present case—it surely could not be equitable in the circumstances to grant relief on terms which would put the owners in any worse position than they would have been in if the hirer had returned the vehicle under cl. 10 on the date on which they repossessed themselves of it under cl. 11. Be that as it may, the question does not arise in the present case, in which the owners' claim has been contested solely on the ground that the sum sued for is a penalty in what I have termed the relevant sense, and as such wholly irrecoverable. For the reasons I have endeavoured to state I think that contention ill-founded, and accordingly would, for my part, dismiss the appeal.

HODSON, L.J. : On this appeal two questions arise: (i) Can the sum expressed to be payable on determination by the owners of the hiring under the provisions of cl. 11 of the agreement of July 19, 1947, be regarded as a penalty, and, accordingly, irrecoverable by the plaintiffs? (ii) If this sum can be regarded as a penalty, is it penal in amount? I agree with the opinions which my Lords have expressed on the second question and with the reasons they have given for reaching the view that the sum in question is penal in amount and cannot usefully add anything to what has fallen from them.

The first question was answered by the learned judge in favour of the plaintiffs because, as I think, he considered himself bound to do so having regard to the authorities cited to him culminating in the decision of SIMONDS, J., in *Re Apex Supply Co., Ltd.* (2). In that case the learned judge reviewed the authorities and on consideration of a document which had much in common with that now under consideration expressed himself in this way ([1941] 3 All E.R. 481):

"... whatever my own view might be, I should feel bound to give this document the same meaning, and to come to the conclusion that here no question of penalty against liquidated damages arises, that here there is a contract for the payment of a certain sum in a certain event, and that, that event having happened, that sum is payable."

As SIMONDS, J., pointed out in another connection in an earlier part of his judgment (*ibid.*, 480), it is undesirable to be over-subtle in dealing with commercial documents of this kind. Accordingly, the courts have endeavoured to take a consistent course in construing such documents. It is, therefore, with considerable diffidence that I have reached a conclusion in this matter adverse to that which appears to have been widely accepted in this class of case and is, moreover, the conclusion which JENKINS, L.J., is satisfied is correct. I am, however, influenced towards my conclusion by the view which appears to have been taken by the Court of Appeal in *Roadways Transport Development, Ltd. v. Broune & Gray* (6). All the members of the court (BANKES, SCRUTTON and ATKIN, L.J.J.) held that the sum there payable on termination of a hiring by the owner of a motor car was a reasonable sum and did not offend against the rule of law dealing with penalties as opposed to liquidated damages. It can, of course, be fairly said that they did not discuss the point now at issue at all. Nevertheless, it seems that the approach made by all three members of the court to the problem was based on the view that the law dealing with penalties had application. They had, I think, directed themselves in accordance with that law, and then come to the conclusion that the sum in question was not penal in amount.

In order to illustrate my meaning, I propose to read what SCRUTTON, L.J., said on this matter (JONES AND PROUDFOOT, p. 122):

"I entirely agree with the judgment of BRANSON, J., in this case and I do not propose to add anything to it except on the question of penalty. It is said that the sum of £100 claimed under cl. 5 must be a penalty, and one of the reasons given is that as a matter of fact on the figures in this case the plaintiff makes more by the agreement being broken than he would have done if it had been kept; and that is quite true, but it is true not because of cl. 5 but because of the provision as to the forfeiture of the deposit; and it is always the case, where you forfeit a deposit of any substantial amount and keep the thing you have sold plus the deposit, unless the price was very much in excess of the market value, you get more by the defendant's breach than you would have done if he had kept to the bargain, because you have got the thing you have sold and you have got a substantial deposit as well. That is the defendant's look-out for not keeping to the agreement. This particular clause as to paying the £100 is made to vary according to the length of time that the purchaser has used the car; for the longer he has used it and the more the seller has got by way of rent the less the purchaser in default has to pay. It appears to me to come exactly within the language used by LORD DUNEDIN in the last case so far as I know in the House of Lords, *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage & Motor Co., Ltd.* (1), in which *Willson v. Love* (12) was discussed. LORD DUNEDIN says ([1915] A.C. 86): 'The essence of a penalty is a payment of money stipulated as in terrorem of the offending party. The essence of liquidated damages is a genuine covenanted pre-estimate of damage'. Then (*ibid.*, 87): 'it is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties': and LORD PARKER OF WADDINGTON gave judgment to the same effect. It seems to me on these principles this is clearly a genuine pre-estimate of the damage, and that being so the guarantor must pay."

No member of the court expressed the opinion that the contract was outside the penalty area on the simple ground that the agreement provided for a sum of money in a certain event, namely, the determination of the hiring in accordance with the terms of the agreement. I cannot but think that if this had been a complete answer to the appellant's argument the court would have so declared.

The other decision of the Court of Appeal to which we have been referred, namely, *Associated Distributors, Ltd. v. Hall* (7), was a case in which under an agreement of the same class the hirer elected to determine the agreement, and in those circumstances the court came to the conclusion that no question of penalty or liquidated damages arose. SCOTT, L.J., expressly left open the question, as SIMONDS, J., pointed out ([1941] 3 All E.R. 481) in the *Apex* case (2), of what might be the view of the court if the agreement had been terminated, not by the hirer, but by the owner. SLESSER, L.J., also left the question open. The Court of Appeal certainly did not give any decision discouraging to the present defendant although it is true, as SIMONDS, J., also pointed out, that the judgment of SALTER, J., sitting as a member of a Divisional Court of the King's Bench Division in *Elsey & Co., Ltd. v. Hyde* (3), was not adversely criticised. This last is the authority from which flows the line of argument which was accepted in the court below and is contained in the passage from the judgment of SALTER, J., where he discusses, *inter alia*, the case of a hire being determined by the owner because the hirer is in arrears with his payments. The material passages of his judgment, taken from pp. 111, 112 and 113 of JONES AND PROUDFOOT'S NOTES ON HIRE PURCHASE LAW have already been read by my Lords.

GREER, L.J., sitting with LORD HANWORTH, M.R., as a Divisional Court of the King's Bench Division in *Chester & Cole, Ltd. v. Wright* (4), expressed himself on this topic saying (JONES AND PROUDFOOT, p. 130):

"...it may very well be that the view which is, I think, the view of SALTER, J., in *Elsey's* case (3), which was cited before us, is the right way to look at this clause, namely, that it is not either liquidated damages or a penalty, but it is a sum payable in respect of one event, namely, the determination and end of the hiring agreement, whether that end of the hiring agreement arises from the hirer delivering the car back again, or whether it arises from the owner taking it out of the possession of the hirer in the events in which he is entitled to take it out."

But, even if it is a penalty, it will be observed that the whole of this passage is introduced by the phrase, "it may very well be", and is, therefore, not particularly strong support for the opinion of SALTER, J. My difficulty is to see the validity of the distinction between a claim to receive payment of a sum of money because of a right to determine arising from breach of contract, and a claim to receive payment of the same sum by reason of breach of contract giving a right to determine. The latter situation arises in cases of breach of condition amounting to a repudiation of the contract giving the opposite party the right to accept the repudiation and sue for damages. In so acting he determines the contract. Clause 11 purports to produce exactly this situation in respect of any breach referred to therein, and it seems to me unreal to speak of a remedy arising from the right to determine as opposed to a remedy arising from the breach. It is said that the right to determine arises in cl. 11 not only in cases of breaches great or small, but also in a number of other events which have nothing to do with breach of contract, and, accordingly, since the law as to penalties for breach is inapplicable as such in these numerous instances, so it cannot be applied to that part of the clause to which it might otherwise be appropriate. I am unable to accept this contention which seems to involve that a draftsman of a written contract can always draw his document in such a way as to defeat the common law by incorporating in the same clause provisions dealing with the right to determine the contract on the occurrence of an infinite number of events only one of which is a breach of contract. For these reasons I am of opinion that the law as to penalties is applicable, and that, therefore, the first question posed should be answered in favour of the defendant and that the appeal should succeed.

Appeal allowed.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Robert S. Boyes*, Bexhill (for the defendant); *Clutton, Moore & Lavington* (for the plaintiffs).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

**Re LONGBOURNE'S MARRIAGE SETTLEMENT.
WARREN AND OTHERS v. INLAND REVENUE
COMMISSIONERS.**

[CHANCERY DIVISION (Wynn-Parry, J.), October 29, 31, November 4, 5, 1952.]

Estate Duty—Passing—Cesser of life interest—Continuing annuity to spouse—Child entitled absolutely subject to annuity—Allowance for annuity—Finance Act, 1894 (c. 30), s. 1, s. 2 (1) (b).

By an ante-nuptial settlement dated Sept. 13, 1907, the wife directed the trustees thereof to stand possessed of the investments therein mentioned on trust after the intended marriage (which took place) (a) out of the annual income of the settled property to pay the yearly sum of £2,000 (subsequently reduced to £1,000) to the husband during his life free from all deductions except income tax, and (b) subject thereto, to pay the annual income of the settled property to the wife during her life, and (c) after the death of the wife, and (if the husband survived her) subject to the trustees' setting apart such part of the settled property as would, in their opinion, be sufficient out of income to discharge the said yearly sum of £2,000 (or so much thereof as at the date of such setting apart might be payable), and subject to the payment of the said yearly sum out of the income of the settled property until a fund was set aside to answer the same, as to both the capital and income of the settled property (in default of appointment) for the children or child of the marriage who attained twenty-one. The settlement further provided that, if and when the trustees set aside a fund to answer the said yearly sum, then the yearly sum should be paid out of the income of the fund so set aside, or, if the income were insufficient, out of the capital thereof, in exoneration of the balance of the settled property. One child was born of the marriage and attained the age of twenty-one years. On Jan. 16, 1946, the wife died, leaving the husband and the child surviving. On the question of estate duty payable in respect of the settled property in connection with her death,

HELD: the whole settled property passed under the Finance Act, 1894, s. 1, and for the purposes of duty a deduction could not be made from the value thereof for the "slice" required to produce the annuity which continued payable to the husband, but (as was conceded) an allowance for the burden of the annuity could be taken equivalent to the actuarial value of the annuity.

Dicta of SIR RAYMOND EVERSHED, M.R., and ROMER, L.J., in *Re Lambton's Marriage Settlement* (ante, pp. 209, 215, 218), and of JENKINS, L.J., in *Re Duke of Norfolk* ([1950] 1 All E.R. 675), applied.

AS TO DEDUCTIONS ALLOWABLE AGAINST PROPERTY LIABLE TO ESTATE DUTY, see HALSBURY, Hailsham Edn., Vol. 13, pp. 273-276, paras. 281-285; and **FOR CASES,** see DIGEST, Vol. 21, pp. 25, 26, Nos. 138-145.

Cases referred to:

- (1) *Re Lambton's Marriage Settlement*, ante, p. 201.
- (2) *Cowley (Earl) v. Inland Revenue Comrs.*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; *varying S.C. sub nom. Re Cowley's (Earl) Estate*, [1898] 1 Q.B. 355; 21 Digest 7, 27.
- (3) *De Trafford v. A.-G.*, [1935] A.C. 280; 104 L.J.K.B. 396; 153 L.T. 17; Digest Supp.
- (4) *A.-G. v. Glossop*, [1906] 1 K.B. 284; *affd.* C.A., [1907] 1 K.B. 163; 76 L.J.K.B. 199; 95 L.T. 823; 21 Digest 14, 69.
- (5) *Re Norfolk (Duke)*, [1950] 1 All E.R. 664; [1950] Ch. 467; 2nd Digest Supp.

ADJOURNED SUMMONS to determine (i) whether estate duty in respect of the property comprised in the marriage settlement dated Sept. 13, 1907, on the

death of Gwendoline Carew More-Molyneux Longbourne, on January 16, 1946, became payable (a) on the principal value of the proportion of the settled property corresponding with the proportion of its income after providing for the annuity of £1,000 payable to John Wallis McCowen (since deceased), or (b) on the principal value of the said settled property with deductions for the value of the said annuity, or (c) on the principal value of the whole of the said settled property, or (d) on some other and what portions of the said settled property; and (ii) if the value of the said annuity ought to be deducted from the principal value of the settled property, on what basis such value ought to be ascertained.

Harold Christie, Q.C., Borneman, Q.C., and Beattie for the plaintiffs, the trustees of the marriage settlement.

Pennyquick, Q.C., and J. H. Stamp for the Inland Revenue Commissioners.

WYNN-PARRY, J.: The first question which arises is whether or not on the death of the settlor the property passed under the Finance Act, 1894, s. 1, or whether this is a case falling to be dealt with under s. 2. On that point I entertain no doubt but that the answer is that the property passed under s. 1.

The next question (and this is the point which has given rise to the main dispute between the parties) is: What property passed? Was it, as the Crown contends, the whole of the property subject to the settlement, or, as is contended for by the plaintiffs, less than the whole, viz., the property remaining after there had been taken out of the whole a slice sufficient by its income to produce the amount of the annuity? A great many authorities have been cited to me, but it appears to me that on this aspect of the case the really relevant authority is the recent decision of the Court of Appeal in *Re Lambton's Marriage Settlement* (1). I do not propose to travel through the facts in that case because I take the view that the passages to which counsel for the Crown particularly referred me (and to which I propose to refer immediately) are passages in which **SIR RAYMOND EVERSLED, M.R., and ROMER, L.J.,** were speaking, and intended to speak, in general terms. The Master of the Rolls says (ante, p. 209):

"The student of the law who read *Earl Cowley v. Inland Revenue Comrs.* (2) in relation to this point might, I think, be excused for failing to discern that it had (as, in my judgment, was the case) decided a most significant and far-reaching question of principle. When I come to *De Trafford v. A.-G.* (3), I think it is impossible to resist the view that what I have said is correct, for, putting it for the moment very briefly, the *Cowley* case (2) must now, in my view, be taken to have decided that where the income of settled estate is held on trusts not to pay it in aliquot shares to two or more persons, but to apply the income first in making an annual payment of a fixed sum or an annuity, whether that annuity is or is not charged on any part of the estate, and subject thereto to pay the income to another person, then the entire property passes on the death of the latter person under s. 1 of the Finance Act, 1894, and s. 2 (1) (b) has no application whatever to it. How far-reaching that is may be seen if examples are taken (and the present is indeed not a bad one) in which the annuity or fixed annual payment takes up by far the largest part of the income of the whole estate. So far, indeed, does the principle go that it is irrelevant that the person who succeeds to the whole income is the same person who has in fact enjoyed the annuity or annual payment. The result seems indeed a hard one, but though the point appeared most casually taken and briefly dealt with in the House of Lords as a minor point of little significance, it is my view that *De Trafford* (3) beyond any question lays it down that that is what, as a matter of principle, *Earl Cowley v. Inland Revenue Comrs.* (2) in the House of Lords did decide."

In my judgment, that language was designed to cover the case of a continuing annuity. I can find nothing in it which points to the contrary. I read the sentence:

"So far, indeed, does the principle go that it is irrelevant that the person who succeeds to the whole income is the same person who has in fact enjoyed the annuity or annual payment"

A as representing the length to which the principle must be taken to go, and, therefore, the case before me is a fortiori within the language of that passage.

Later, in his judgment, the Master of the Rolls is reported as saying, after referring to *A.-G. v. Glossop* (4) and quoting from the opinion of Lord Russell in *Earl Cowley v. Inland Revenue Comrs.* (2) and in the *De Trafford* case (3) ante, p. 215):

B "The passage which I have read at the end of Lord Russell's opinion makes quite clear, I think, that, in the view of the House of Lords, where a person is entitled to an annuity or annual sum payable out of income, then on the death of the person entitled to the rest of the income there is a passing of the whole estate under s. 1, and in that respect the case differs from the case where the income is payable in aliquot shares to two or more persons. That distinction between aliquot shares and an annuity or annual fixed sum may, no doubt to many, seem a narrow and fine one. Perhaps C it is, but that it exists and is clearly established is, I think, not now open to any doubt, and, if any citation were necessary for this purpose, I cite the recent case decided in this court of *Re Duke of Norfolk* (5), and in particular the passages which were cited from the judgment of Jenkins, D L.J. ([1950] 1 All E.R. 673 et seq.). I am unable to read *De Trafford's* case (3) as doing other than deciding and establishing that *Earl Cowley v. Inland Revenue Comrs.* (2), whatever may have been thought at the time or subsequently before 1935, covers as a matter of principle all cases where income under a settlement is held on trust to pay an annuity or other E fixed sum and subject thereto to pay the balance to A B, and then A B dies—in all those cases, as I have said, there is a passing of the whole property and it is irrelevant that the person who succeeds to the whole income is the same person who enjoyed the annuity or fixed annual sum."

F There again, as I understand the language of the Master of the Rolls, he is not confining his observations to a particular case but is stating a general principle, a principle, therefore, of general application.

Finally, I would refer to the passage in the judgment of Romer, L.J., on which counsel for the Crown relied (ante, p. 218):

G "If this principle had been present to the minds of the members of the court in the *Glossop* case (4), it must, I think, have resulted in a conception different from that which formed the basis of their decision. It must necessarily have led to the conclusion that the wife had no beneficial interest in any individual particles of income arising from the trust fund, but an interest in the income as a whole, and that during her lifetime, as no particles of income were dedicated to her exclusive benefit, the husband was entitled in possession to the whole income, subject only to the payment H out of that income generally of the wife's annuity. From this it must follow that on the husband's death in the present case there was a passing of the settled fund as a whole, and not merely the passing of a segregated part thereof; and for the reasons which my Lord stated more elaborately (and of which I have given the merest summary) it seems to me there is no escape from the conclusion which the Master of the Rolls has expressed. For my part I share his regret that we should be compelled to this conclusion."

Those again seem to me to be words of general application.

What is the result? It appears to me that the basis of that decision must be, as is contended by the Crown, that where a tenant for life is entitled to property subject to an annuity, the annuitant has an interest in the whole of the property and not only in a slice thereof, and equally the tenant for life has an interest in possession in the whole property. The tenant for life dies. It must surely follow that the whole property passes on that death because the tenant for life was entitled in possession to the whole. After his or her death, someone else comes into possession of the whole. There has been a change of title. That result, on the reasoning of the Court of Appeal in *Lambton's* case (1) must be so none the less because the next taker is the annuitant himself, and, as I see it, a fortiori, where, as here, the next taker is not the annuitant.

The argument to the contrary, as I have mentioned, was that not the whole of the property passes, but only a slice. Apart from the difficulty with which the plaintiffs are faced in advancing that argument in view of *Lambton's* case (1), there appears to me to be this overwhelming difficulty. As I read the decision of the Court of Appeal in the *Duke of Norfolk's* case (5), this argument was in substance advanced on behalf of the Crown and was expressly rejected by the Court of Appeal, the grounds for the rejection being stated by JENKINS, L.J., in the course of his judgment in a passage to which the Master of the Rolls referred in *Re Lambton's Marriage Settlement* (1). He says ([1950] 1 All E.R. 675):

"It is next alleged that the interest of an annuitant in respect of an annuity charged on property is equivalent to a life interest in the share of capital required to produce the annuity ascertained by reference to the proportion borne by the amount of the annuity to the whole income of the property charged. The conclusion is then adduced that, on the authorities to which I have just referred, it follows that the property which passes under s. 1 when a continuing annuity charged on property passes on a death within the meaning of that section is not simply the annuity for the residue of its prescribed duration (which is clearly all that passes in fact), but the proportion ascertained as above of the corpus of the property charged with the annuity. This contention seems to me contrary to all principle. An annuity charged on property is not, nor is it in any way equivalent to, an interest in a proportion of the capital of the property charged sufficient to produce its yearly amount. It is nothing more nor less than a right to receive the stipulated yearly sum out of the income of the whole of the property charged (and in many cases out of the capital in the event of a deficiency of income). It confers no interest in any particular part of the property charged, but simply a security extending over the whole. The annuitant is entitled to receive no less and no more than the stipulated sum. He neither gains by a rise nor loses by a fall in the amount of income produced by the property, except in so far as there may be a deficiency of income in a case in which recourse to capital is excluded. On the other hand, a life interest in a share of the income of property is equivalent to, and, indeed, constitutes, a life interest in the share of the capital corresponding to the share of income. The life tenant enjoys the share of income whatever it may amount to, and his interest, viewed as a life interest in capital, consists of a constant proportion of the whole property, whether the income is great or small and whether the capital value of the property rises or falls. The property which changes hands on his death (or, in other words, passes under s. 1) thus clearly consists of the designated share of capital which then passes from his beneficial enjoyment to that of another. An annuity cannot be so related to any fixed proportion of capital: see *De Trafford v. A.-G.* (3) ([1935] A.C. 290). The proportion of the total income required to produce the annuity, and with it the corresponding share of capital, varies from year

to year according to the total income produced by the property charged. The Crown's contention thus involves substituting for the annuity a 'slice' of capital ascertained by means of a calculation on the lines prescribed by s. 7 (7) (b) for ascertaining the benefit accruing or arising by the cesser of an interest, with a result depending on the rate of income produced by the whole fund over whatever period might be selected for the purposes of the calculation. The 'slice' so ascertained would bear no relation whatever to the legal rights of the annuitant, and its ascertainment would amount to the construction for estate duty purposes of a wholly fictitious and notional proprietary interest for which there is no warrant whatever in the relevant legislation."

It appears to me, with respect, that the reasoning contained in that passage applies directly to the argument which is put forward on behalf of the plaintiffs in this case, and that on the authority of that reasoning I am bound to reject that argument. In the result, so far as this part of the matter is concerned, I come to the conclusion that on the death of the settlor the whole of the property passed.

The Crown, however, concedes that, as the annuity continues and must be treated as representing a burden on the property, there must be a deduction representing the value of that burden. Here, again, there has been a dispute between the parties as to how that burden should be calculated. An argument was developed that I should apply, by analogy, the Finance Act, 1894, s. 7 (7) (b), but I can see no warrant on a consideration of that Act for acceding to that suggestion. The language of that sub-section is clearly confined to cases arising under s. 2 and has no application to cases arising under s. 1. The fact is that the legislation is silent on this point. As the Crown concedes that there should be a deduction, in my view, I can do nothing else but accept the effect of that concession and direct that the value of the deduction must be the value of the annuity at the date of the death calculated on actuarial principles. I propose, therefore, in answering the questions raised in the originating summons to declare that estate duty in respect of the property comprised in the marriage settlement on the death of the settlor on Jan. 16, 1946, became payable on the principal value of the settled property with a deduction in respect of the continuing annuity, the amount of such deduction to be calculated on actuarial principles.

Order accordingly.

Solicitors: *Warrens* (for the plaintiffs); *Solicitor of Inland Revenue*.

[*Reported by R. D. H. Osborne, Esq., Barrister-at-Law.*]

PRACTICE NOTE.

PENNY v. PENNY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), October 15, 16, 1952.]

Divorce—Pleading—Petition—"Previous proceedings with reference to the marriage"—*Summons issued by wife in court of summary jurisdiction and withdrawn before adjudication—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 4 (1) (h).*

By Matrimonial Causes Rules, 1950, r. 4:

"Form of petition.—(1) The petition (except in a suit for jactitation of marriage) shall state . . . (h) whether there have been in the High Court, county court or a court of summary jurisdiction any, and if so what, previous proceedings (including any application under r. 2) with reference to the marriage or the children of the marriage by or on behalf of either of the parties to the marriage, the date and effect of any decree or order made in such proceedings, and, in the case of proceedings with reference to the marriage, whether there has been any resumption of cohabitation since the making thereof . . ."

The issue of a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, is a "previous proceeding" within the meaning of r. 4 (1) (h) of the Matrimonial Causes Rules, 1950, and should, therefore, be pleaded as such in the petition.

FOR THE MATRIMONIAL CAUSES RULES, 1950, r. 4 (1) (h), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 10, p. 199.

PETITION by the wife for dissolution of the marriage on the ground of the husband's cruelty.

I. S. Hill for the wife.

J. B. Gardner for the husband.

In the course of the hearing it appeared that in 1946 the wife issued a summons in a court of summary jurisdiction alleging that the husband had been guilty of persistent cruelty to her. This summons was withdrawn before the hearing on the promise of the husband to improve his behaviour. The summons was not referred to in the petition, and KARMINSKI, J., expressed his opinion that the issue of the summons was a "previous proceeding with reference to the marriage" within the meaning of r. 4 (1) (h) of the Matrimonial Causes Rules, 1950, and should have been pleaded in the petition.

Solicitors: *P. G. W. Simes* (for the wife); *G. E. C. Dougherty* (for the husband).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

NOTE.

WHARTON v. WHARTON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Davies, J.), October 22, 1952.]

A *Justices—Husband and wife—Maintenance—Amount of—Considerations to be applied—Desire to effect reconciliation between parties—Conduct of parties—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5 (c).*

In determining the amount of maintenance to be paid by a husband under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, justices ought not to make an order for a small amount in order to force the wife to agree to a reconciliation. If they wish to effect a reconciliation their proper course is to adjourn the case pending the intervention of the probation officer and to award by way of an interim order such amount as they think appropriate.

B Although the Summary Jurisdiction (Married Women) Act, 1895, s. 5 (c), regulating the awards of maintenance in courts of summary jurisdiction, refers to the duty of "having regard to the means" of the parties, that does not exclude any relevant consideration of the conduct of the spouses, but, if the conduct of one spouse is taken into account in determining the amount of the award, the justices should also take into account the conduct of the other spouse.

C AS TO ORDERS FOR MAINTENANCE OF WIFE IN COURTS OF SUMMARY JURISDICTION, see HALSBURY, Hailsham Edn., Vol. 10, p. 840, para. 1342; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 705-708, Nos. 6729-6755.

FOR THE SUMMARY JURISDICTION (MARRIED WOMEN) ACT, 1895, s. 5 (c), see HALSBURY'S STATUTES, Second Edn., Vol. 11, p. 851.

Case referred to:

E (1) *Corkhill v. Corkhill*, Oct. 21, 1952 (Divorce Divisional Court) (unreported).

APPEAL by the wife against an order of justices for the Seaham petty sessional division of Durham, dated July 18, 1952, whereby they awarded her the sum of £1 10s. per week for her maintenance.

The parties were married in 1936. In 1952 the wife became suspicious of the husband's interest in another woman. This led to quarrels between them, and eventually the parties separated. Before the justices the husband admitted desertion, but he said in evidence that whenever the wife could not get her own way she threatened to commit suicide. The justices found (i) that, although the husband had admitted desertion, he had suffered mental cruelty for years due to the wife's threats to commit suicide, and (ii) that there was still a chance of reconciliation, and they fixed the amount of the award at £1 10s. per week.

G The wife appealed on the ground that this sum was inadequate.

G. J. Cohen for the wife.

Binney for the husband.

H LORD MERRIMAN, P., in his judgment, dealing with the first of the justices' reasons, said that, while he did not ignore the principle that, although the Summary Jurisdiction (Married Women) Act, 1895, s. 5, regulating awards of maintenance in courts of summary jurisdiction, referred to the duty of "having regard to the means" of the parties, that did not exclude any relevant consideration of the conduct of the spouses, nevertheless, if the sum of £1 10s. a week, which was anything but adequate on the figures, was to be justified by the wife's supposed misconduct, there should have been thrown into the scale the evidence of an improper association between the husband and the other woman. Dealing with the second of the justices' reasons, HIS LORDSHIP referred

to *Corkhill v. Corkhill* (1), and said that, if justices wished to effect a reconciliation, the proper way to do it was to adjourn the summons pending the intervention of the probation officer to see whether a reconciliation could be effected, awarding by way of an interim order such amount as they thought appropriate. It was not the proper way to deal with the matter to impose on the wife the disability of an inadequate award, in order, in effect, to starve her into reconciliation.

DAVIES, J.: I agree.

Appeal allowed: amount ordered varied to £4.

Solicitors: *Torr & Co.*, agents for *Morton, Morton & Shaw*, Sunderland (for the wife); *Bellamy, Bestford & Co.*, agents for *Bryan T. Mair*, Sunderland (for the husband).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

WHITELEY v. WILSON AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Romer, L.J., and Harman, J.), October 24, 27, 1952.]

Rent Restriction—" Dwelling-house "—Premises containing shop and dwelling accommodation—Question of fact—Dominant purpose immaterial—Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 3 (3).

On Nov. 27, 1950, premises, which consisted of a shop on the ground floor with dwelling accommodation above, were demised to the defendants for a term of years. There was some means of inter-communication between shop and dwelling accommodation, as well as a separate means of access to each part from the street. There were no covenants in the lease concerning the carrying on of any particular trade or business. In September, 1951, the defendants assigned the lease to the plaintiff in consideration of the payment of £150. On a claim by the plaintiff under s. 8 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, for the recovery of the £150 on the ground that the premises constituted a "dwelling-house" within the Rent Acts, and that the £150 was a "premium" within the sub-section,

HELD: since by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (3), a dwelling-house does not lose the protection of the Rent Acts "by reason only that part of the premises is used as a shop", the question to be determined was whether or not, as a matter of fact, there was a "dwelling-house"; in determining that question it was not proper to consider whether the premises were predominantly used for residential or business purposes; in the circumstances the premises constituted a "dwelling-house" and were thus within the ambit of the Rent Acts; and, therefore, the £150 was recoverable.

Principle laid down by DENNING, L.J., in *Feyereisel v. Parry* ([1952] 1 All E.R. 733), applied.

Thompson v. Simpson ([1952] 1 All E.R. 431), criticised.

FOR THE RENT AND MORTGAGE INTEREST RESTRICTIONS ACT, 1939, s. 3 (3), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1078.

Cases referred to:

- (1) *Vickery v. Martin*, [1944] 2 All E.R. 167; [1944] K.B. 679; 113 L.J.K.B. 552; 171 L.T. 89; 31 Digest, Replacement, 649, 7527.
- (2) *Feyereisel v. Parry*, [1952] 1 All E.R. 728; *sub nom. Feyereisel v. Turnidge*, [1952] 2 Q.B. 29.
- (3) *Pender v. Reid*, 1948 S.C. 381; 31 Digest, Replacement, 650, 2530.
- (4) *Kitchen's Trustee v. Madders*, [1949] 2 All E.R. 1079; [1950] Ch. 134; 2nd Digest Supp.

(5) *Langford Property Co., Ltd. v. Batten*, [1950] 2 All E.R. 1079; [1951] A.C. 223; 31 Digest, Replacement, 645, 7503.

(6) *Thompsonstone v. Simpson*, [1952] 1 All E.R. 431.

(7) *M'Clymonts Trustees v. Ross*, 1929 S.C. (Ct. of Sess.) 585; 31 Digest, Replacement, 650, 2529.

A APPEAL by the defendants against an order of His Honour JUDGE CLOTHIER, Q.C., sitting at Lambeth County Court, dated July 21, 1952. The facts appear in the headnote.

R. H. W. Dunn for the defendants.

C. Lawson for the plaintiff.

SIR RAYMOND EVERSHED, M.R., stated the facts and continued:

B I read next s. 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, on which the whole matter turns:

C “Subject to the provisions of para. (a) of the last preceding sub-section [relating to licensed premises], the application of the principal Acts, by virtue of this section, to any dwelling-house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes; and for the purposes of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1938, as amended by virtue of this section, any land or premises let together with a dwelling-house shall, unless the land or premises so let consists or consist of agricultural land exceeding two acres in extent, be treated as part of the dwelling-house; but, save as aforesaid, the principal Acts shall not, by virtue of this section, apply to any dwelling-house let together with land other than the site of the dwelling-house.”

D If this matter were *res integra*, I should say that the first question to ask is whether the premises in question fall within the first of the three phrases which constitute this sub-section—in other words: Is there here a dwelling-house? In my judgment, applying the ordinary standards of common sense to the problem, on the facts I would answer that question unhesitatingly in the affirmative. If that be right, then, as the sub-section lays down, it matters not, so far as the application of the Act is concerned, that some part of the dwelling-house is used for business or trade purposes. In that connection LORD GREENE, M.R., in *Vickery v. Martin* (1) pointed out that it was not necessary, for the premises to remain within the Act, that the business use or business part of the premises

E should be merely unsubstantial in extent. The question of substance did not of itself matter. The question was, however great or small the extent of the business carried on, were the premises a dwelling-house? *Vickery v. Martin* (1), it may be remembered, was a case in which the tenant conducted a lodging-house business on a substantial scale, but this court nevertheless held that the house was a dwelling-house within the meaning of the Act.

G If that view is right, then, as it seems to me, the first part of this sub-section applies, and the second and third phrases need not be considered, for I should read the second and third phrases (again treating the matter as *res integra*) as applying, not to the case of a single structure, but to the case where, in addition to the dwelling-house and the land on which it stands, there is also comprised in the letting, or there are also let at the same time, other land or premises,

H either built on or not, and that view of the case seems to me to be borne out particularly by the reference at the very end of the sub-section to the “site” of the dwelling-house as distinct from the other land let therewith. The view which I have expressed is also, as I understand it, the view of the county court judge. The challenge to that view has been presented to us by counsel for the defendants, who says that, although there is here one single structure, nevertheless, having regard to certain decisions, the question to be examined and answered is: Which of the two characteristics of this building predominates? Is it

predominantly used or was it predominantly let for dwelling-house purposes, or is it used or let predominantly for business purposes? Counsel seeks to invoke, as authority for that approach, the second and third phrases of the sub-section.

The principal authority on this matter in this country is the recent decision of this court in *Feyereisel v. Parry* (2) and I think that nothing in that case affects or qualifies what I take to be the ordinary meaning of the language in question. In *Feyereisel v. Parry* (2) the question related, not to a single structure, but to a camping site on which were a number of objects, bodies of omnibuses and huts, and also a bungalow available for, and in fact used by, the tenant for personal occupation. It was plain that the letting was to enable the plaintiff to conduct on that composite site a business connected with the camping ground, the bungalow being an adjunct to that business and available to him for his convenience as a residence in connection therewith. The case, therefore, as I follow the judgments, turns on the second and third phrases of the sub-section, the first phrase (that which I think applies here) having no application to the whole subject-matter of the letting. And, indeed, that the first phrase of the sub-section was regarded as inapplicable appears, to my mind, clearly enough from (to take one example) a passage in the judgment of SOMERVELL, L.J., where, dealing with an argument of counsel for the tenant, that, if somewhere on the subject-matter was to be found a dwelling-house, then (by operation of the second phrase) the Act applied to give protection, he said ([1952] 1 All E.R. 731):

"If counsel for the tenant is right, what would in ordinary language be described as a lease of business premises, if within the rateable value, would obtain the protection of the Act if one could find a dwelling-house within it. I think the words used at the beginning of this section by necessary implication negative that proposition."

In the *Feyereisel* case (2), since on its facts it fell to be determined by reference, not to the first phrase, but to the second and third phrases, it was necessary to decide whether the dwelling-house was an adjunct to the rest of the subject-matter or vice versa, and, in adopting that approach, this court expressed itself as being in agreement with a similar conclusion reached in Scotland in *Pender v. Reid* (3). In that case, the subject-matter consisted of property which included a house and yard, but that house and yard formed but a small part of the premises as a whole which contained a coal "ree" and other elements, indicating that its primary purpose was for carrying on a coal business thereon. I am content to adopt, as I respectfully do, the summary of the effect of this sub-section which is to be found at the end of the judgment of DENNING, L.J., in the *Feyereisel* case (2). He there referred to *Vickery v. Martin* (1) and to *Kitchen's Trustee v. Madders* (4), and said ([1952] 1 All E.R. 733):

"In those cases there was one house let and used as a single entity for dwelling purposes. It was not let together with other land or premises. The effect of s. 3 (3) is, therefore, as follows:—First, a dwelling-house does not cease to be protected simply because a substantial part of it is used for business purposes. Secondly, a dwelling-house does not cease to be protected simply because it is let with something else which is an adjunct to it, such as a garden, a yard, a garage or a paddock. But, thirdly, a dwelling-house is not protected if it is let with more than two acres of agricultural land or if something else such as a factory or a business is the main object of the letting and the dwelling-house is merely an adjunct to it. The present case comes within the third category. The camping site was the main object of the letting and the bungalow was merely an adjunct to it."

I add in reference to the *Feyereisel* case (2) that the language which ROMER, L.J., cited (*ibid.*, 734) from LORD RADCLIFFE's opinion in *Langford Property Co. v. Batten* (5) seems to me to support the same conclusion. LORD RADCLIFFE said ([1950] 2 All E.R. 1086):

"The basic thing, therefore, which is protected is the structure forming

a house or part of a house and the site that it occupies. If something beyond that is also to come within the protection of the Act [the Act of 1920, s. 12 (2)] it must be brought within it by the operation of some positive enactment to be found between the beginning and the end of sub-s. (2)."

I appreciate, of course, that the *Langford* case (5) was directed to quite a different subject-matter, but that language of LORD RADCLIFFE does seem to me to lend
A force to the view that if, on a fair view of the matter, the case falls within the first part of the sub-section, the court is relieved from examining further the second and third.

Whether a structure is a dwelling-house, or is an office, or constitutes other business premises, is a question of fact in the particular case to be determined on the evidence, and I do not doubt that in marginal cases the court may properly
B consider whether the business use or the business occupation does not so far predominate as to exclude from material significance the fact that there may be some part of the premises which can be said to be used for residential purposes, as SOMERVELL, L.J., observed in the passage ([1952] 1 All E.R. 731) from his judgment which I have already read. But that kind of consideration is quite
C a different matter from the question whether the dwelling-house is an adjunct to the rest of the subject-matter or vice versa, which arises on the second and third parts of the sub-section, and *Vickery v. Martin* (1) makes it (as I have said) plain that the mere fact that the business carried on is of a most substantial character does not of itself disqualify the premises as a whole from being a dwelling-house. That being my view, I agree entirely with the learned judge
D that the question of balancing the uses, which process has to be performed in a case falling within the second and third parts of the sub-section, does not arise here at all. I agree with him that this is, or was at all material times, a dwelling-house, and is entitled to the protection of the Act accordingly.

Having formed that view, I think it is only right to say by way of conclusion that I have found myself unable to accept what I apprehend to be certain of the reasoning of HALLETT, J., in *Thompstone v. Simpson* (6). That, like the present,
E was a case of a single structure, the ground floor of which was used for business purposes and the first and second floors for living accommodation. The learned judge found as a fact that the business part and the living part of the premises were "divisible into two separate entities", and, from that, that the dominant purpose of the house was the carrying on of a business and not the provision of a dwelling-house. The part of the reasoning from which I venture to dissent is
F that which involves and proceeds on the consideration of dominant purpose. If the learned judge had found as a fact that the first and second floors should be regarded as one entity, distinct from the shop premises on the ground floor, which were to be regarded as a wholly distinct entity, then I think he might have proceeded to find that the latter entity was outside the protection of the Act, and he might have made an order confined to it alone. But he did not so
G decide, for he made an order relating to the whole premises. He might, again, have found that the premises were not a dwelling-house at all in any proper sense, but were in fact business premises, but such a finding, which might have been difficult on the evidence, was not the finding at which he arrived. He, I think, thought that *Pender v. Reid* (3) applied no less to the parts of a dwelling-house, one vertically imposed on another on a single site, than to a dwelling-
H house and other premises horizontally adjacent, and in that interpretation of *Pender v. Reid* (3) I think with all respect he was mistaken. Indeed, it seems to me that the view that he took was not properly consistent with the later case of *Vickery v. Martin* (1), or, indeed, with the reasoning of *Feyereisel v. Parry* (2). On the other hand, it seems to me that to *M'Clymonts Trustees v. Ross* (7) no such criticism can be directed, for in that case the finding of the court was that the business part of the premises had become completely separated, in fact and in occupation, from the dwelling-house part, and the order of the Scottish court

was for possession of the former only. For the reasons which I have given, I think the learned judge here came to a correct conclusion, and that this appeal should be dismissed.

ROMER, L.J. : I agree that no question of dominant purpose arises in the present case. The question in such cases as this, where the subject-matter of the tenancy is one building used partly as a dwelling-house and partly as a shop, and no purpose is specified in the tenancy agreement, is whether the building should in a broad sense be regarded, on the one hand, as a dwelling-house which is partly or even substantially used as a shop, or, on the other hand, as a shop which is used in part for residential purposes. If the former, then the building is within the Rent Restrictions Acts, by reason of the first part of s. 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, and will not be taken out of it because of the general provision at the end of the sub-section. If, on the other hand, the common sense of the matter is that the building is a shop, then it is outside the first part of the sub-section and will not be brought within the Act by virtue of the second part. In my opinion, it is only in cases in which the first part of the sub-section is inapplicable that the effect of the second and third parts need be considered, and these apply, as I think, mainly, if not wholly, to land or other premises let together with a dwelling-house and not forming a part of its structure. The question whether the premises in the present case did or did not constitute a dwelling-house is one, I think, of fact, and one on which the learned judge arrived at a conclusion after approaching the matter from the right angle. He found that the premises were a dwelling-house, and that, to my mind, was an end of the case, because it is a dwelling-house within the first part of the sub-section, and it is not excluded merely because a part of it is used as a shop.

With regard to *Thompsonstone v. Simpson* (6), I entirely agree with the observations that my Lord has just made and I have nothing to add. With regard to *Feyereisel v. Parry* (2), I would associate myself with what my Lord has said about the summarised conclusion which DENNING, L.J., expressed ([1952] 1 All E.R. 733) as to the effect of s. 3 (3) of the Act. It appears to me to be a complete and entirely satisfactory definition of the effect of the sub-section operating on the various subject-matters to which it is directed. Finally, with regard to that case I would just like to say one word about an observation which I made. After referring to the part of sub-s. (3) which refers to the case of a dwelling-house let together with land other than the site of the dwelling-house, I said (*ibid.*, 734):

“ I regard that part of the sub-section as being the general law applicable to composite lets.”

I only want to say that that phrase, “ composite lets ”, was not intended to refer to the first part of the sub-section, which is directed to tenancies of dwelling-houses of which a part is used as business or similar premises, but only to the lettings of a composite character which are envisaged by the second and third parts of the sub-section. For the reasons which my Lord has given and for the reasons I have stated, I agree that this appeal must be dismissed.

HARMAN, J. : I agree that the appeal should be dismissed for the reasons stated by my Lords.

Appeal dismissed.

Solicitors: *Frank J. Stimpson* (for the defendants); *Rising & Ravenscroft* (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

ADLER v. BLACKMAN.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.JJ.), November 4, 5, 1952.]

Landlord and Tenant—Duration of tenancy—Weekly tenancy—Tenancy for one year at weekly rent—Holding over at weekly rent—Rebuttal of presumption of yearly tenancy—Notice to quit on basis of weekly tenancy—Claim for compensation or new lease under Landlord and Tenant Act, 1927 (c. 36), s. 4 (1), s. 5 (1) (2).

A A weekly tenant entered into an agreement with his landlord for a tenancy for one year of shop premises at a rent of £3 a week. At the end of the year he held over at the same rent, and later was given notice to quit on the basis that he held a weekly tenancy. He claimed compensation, or, B alternatively, a new lease under the Landlord and Tenant Act, 1927, s. 4 (1) and s. 5 (1) and (2), and he applied to the court therefor, but without success. In an action by the landlord for possession,

C HELD: it was essential to the presumption of a yearly tenancy on the determination of a letting for a year or for a term of years that the rent should be expressed as an annual sum; that presumption was rebutted where, as here, the rent was expressed to be payable as a weekly rent and not as an instalment of the rent fixed for the one year's tenancy; the tenancy, therefore, was a weekly one, and the notice to quit was valid.

D Per JENKINS, L.J.: at the highest in favour of the tenant the position so far as it rested on the tenancy agreement was equivocal and, therefore, other evidence might be resorted to to ascertain the true intentions of the parties; any doubts as to their intentions was resolved in favour of the landlord by the facts that the notice to quit expressly described the tenancy as a weekly tenancy and that this view of the position was accepted by the tenant who made his application under the Landlord and Tenant Act, 1927, on the footing that he held the premises on a weekly tenancy.

E Dictum of MAUGHAM, J., in *Ladies' Hosiery & Underwear, Ltd. v. Parker* ([1930] 1 Ch. 328), applied.

Covered Markets, Ltd. v. Green ([1947] 2 All E.R. 140), disapproved.

Decision of ORMEROD, J. ([1952] 2 All E.R. 41), affirmed.

AS TO PRESUMPTION OF YEARLY TENANCY, see HALSBURY, Hailsham Edn., Vol. 20, p. 124, para. 137; and FOR CASES, see DIGEST, Replacement Vol. 31, pp. 49-55, Nos. 2074-2121.

F Cases referred to:

(1) *Ladies' Hosiery & Underwear, Ltd. v. Parker*, [1930] 1 Ch. 304; 99 L.J.Ch. 201; 142 L.T. 299; 31 Digest, Replacement, 50, 2084.

(2) *R. v. Herstonceaux (Inhabitants)*, (1827), 7 B. & C. 551; 6 L.J.O.S.M.C. 35; 108 E.R. 828; 31 Digest, Replacement, 46, 2052.

G (3) *Covered Markets, Ltd. v. Green*, [1947] 2 All E.R. 140; 31 Digest, Replacement, 54, 2114.

(4) *Bank of Victoria v. M'Hutchison*, (1881), 7 V.L.R. 452.

(5) *Box v. Attfield*, (1886), 12 V.L.R. 574; 31 Digest, Replacement, 55, 666.

H APPEAL by the tenant from an order of ORMEROD, J., made on May 9, 1952, and reported [1952] 2 All E.R. 41, in an action for damages, possession, and mesne profits.

The landlord, Szoel Noa Adler, the plaintiff in the action, claimed from the tenant, Philip Blackman, possession of shop premises, 29 Cheshire Street, Bethnal Green, by virtue of a notice to quit given on July 27, 1950, on the basis that the tenancy was a weekly one. The tenant contended that the notice to quit was invalid on the ground that he was entitled to six months' notice, his tenancy being an implied yearly tenancy on a holding over with the landlord's consent after the expiration of an agreement for a tenancy for one year. The

landlord contended that the presumption of a yearly tenancy was rebutted by the payment of a rent calculated and payable by the week, by the fact that the tenant had been a weekly tenant before the agreement for a year's tenancy, and by the conduct of the tenant in claiming and applying to the court for compensation or a new lease under the Landlord and Tenant Act, 1927, s. 4 (1) and s. 5 (1) and (2), after receiving the notice to quit. He submitted that the tenant, having elected to treat the notice as valid by taking such proceedings under the Act of 1927, could not now raise the question of its validity as a defence. ORMEROD, J., held that the presumption that at the end of the tenancy for a year the tenant had held over on a yearly tenancy was rebutted by the facts that the rent which he paid under the tenancy for a year was £3 per week and was not calculated by reference to a yearly sum and that the tenancy was for only one year and not for a term, and also by the conduct of the parties in serving and accepting a notice to quit given on the basis that the tenancy was a weekly one. The tenancy was, therefore, a weekly one and the notice to quit was valid.

Heathcote-Williams, Q.C., and *Hawser* for the tenant.

Gallop, Q.C., and *Avgherinos* for the landlord.

SOMERVELL, L.J. : This is an appeal from a decision of ORMEROD, J., in a dispute between landlord and tenant. The question is whether a week's notice to quit was a valid notice. The tenant entered into an agreement with his landlord at one stage in their relationship for a tenancy for one year of shop premises at a rent of £3 a week. At the end of the year he remained in the shop and he continued to pay £3 per week. The notice to quit being on the basis that the tenancy was a weekly one, the tenant now seeks to rely on the presumption—which is rebuttable—that, in certain circumstances, where there has been a yearly tenancy or a tenancy for a term and the tenant holds over and rent is accepted, the tenancy is a yearly tenancy. The position is stated in this way in HILL AND REDMAN'S LAW OF LANDLORD AND TENANT, 11th ed., p. 28, para. 14 (3) :

“A tenancy from year to year arises by presumption of law when a person who has entered upon premises, or, having been tenant, has remained in possession of premises with the consent of the landlord, in such circumstances as to be in the first instance tenant at will—or, in the case of holding over, tenant at sufferance subsequently pays rent with reference to a yearly holding, provided that there are no circumstances to rebut the presumption.”

At one time the tenant here was, admittedly, a tenant by the week. Then there was the agreement for a year to which I have referred, and we are concerned with the period after that year had come to an end. It is on the agreement for the year that the tenant relies. It will be noted that the rent as expressed in that agreement was so much per week. The decided cases when a yearly tenancy has been implied are cases where the rent is stated as a rent per year, though, of course, such a rent may be payable half yearly, quarterly, monthly, or, in one of the reported cases, weekly.

The first question is whether the fact that the rent is not paid yearly leads to the conclusion that the presumption would not apply in the absence of some other circumstances on which it could be based. That point came before MAUGHAM, J., in *Ladies' Hosiery & Underwear, Ltd. v. Parker* (1). The learned judge decided that case on another point, but, as this question had been argued, he gave his views on it. The lease in that case was for a term of three years commencing from Oct. 12, 1914, at a weekly rent of £2 payable weekly. The learned judge referred to the principle which I have stated, and to *R. v. Herstmonceaux (Inhabitants)* (2), where the principle was applied to a yearly rent of twenty guineas payable weekly. He goes on to say ([1930] 1 Ch. 328):

“In the present case, the lease or agreement is one for three years at a rent of £2 a week. It is not a lease for three years at a rent of £104 per

A annum payable weekly: and it is observable that £2 a week is a rent which, as we all know, is not exactly divisible into the number of days either of an ordinary year or of a leap year. I cannot find, and counsel have been unable to find, any case exactly in point; but I have come to the conclusion that there is no reason for extending the views, which are binding on me, as to the terms which justify the inference that a tenancy is from year to year, and that in this case, narrow as the distinction is, the holding over of the premises after the expiration of the agreement of Oct. 10, 1914, would have resulted only, and did result only, in the tenant's being a tenant from week to week."

B I agree with that. I think that when, as here, a term comes to an end one has to consider what inferences are properly to be drawn from the payment and acceptance of rent. That is the basis of the presumption. In the cases in the books the rent is expressed to be so much per year, and in the extreme case where the rent, being so expressed, is to be payable weekly, when the landlord accepts a weekly sum what he is accepting is an instalment of the agreed figure for a yearly rent. One sees from that the force of the argument which has led the court in those cases to presume a tenancy for a further year, but in a case C like the present, where the rent is expressed to be per week, I think that when the fixed period has come to an end one should not presume anything but a weekly tenancy, namely, a tenancy for the period in respect of which the rent is expressed. It is one of those cases (and there are many) when the law has to do its best to fill up a gap which has been left by the parties. The parties are obviously in some relationship of landlord and tenant, but they have not taken D the trouble to write down in black and white what the relationship is. That, I think, is the proper conclusion.

E There was a further point to which the learned judge referred, and, though he did not regard it as necessary to his decision, I will say a word about it. In July, 1950, this notice to quit was given on the basis that the tenant was a weekly tenant. On receipt of that notice the tenant proceeded to apply under the Landlord and Tenant Act, 1927, for a new lease and compensation on the basis that the notice was a good notice bringing his tenancy to an end, whereas, of course, if it had been a yearly tenancy there would have been admittedly a six months' notice required expiring at the end of the year. The learned judge regarded that as evidence of the intention of the parties as at the time when the year terminated, and, therefore, relevant to support the conclusion that the F holding over was on the basis of a weekly tenancy. I find it unnecessary to rely on that though it would have been relevant in considering whether the presumption is rebutted if, contrary to the view I held, there had been a prima facie presumption that the tenant had held over on a yearly tenancy. I do not, however, base my decision on what happened in July, 1950, though it is, perhaps, G comforting to realise that, at any rate at that time, neither side took the view that this was a yearly rather than a weekly relationship. For these reasons I would dismiss the appeal.

H JENKINS, L.J. : I agree. With the exceptions to which I will later refer, I think all the cases in which an implication of a yearly tenancy taking effect after the termination of a letting for one year or a term of years has been held to have been raised have been cases where the original letting from which the implication was deduced was a letting for a year or for a term of years at an annual rent, that is to say, a rent expressed as an annual sum, by whatever instalments it may have been made payable. In the *Ladies' Hosiery* case (1) MAUGHAM, J., held, in effect, that it was essential to the implication of a yearly tenancy after the determination of a letting for a year or for a term of years that the rent should be expressed as an annual sum. His view was that where the rent in the original letting was otherwise expressed (as in the case before him where the original letting was for three years at a rent of £2 a week) there was no

ground for the implication of a yearly tenancy. I agree with the reasoning of MAUGHAM, J., and I think his view is to be preferred to the view taken in the three cases which constitute the exceptions I have mentioned. Those cases were *Covered Markets, Ltd. v. Green* (3), a decision of MACNAGHTEN, J., and two Australian cases to which we were referred, namely, *Bank of Victoria v. M'Hutchison* (4), decided in 1881, the other, *Box v. Attfield* (5), decided in 1886. It follows, in my view, that the learned judge's decision in the present case is warranted by the form of the letting for one year, which was a letting

"for the term of one year to commence from Dec. 22, 1947, at the inclusive weekly rent of £3 payable weekly in advance on every Monday in each week during the whole of the tenancy the first four weeks to be paid on the signing hereof",

the rent being thus expressed to be payable simply as a weekly rent and not as an instalment of the rent fixed for the one year's tenancy. At highest I think the position so far as it rests on the tenancy agreement alone is equivocal, and, if it is equivocal, it seems to me that any doubt as to the parties' intention is resolved in favour of the landlord by the facts that the notice to quit of July 27, 1950, expressly describes the tenancy as a weekly tenancy and that this view of the position was accepted by the tenant who, thereupon, made his application under the Landlord and Tenant Act, 1927, on the footing that he held the premises on a weekly tenancy at £3 per week payable on Mondays. It is, no doubt, true that the subsequent expression by the parties of erroneous views as to the terms of a bargain previously entered into cannot alter its legal effect, but what one is seeking here is the intention to be imputed to the parties from the facts that the tenant had remained in occupation with the consent of the landlord and had paid rent after the expiration of the term of the original letting. As I have said, I think at highest in favour of the tenant the implication here, so far as it is based simply on those bare facts, is equivocal owing to the absence of any reservation of rent expressed as an annual sum. It follows, in my view, that other evidence may be resorted to to ascertain what their true intention was. Here one has a record of their understanding of the position in July and August, 1950, which seems to me to provide at all events some evidence of what their intention must be taken to have been at the time when the letting for a year at a weekly rent came to an end and the tenant held over. Accordingly, I agree that this appeal should be dismissed.

HODSON, L.J. : I agree that the observations of MAUGHAM, J., in *Ladies' Hosiery & Underwear, Ltd. v. Parker* (1) apply exactly mutatis mutandis to this case and I agree with the learned judge's view of an agreement which corresponded very closely to the agreement under consideration. That disposed of this case and I think it does involve a rejection of the view which MACNAGHTEN, J., took in *Covered Markets, Ltd. v. Green* (3), a case in which the agreement was virtually indistinguishable. It is, therefore, unnecessary to consider what the effect may be or might have been of the subsequent conduct of the parties after the date of the expiration of the agreement. I agree, therefore, that the appeal should be dismissed.

SOMERVELL, L.J. : I would like to add that I agree with what my brethren have said about the *Covered Markets* case (3).

Appeal dismissed.

Solicitors : *Manches & Co.* (for the tenant) ; *Adler & Adler* (for the landlord).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

POYSER v. POYSER AND OTHERS.

[COURT OF APPEAL (Singleton, Birkett and Morris, L.JJ.), November 5, 6, 1952.]

Divorce—Adultery—Evidence—No evidence given by respondent in disproof of charge of adultery—Matrimonial Causes Act, 1950 (c. 25), s. 32 (3).

A A husband petitioned for divorce on the ground of his wife's adultery. He had already on four occasions charged her before the justices with adultery, with a view to terminating an order for maintenance which the justices had made, but on each occasion his charges failed. In the divorce proceedings counsel for the wife stated that, with a view to protecting her from a fifth cross-examination as to adultery, he was not going to ask her to give evidence in disproof of adultery so as to obtain the protection of s. 32 (3) of the Matrimonial Causes Act, 1950. On the question of the degree to which the failure of the wife to give evidence in disproof of adultery should be taken against her and considered probative of guilt,

B HELD: the court was entitled to take into consideration all the circumstances connected with the failure to give evidence in disproof of adultery, but need not necessarily take the failure strongly against the party or as proof of guilt.

C Passage in LATEY ON DIVORCE, 14th ed., at p. 406, criticised.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 32 (3), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 417.

D APPEAL by the husband from an order of Mr. Commissioner REWCASTLE, Q.C., dated July 4, 1952, dismissing his petition for divorce on the ground of his wife's adultery with three men, two of whom were cited as co-respondents, and granting the wife a decree of divorce on the ground of his desertion. The issue was one of fact, and the case is reported only on the question of what weight is to be given to the failure of a respondent against whom adultery is charged to give evidence in disproof.

E Lermom for the husband.

Crispin for the wife.

Mr. Bell, one of the co-respondents, appeared in person.

The other co-respondent, who had been dismissed from the suit, did not appear.

F SINGLETON, L.J., after stating the facts, dealt with the course which the case took before the learned commissioner in relation to the wife's evidence in chief and continued: At the end of the case for the husband counsel for the wife said to the learned commissioner:

G "This woman, who was deserted by her husband early in 1947, has been hounded since Aug. 3, 1949, by being taken to the magistrate's court on no fewer than four occasions on allegations of adultery. Every witness your Lordship has heard in this court... gave evidence before the magistrate... On four occasions the husband has failed... After earnest reflection, I am not going to take from the wife any denial of adultery... There is no evidence against her of adultery... I will ask your Lordship to say that, so far as adultery is concerned, no case is made out against my client."

H Section 32 (3) of the Matrimonial Causes Act, 1950, provides:

"The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings, but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery."

In the present case this position arose. The wife against whom there was a case of adultery—I say no more—did not desire to deny that she had committed adultery, or her counsel, answering for her, said she did not propose to do so, and pointed out to the commissioner that, in those circumstances, she could not be cross-examined on that subject.

The learned author of *LATY ON DIVORCE*, 14th ed., at p. 406, deals with the effect of s. 32 (3) of the Matrimonial Causes Act, 1950, and I read a portion of the text:

“The section is peremptory. A party may give evidence denying his own adultery. If he does not, no questions on the point, direct or indirect, may be put either by counsel in cross-examination or by the court. If a party goes into the box and does not deny a charge or suggestion of adultery in chief, or without sufficient reason fails to go into the box and give evidence when he or she ought to do so, the circumstances will be taken strongly against such party, and may be considered so far corroborative of guilt as to make what was previously a weak case against him or her into a strong one. But a party who is altogether silent in chief as to alleged adultery cannot be cross-examined on the point, whether pleaded or not.”

I shall not be misunderstood if I say that I think the paragraph which I have just read might be re-framed in a sense. It is not always that the failure of a person to give evidence will be taken strongly against such party, and the words “corroborative of guilt” are not, I think, very clear.

BIRKETT, L.J., has pointed out that if in a criminal case there is evidence of guilt to go before a jury, and the accused does not go into the witness-box to give evidence, it is open to the judge to point out to the jury, if he thinks it right so to do, that the accused man has not seen fit to go into the witness-box to deny the charge. Each case must depend on its own circumstances, and I would put the matter in this way. If, in the circumstances of a particular case, the judge thought that the case of the petitioner called for an answer and none was forthcoming, it is open to him to have regard to that fact. In other words, if there is a *prima facie* case of adultery and the respondent says: “I am not going into the witness-box to deny that”, or the respondent’s counsel says: “I will not ask my client a question on that, so that he (or she) cannot be cross-examined on it”, it is a matter which the court is entitled to take into consideration. It is not of necessity a strong point, though it might be in some cases. It is possible to imagine a case in which a party might not desire to go into the witness-box for other reasons altogether, perhaps reasons of health. It is a circumstance, a fact, which the judge is entitled to consider.

[HIS LORDSHIP examined the judgment of the commissioner, and said that the appeal should be allowed and there should be a new trial.]

BIRKETT, L.J., and MORRIS, L.J., concurred.

Appeal allowed.

Solicitors: *Martin & Nicholson* (for the husband); *Charles & Co.* (for the wife).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

PALLANT v. MORGAN.

[CHANCERY DIVISION (Harman, J.), October 13, 14, 15, 16, November 6, 1952.]

Specific Performance—Sale of land—Uncertainty—Effect of fraud of defendant—Agreement to convey if plaintiff did not bid at auction—Failure to perform agreement.

A. and B., who owned neighbouring land, each desired to prevent certain nearby woodland, which was intended to be sold by auction, from falling into the hands of timber merchants, and they entered into negotiations with a view to agreement on the portion of the woodland which they should respectively acquire, it being intended that, if agreement could be reached, they would not compete against each other at the auction. Final agreement was not reached, but, immediately prior to the sale, A.'s agent (who had authority to bid up to £2,000 for lot 16 if he failed to agree, as he was instructed to attempt to do, with B.'s agent) orally agreed with B.'s agent that if he (A.'s agent) refrained from bidding and B.'s agent acquired lots 15 and 16, B. would convey certain portions of the woodland from both lot 16 and lot 15 to A. at a price to be settled in accordance with a formula which had been previously discussed, but which left undecided, within certain limits, the exact price to be paid for the land by A., and the exact method of valuing the timber. B.'s agent also intimated that B. would not be willing to sell to A. part of the land required by him except so far as it did not affect certain water rights which B. had, and A.'s agent agreed that A. should restrict his requirements to enable B. to secure protection of his rights. A.'s agent did not bid, and B.'s agent bought both lot 15 and lot 16 (the latter for £1,000). B. failed to convey to A. the areas he required. In an action by A. for the specific performance by B. of the agreement which, A. alleged, had been entered into by their agents, B. did not rely on the Law of Property Act, 1925, s. 40.

HELD: specific performance of the agreement made between the agents could not be decreed as its terms were too uncertain, but, on the facts, B.'s agent was bidding for lot 16 at the auction for both A. and B. on an agreement that there should be an arrangement between the parties on the division of the lot if he were successful, and, in the circumstances, B. must be deemed to hold the property comprising lot 16 (but not lot 15, for A.'s agent had no authority to bid for that) for himself and A. jointly, and, failing agreement on a division between them, it must be re-sold, both parties being at liberty to bid, and the proceeds of sale must be divided equally after repayment to B. of the amount of his purchase price with interest at four per cent.

Chattock v. Muller (1878) (8 Ch.D. 177), applied.

AS TO CONTRACTS NOT SUFFICIENTLY CERTAIN TO BE ENFORCED, see HALSBURY, Hailsham Edn., Vol. 31, pp. 348-355, paras. 385-398; and FOR CASES, see DIGEST, Vol. 42, pp. 452-459, Nos. 225-286.

Case referred to:

(1) *Chattock v. Muller*, (1878), 8 Ch.D. 177; 42 Digest 459, 286.

ACTION by which the plaintiff sought specific performance of an agreement made between him and the defendant through their agents whereby the plaintiff's agent refrained from bidding for certain woodland at an auction on the footing that, if the defendant's agent was successful in bidding (as happened), the defendant would re-sell certain portions of the land to the plaintiff at a price to be ascertained by way of a formula agreed between the agents for the purpose. Alternatively, the plaintiff claimed that the defendant acquired the land on behalf of himself and the plaintiff with the intention of dividing it between them in such manner as they might agree, and that, as they had failed to agree, the

land was held by the defendant for both parties jointly. A defence based on the Law of Property Act, 1925, s. 40, was abandoned at the trial.

Raymond Jennings, Q.C., and Belsham for the plaintiff.

Sir Lynn Ungood-Thomas, Q.C., and E. B. Stamp for the defendant.

Cur. adv. vult.

Nov. 6. **HARMAN, J.**, read the following judgment. This is a dispute between neighbours as to certain land adjacent to the properties of each of them and of importance to both from an amenity point of view. The land in question was purchased by the defendant at an auction on Sept. 14, 1950, and the plaintiff's case is that in the circumstances in which the defendant acquired the land he is bound to re-sell certain portions of it to the plaintiff at a price to be ascertained by way of a formula agreed between their agents for the purpose. Alternatively, the plaintiff claims that the defendant acquired the land on behalf of himself and the plaintiff with the intention of dividing it between them in such manner as they might agree, and that, as they have failed to agree, the land is now held by the defendant for the two of them jointly.

The plaintiff is the leaseholder of a property known as Reeth Cottage situate near Fernhurst in a pleasant part of the country between Haslemere and Midhurst forming part of a large estate known as the Blackdown estate. The defendant is the freeholder of a farm known as Lower House Farm lying to the south of the plaintiff's property. The Blackdown estate is to a great extent covered by woods which add to the beauty of the countryside, but of course need a good deal of maintenance without very much financial return. The estate, or parts of it, was in the market in 1941, and it appears that there has been some felling of timber by timber merchants who acquired rights at that time. When, therefore, in 1950 it became known to the parties that a further auction was to be held they were naturally anxious about the woods in the vicinity of their properties. They were also conscious of the fact that if they bid one against the other no one would profit except the owner, and that it was preferable if possible that they should agree before the sale not to compete. Consequently, early in August the plaintiff wrote to the defendant suggesting an agreement between them, and there followed a meeting at a friend's house at which some map or other was studied and suggestions were made as to a possible method of division. Following this, on Aug. 10, 1950, the plaintiff sent the defendant a tracing showing by reference to the sale plan of 1941 the portions which he desired to acquire. The defendant about this time consulted Messrs. Harrods about the not inconsiderable acquisitions he proposed to make at the auction sale which was by now fixed for Sept. 14, 1950, and on Aug. 28 Mr. James, the manager of Harrods' estate office, is found writing to the plaintiff demurring to his suggestions and making alternative ones. The new plan and conditions of sale were circulated at the end of August, and on Sept. 1 Mr. James wrote again to the plaintiff suggesting that with a little give and take a common boundary could easily be fixed. On Sept. 3 Mr. James had an interview with the plaintiff at which there was some approach to an agreement over areas, but none as to price, Mr. James suggesting that, on lot 16 as lotted on the new auction particulars, the valuable timber was on the portion proposed to be taken by the plaintiff and that an area valuation would not be fair, but that the timber should be valued and apportioned separately. This suggestion somewhat alarmed the plaintiff who, on Sept. 9, consulted Messrs. Cubitt & West, auctioneers and surveyors of Haslemere and elsewhere, and he was put in charge of one Mason, then an employee, but now a partner in the firm. The immediate cause of this step was a new proposal from the defendant set out in a letter of Sept. 7 and illustrated by a plan which accompanied it.

On Sept. 11 there was a long telephone conversation between Mr. Mason and Mr. James searching for a formula of agreement. It is common ground that no agreement was reached at this conversation, but the two surveyors

were able to define the extent of the differences between their clients and to reach certain tentative conclusions. They agreed that the basic price of the land should be between £3 and £5 an acre, and also that the proper way to deal with the timber on lot 16 was to agree on a valuation of the two portions into which it would be divided and apportion it between the parties. What they did not agree was whether £3 or £5 an acre should be the average price or how, if the two valuers disagreed, the price of the timber could be settled. As to area, Mr. James gave Mr. Mason to understand that the defendant would not concede to the plaintiff a portion of lot 16 south of a certain ride running east to west (ordnance No. 107). This position was accepted by Mr. Mason. Both parties agreed that the defendant would be willing to sell to the plaintiff the areas marked in green chalk "C" and "A" on the plan before me. "A" was in fact a small part of lot 15 which also the defendant proposed to buy. As to the area marked "B", the matter was left in doubt, the plaintiff desiring to have it and Mr. James, on his client's behalf, doubting whether it would be conceded. Thus at this date the parties had failed to reach an agreement though they were near it, and this is recorded in a letter from the defendant to the plaintiff of Sept. 12, 1950.

The auction was held on Sept. 14 and was attended by both Mr. James and Mr. Mason, but by neither of their principals. Each had instructions to bid for lot 16, Mr. Mason up to £2,000 and Mr. James up to £3,000. Mr. James also had authority to bid for lot 15, but Mr. Mason had none. The two surveyors had not met before the day of the sale, but they did meet for a short time immediately before the sale began, and there is a sharp conflict of evidence between them. The outcome of the conversation is not in doubt. Mr. Mason, who entered the auction room with instructions to bid up to £2,000 for lot 16 unless he reached an agreement with Mr. James which he was instructed to attempt, refrained from bidding, and as a result Mr. James acquired the lot for his client for £1,000. Two views are advanced as to the reason why Mason did not bid. Mr. Mason says that he agreed not to bid on the faith of an assurance from Mr. James that, if he refrained, the defendant, should he acquire lots 15 and 16, would convey over the portions "C" and "A" to the plaintiff at a price to be settled in accordance with the formula arrived at on Sept. 11. Mr. James, on the other hand, says that all he did was to make what he called a friendly gesture to Mr. Mason to the effect that it would be better for Mr. Mason in his client's interest not to bid and that he, Mr. James, felt sure that in that event there would be no great difficulty in arriving at an agreement.

This difference is, in my judgment, crucial, and I am bound to choose between these two versions. I have no hesitation in choosing that of Mr. Mason. In the first place, on certain matters of detail his recollection is obviously better than that of Mr. James. Notably he said that he only had one conversation with Mr. James and that on Sept. 11, and this he was able to substantiate by contemporary entries from his office. Mr. James, on the other hand, says there were two conversations and that the only one of importance occurred on Sept. 9. In this I think he was clearly wrong. Secondly, Mr. James denied in the witness box that anything he said was intended to induce or did induce Mr. Mason to refrain from bidding, but in a letter written to his employer on the day following the sale he used this expression:

"I saw Bertie Pallant's agent in the saleroom before the sale commenced and he agreed to refrain from bidding."

It is true that the letter goes on in these words:

"... on the understanding that you will be able to get together as to the division of the boundaries and the timber, I have not committed you to anything."

Mr. James agreed at once that if his letter was intended to convey that he had misled Mr. Mason into keeping out of the ring by a promise which was really

no promise that would be an act of dishonesty to which no reputable agent occupying the position he does would stoop. Mr. James further said that he had no authority from his principal to make an agreement. This may well be so, but if he used terms in talking to Mr. Mason which reasonably induced the latter to hold his hand on the faith of an agreement that was well within the scope of his ostensible authority, and if he so induced Mr. Mason irrevocably to alter his principal's position and obtained thereby an advantage for his own principal, it does not lie in the mouth of the defendant to repudiate what was done on his behalf, and it is fair to him to say that he made no attempt to do so. His defences were, first, that no agreement was made in the auction room, and, secondly, the Law of Property Act, 1925, s. 40, but this latter defence he abandoned at the trial as being one of which, in the circumstances, he did not choose to avail himself even if it was open to him, and this is also to his credit.

Apart from the view I take about the value of the recollections of the two agents, there is the general consideration of the probability of the matter. I am satisfied that Mr. Mason had definite instructions to bid unless he reached an agreement, and I do not think he would have acted in the way he did unless he at least thought he had reached such an agreement. He might, of course, have deceived himself, but, in my judgment, he did not do so. His conversation with Mr. James was, as I find, to the following effect. Mr. James observed that, if agreement was to be reached, the plaintiff would have to give way not only on ordnance No. 107, but on "B", and Mr. Mason, having express authority to that effect, agreed to do so. Mr. James then said that the defendant would not be willing to sell any part of "A", which affected certain water rights by which he set store, and Mr. Mason agreed that in so far as the boundaries of "A" as drawn did affect them the plaintiff would give way here also. Mr. James thereupon intimated that in that case everything would be all right, and thereupon Mr. Mason said he would not bid and did not do so.

Can, then, the plaintiff have a specific performance of the agreement so reached? In my judgment, he cannot, for there is too much left undecided. There is the margin between £3 and £5 an acre, there is the exact method of valuing the timber, and there is the question of what part if any of "A" affects the defendant's water rights. Is the result, then, that the plaintiff must fail? In my judgment, not so. To allow the defendant to retain lot 16 in these circumstances would be tantamount to sanctioning a fraud on his part, and I find the following in *FRY ON SPECIFIC PERFORMANCE*, 6th ed., p. 184, para. 386, where the author is dealing with what he styles the uncertainty of the contract:

"The same certainty will not be required in cases where there is any element of fraud, as in simple cases of specific performance of a contract. Thus where A. agreed with B. in effect that if B. would not try to buy a certain estate, A. would try to buy, and in case of success would cede a portion of the estate to B. at a certain price: and B. acted on his bargain and allowed A. to purchase: and A. having purchased refused to perform his part and set up the uncertainty of the part to be ceded: the court held that the defence could not avail, and directed an inquiry to ascertain the portion to be given up and the price. It seems that if this could not have been ascertained, B. might have claimed the whole estate."

The case on which that paragraph is based is *Chattock v. Muller* (1). The head-note there reads as follows:

"The defendant purchased an estate, having agreed with the plaintiff that, if he made the purchase, he would cede part thereof to the plaintiff. There was some uncertainty in the memorandum of agreement between the plaintiff and defendant as to the exact portion which was to be ceded to the plaintiff. In an action by the plaintiff for specific performance of the agreement, the court directed a reference to chambers to ascertain what

portion the plaintiff was entitled to, and decreed that the defendant should convey such portion to the plaintiff."

A In that case there was an agreement between the plaintiff and the defendant as to bidding at an auction and a subsequent division of the property if acquired. In the event, neither party acquired the property at the auction, but subsequently it was agreed between them that the defendant should attempt to buy the property by private contract, the agreement still standing, and, notwithstanding the fact that the defendant wrote to the plaintiff saying that he had had an offer and adding: "You are of course quite at liberty to offer for the property", the plaintiff, having refrained from making such an offer, was held entitled to have the agreement specifically performed. SIR RICHARD MALINS, V.-C., gave judgment as follows (8 Ch.D. 181):

B "It is clear that the defendant attended the auction partly on his own account and partly as the plaintiff's agent, and if he had then purchased the estate, he must have been held to be a trustee for the plaintiff of the house and the eighty or ninety acres which it had been arranged that he should have. The subsequent negotiations were treated as carried on by the defendant on behalf of himself and the plaintiff, and he treated the purchase as a joint purchase in various letters until July 25, when he appears to have become enamoured with the estate, and astonished the plaintiff by his letter of that date, in which he assumed to be the owner of the estate, part of which he had unquestionably purchased as the agent of the plaintiff. This was a flagrant breach of duty, which in this court has always been considered as a fraud . . . it was strongly argued . . . for the defendant, D that the plaintiff cannot have a decree because there was no certainty as to what part of the estate the plaintiff was to have, or as to the price to be paid for it. In a case like this, where the defendant has acquired the estate or part of it by a fraud on the plaintiff, I think that the court would be bound, if possible, to overcome all technical difficulties in order to defeat the unfair course of dealing of the defendant, and I should not, in my opinion, be E going too far if I compelled the defendant to give the whole estate to the plaintiff at the price given for it, rather than that he should succeed in retaining it on account of any uncertainty as to the part which the plaintiff is entitled to have. But I think the memorandum in the handwriting of the defendant, which was given to the plaintiff at the interview of June 20, relieves the court in this case from any difficulty."

F The present case is, if anything, stronger than that one, but I do not follow the Vice-Chancellor in his suggestion that the defendant could become bound to hand over the whole property to the plaintiff at the price he gave for it. In my judgment, the proper inference from the facts is that the defendant's agent, when he bid for lot 16, was bidding for both parties on an agreement that there should be an arrangement between the parties on the division of the lot G if he were successful. The plaintiff and the defendant have failed to reach such an agreement, and the court cannot compel them to one. The best it can do is to decree that the property is held by the defendant for himself and the plaintiff jointly, and, if they fail to agree on a division, the property must be re-sold, either party being at liberty to bid, and the proceeds of sale being divided equally after repaying to the defendant the £1,000 which he paid with interest H at 4 per cent. It is true that the suggested agreement would have involved the transfer to the plaintiff of a portion of lot 15, but, in default of an agreement, he cannot obtain that, for his agent had no instructions to bid for that lot in any event.

I mention, in order to show that I have not ignored it, that there was further communication between the agents after the sale in which the plaintiff's agent was still asking for the transfer to the plaintiff of area "B", and that on Sept. 23 Mr. Mason wrote to Mr. James agreeing not to ask further for area "B" and

also to concede such part of area "A" as contained the source of the defendant's water. He ended this letter with the expression: "This, I hope, settles the boundaries". It was urged on me that this showed that the plaintiff's agent knew that there had been no agreement before the sale. I think it does show that he realised that the details of the agreement had been left in doubt, but this, in my judgment, is not fatal to the plaintiff's case, which rests on the fact that his agent was kept out of the ring at the auction by a promise that, if he would not bid, an agreement would be reached. *Order accordingly.*

Solicitors: *Gascoin & Co.* (for the plaintiff); *William Charles Crocker* (for the defendant).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

BANK VOOR HANDEL EN SCHEEPVAART N.V. v. SLATFORD (sued as CUSTODIAN OF ENEMY PROPERTY) AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.), October 6, 7, 8, November 3, 1952.]

Crown—Servants—Custodian of Enemy Property—Liability to income tax—Trading with the Enemy Act, 1939 (c. 89), s. 7 (1)—Trading with the Enemy (Custodian) Order, 1939 (S.R. & O., 1939, No. 1198), art. 3 (i) (ii).

On July 3, 1940, gold belonging to a Dutch banking company was transferred from safe deposit in London to the Custodian of Enemy Property by a vesting order made by the Board of Trade under the Trading with the Enemy Act, 1939, s. 7 (1), and the Trading with the Enemy (Custodian) Order, 1939. On July 24 the Custodian sold the gold and retained the proceeds as enemy property. He subsequently used the proceeds to purchase Treasury bills at a discount and paid income tax on the profits made. In April, 1950, on a demand by the Administrator of Hungarian Property, made under art. 1 (5) (e) of the Treaty of Peace (Hungary) Order, 1948, he transferred the proceeds to the Administrator. On July 30, 1951, the Dutch banking company obtained judgment for the amount of the proceeds of the gold against the Administrator, and it was conceded by the Administrator that any sums earned by the proceeds while in the hands of the Custodian should go with the proceeds. The Dutch company claimed that it was entitled to these sums without deduction of the income tax paid by the Custodian in respect of the profits on the Treasury bills, on the ground that Crown status attached to the Custodian, and, therefore, he was not liable to income tax.

HELD: in the case of officials, such as the Custodian of Enemy Property, who were appointed by the Executive under powers created or conferred by statute, "Crown immunity" belonged to them only if and so far as it was the logical and necessary consequence of the character of their powers and responsibilities, or, as regards any property in their hands, if it was applicable solely for Crown purposes, viz., public purposes or the purposes of the central government; the obligations of preservation and collection of enemy property imposed on the Custodian by s. 7 (1) of the Trading with the Enemy Act, 1939, and orders made thereunder, were quite distinct, both by nature and by the manner of their creation, from the Sovereign's prerogative rights of making war and peace, and the Custodian, in carrying out his duties, was not implementing any of the Crown's prerogatives, and, therefore, Crown immunity did not attach to him by reason of his office: *Austrian Property Administrator v. Russian Bank for Foreign Trade* (1932) (48 T.L.R. 37), distinguished; by art. 3 (i) of the Trading with the Enemy (Custodian) Order, 1939, the Custodian's duty was to retain the assets which became vested in him, pursuant to s. 7 (1) of the Act of 1939, until

the termination of the war unless the Board of Trade otherwise directed, and by art. 3 (ii) such a direction might be in favour of the person who would have been entitled thereto but for the operation of the Act of 1939, and, therefore, unless and until some direction was given to the Custodian by the Board of Trade, or by the Treasury under reg. 4 (3) of the Defence (Trading with the Enemy) Regulations, 1940 (as amended by S.R. & O., 1940, No. 1381), the ultimate destination of the assets remained uncertain; they might be restored to their former owner either during or after the war, and they could not properly be applied by the Custodian for public purposes; and, therefore, the Custodian did not receive the income of the proceeds of sale of the gold exclusively for a Crown purpose and he was liable to income tax in respect thereof.

Per SIR RAYMOND EVERSLED, M.R.: while the proceeds of sale of the gold were retained by the Custodian, the beneficial interests of the Dutch company therein were not wholly extinguished, but were in statutory suspense.

Re Pozot's Settlement Trusts ([1952] 1 All E.R. 1107), applied.

Per SIR RAYMOND EVERSLED, M.R.: "... the commonly used formula that the Income Tax Acts do not bind the Crown conceals the true principle, which is that, in the absence of express provision to the contrary, the Crown and the rights of the Crown are not thereby prejudiced. In the present case it is plain that the deduction of tax does not touch or affect the personal or prerogative rights of the Sovereign, and it is difficult to see how in any other respect the Crown is prejudiced by the retention for the purposes of the public revenues of part of a sum of interest now treated as having been earned for and payable to the plaintiff bank."

Decision of DEVLIN, J. ([1952] 1 All E.R. 314), reversed.

AS TO WHEN CROWN BOUND BY STATUTE, see HALSBURY, Hailsham Edn., Vol. 31, p. 521, para. 681; and FOR CASES, see DIGEST, Vol. 42, pp. 689-693, Nos. 1036-1082.

FOR THE TRADING WITH THE ENEMY ACT, 1939, s. 7 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 26, p. 337.

Cases referred to:

- (1) *London County Territorial & Auxiliary Forces Assocn. v. Nichols*, [1948] 2 All E.R. 432; [1949] 1 K.B. 35; [1948] L.J.R. 1600; 2nd Digest Supp.
- (2) *Austrian Property Administrator v. Russian Bank for Foreign Trade*, (1932), 48 T.L.R. 37; Digest Supp.
- (3) *Coomber v. Berks JJ.*, (1883), 9 App. Cas. 61; 53 L.J.Q.B. 239; 50 L.T. 405; 48 J.P. 421; 2 Tax Cas. 1; 28 Digest 14, 69.
- (4) *Mersey Docks v. Cameron. Jones v. Mersey Docks*, (1865), 11 H.L. Cas. 443; 35 L.J.M.C. 1; 12 L.T. 643; 29 J.P. 483; 11 E.R. 1405; 38 Digest 466, 286.
- (5) *Smith v. Birmingham Union*, (1857), 7 E. & B. 483; 119 E.R. 1326; *sub nom. R. v. Smith*, 26 L.J.M.C. 105; 29 L.T.O.S. 76; 21 J.P. 694; 38 Digest 467, 295.
- (6) *Amherst (Lord) v. Sommers (Lord)*, (1788), 2 Term Rep. 372; 100 E.R. 200; 38 Digest 465, 285.
- (7) *R. v. Stewart, R. v. Stainsby, R. v. Breton, R. v. Foster*, (1857), 8 E. & B. 360; 120 E.R. 134; *sub nom. R. v. Stewart, R. v. Edwards, R. v. Lake, R. v. Stainsby, R. v. Breton, R. v. Foster*, 27 L.J.M.C. 81; 30 L.T.O.S. 114; 22 J.P. 480; 38 Digest 433, 70.
- (8) *Lancashire JJ. v. Stretford Overseers*, (1858), E.B. & E. 225; 120 E.R. 492; *sub nom. R. v. Lancashire JJ.*, 27 L.J.M.C. 209; 31 L.T.O.S. 116; *sub nom. Stretford Overseers v. Lancashire JJ.*, 22 J.P. 705; 38 Digest 481, 395.

- (9) *Hodgson v. Carlisle Local Board of Health*, (1857), 8 E. & B. 116; 120 E.R. 43; *sub nom. R. v. Hodgson*, 29 L.T.O.S. 246; 38 Digest 465, 278.
- (10) *R. v. Manchester Overseers*, (1854), 3 E. & B. 336; 23 L.J.M.C. 48; 22 L.T.O.S. 241; 18 J.P. 218; 118 E.R. 1167; 38 Digest 465, 283.
- (11) *R. v. Shepherd*, (1841), 1 Q.B. 170; 10 L.J.M.C. 44; 5 J.P. 241; 113 E.R. 1095; 38 Digest 434, 77.
- (12) *Re Munster*, [1920] 1 Ch. 268; 89 L.J.Ch. 138; 28 Digest 95, 561. A
- (13) *Re Gourju's Will Trusts*, [1942] 2 All E.R. 605; [1943] Ch. 24; 112 L.J.Ch. 75; 168 L.T. 1; 2nd Digest Supp.
- (14) *Re Pozot's Settlement Trusts*, [1952] 1 All E.R. 1107; [1952] Ch. 427.
- (15) *Stevenson (Hugh) & Sons v. Akt. für Cartonnagen Industrie*, [1918] A.C. 239; 87 L.J.K.B. 416; 118 L.T. 126; 2 Digest 177, 416.
- (16) *Daimler Co., Ltd. v. Continental Tyre & Rubber Co. (Gt. Britain), Ltd.*, [1916] 2 A.C. 307; 85 L.J.K.B. 1333; 114 L.T. 1049; 2 Digest 145, 195. B
- (17) *Willion v. Berkley*, (1561), 1 Plowd. 223; 75 E.R. 339; 38 Digest 702, 466.
- (18) *Magdalen College, Cambridge, Case*, (1615), 11 Co. Rep. 66b; 77 E.R. 1235; 11 Digest 546, 496.
- (19) *Greig v. Edinburgh University*, (1868), L.R. 1 Sc. & Div. 348; 32 J.P. 627; 38 Digest 472, 327.
- (20) *Worcestershire County Council v. Worcester Union*, [1897] 1 Q.B. 480; 66 L.J.Q.B. 323; 76 L.T. 138; 61 J.P. 244; 38 Digest 468, 298. C
- (21) *Cooper v. Hawkins*, [1904] 2 K.B. 164; 73 L.J.K.B. 113; 89 L.T. 476; 68 J.P. 25; 42 Digest 692, 1075.
- (22) *Bombay Province v. Bombay Municipal Corpn.*, [1947] A.C. 58; [1947] L.J.R. 380; 2nd Digest Supp.
- (23) *Clark v. Downes. Clark v. Mawby*, (1931), 145 L.T. 20; 31 Digest, Replacement, 635, 7438. D
- (24) *Rudler v. Franks*, [1947] K.B. 530; [1947] L.J.R. 658; 176 L.T. 326; 111 J.P. 190; 31 Digest, Replacement, 635, 7439.
- (25) *Wirral Estates, Ltd. v. Shaw*, [1932] 2 K.B. 247; 101 L.J.K.B. 370; 147 L.T. 87; 96 J.P. 143; 31 Digest, Replacement, 635, 7442.
- (26) *Tamlin v. Hannaford*, [1949] 2 All E.R. 327; [1950] 1 K.B. 18; 31 Digest, Replacement, 636, 7447. E
- (27) *International Ry. Co. v. Niagara Parks Commission*, [1941] 2 All E.R. 456; [1941] A.C. 328; 111 L.J.P.C. 55; 2nd Digest Supp.
- (28) *Cassidy v. Ministry of Health*, [1951] 1 All E.R. 574; [1951] 2 K.B. 343; 2nd Digest Supp.
- (29) *Stevenson Jordan & Harrison, Ltd. v. MacDonald & Evans*, (1952), 69 R.P.C. 10; [1952] W.N. 7. F
- (30) *R. v. Yorkshire Electricity Board* (Nov. 16, 1951), unreported.

APPEAL by the second defendant, the Administrator of Hungarian Property, from an order of DEVLIN, J., dated Jan. 18, 1952, and reported [1952] 1 All E.R. 314. G

The plaintiff, a Dutch banking company, brought an action claiming *inter alia* (i) a declaration that the first defendant, the Custodian of Enemy Property, was a trustee for the State of the Netherlands and for the plaintiff bank of gold deposited in London of which the plaintiff bank was the owner immediately before May 24, 1940, and of balances due at that time to the plaintiff bank from certain banks in London, and that he was liable to account to the plaintiff bank for the same and all interest and dividends accruing thereto; (ii) damages against the first defendant for conversion of the gold; (iii) a declaration that sums transferred by the first defendant to the second defendant, in April, 1950, being the sum received by the first defendant on the sale of the gold and the sum total of the bank balances (less a fee retained by the Custodian under the Trading with the Enemy (Custodian) Order, 1939, art. 7) were not subject to any charge imposed by the Treaty of Peace (Hungary) Order, 1948, and that H

the plaintiff bank was absolutely entitled to them; and (iv) an order for recovery of the sums with interest thereon.

A On July 3, 1940, the gold was transferred from safe deposit in London to the Custodian of Enemy Property under a vesting order made by the Board of Trade under the Trading with the Enemy Act, 1939, s. 7 (1), and the Trading with the Enemy (Custodian) Order, 1939. On July 24, under an order made under the Act and order of 1939, the Custodian sold the gold and retained the proceeds as enemy property. He acquired the bank balances from the banks holding them under instructions contained in letters from him, dated Jan. 19, 1950, as moneys held by the banks since May 20, 1940, for his account and subject to his direction. In April, 1950, on a demand by the Administrator of Hungarian Property, made under art. 1 (5) (e) of the Treaty of Peace (Hungary) Order, 1948, the Custodian transferred the proceeds and the bank balances to the Administrator.

B On July 30, 1951, DEVLIN, J., gave judgment in the action for the Custodian against the plaintiff bank and judgment for the bank against the Administrator for the sums claimed and interest thereon at four per cent., with liberty to apply if the amount due in respect of the sums earned by the proceeds of the sale of gold by the Custodian were not agreed, it having been conceded that these sums should go to the plaintiff bank if it was successful in the action ([1951] 2 All E.R. 779). The amount was not agreed, and the plaintiff bank applied to the judge to determine the amount due. The plaintiff bank claimed that judgment should be entered for £2,224,367 6s. 11d. The Administrator contended that the sum should be £2,148,041 8s., the difference of £76,325 18s. 11d. being income tax paid by the Custodian in respect of profits made from the purchase by the Custodian of Treasury bills at a discount. The plaintiff bank contended that the Custodian was a servant of the Crown and was exempt from income tax and should not have paid the tax. DEVLIN, J., held that the Custodian received the proceeds of sale for a Crown purpose and was, therefore, exempt from liability to income tax, and, accordingly, he gave judgment for the plaintiff bank.

E *The Attorney-General (Sir Lionel Heald, Q.C.), J. H. Stamp, J. P. Ashworth and R. J. Parker* for the Administrator of Hungarian Property.
Russell, Q.C., and Littman for the plaintiff bank.

Cur. adv. vult.

November 3. The following judgments were read.

F **SIR RAYMOND EVERSLED, M.R.:** The sole question involved in this appeal relates to the propriety of the deduction of a sum of £76,325 18s. 11d. for income tax from the interest or "fruits" earned, during a period of approximately ten years ending on Apr. 30, 1950, by a gross sum of £2,002,910 19s. 1d., for which gross sum, together with interest, the plaintiff bank has obtained judgment against the second defendant, the Administrator of Hungarian Property. The gross sum in question represents as to all but a small portion of it the proceeds of the sale of certain gold bars belonging to the plaintiff bank which were situate in this country on the outbreak of the late war and which, in circumstances later narrated, fell within the scope of the Trading with the Enemy Act, 1939, and became vested, accordingly, in the then Custodian of Enemy Property, the predecessor of the first defendant. Since the plaintiff bank is a Dutch corporation, it may well be asked: What connection with the matter had the second defendant, the Administrator of Hungarian Property? The explanation will emerge from the short statement of facts which it is necessary that I should make, but it may be said at once that the intervention of the Administrator of Hungarian Property in the matter, and the various concessions which were made during the two hearings before DEVLIN, J., have given to the case, in a sense, an artificial character. Certainly, the facts of the case are of a most special and peculiar nature.

I have said that the gold bars and also the bank balance of £18,000 odd, which, together with the proceeds of the gold bars, made up the principal sum of £2,002,910 19s. 1d., were property in this country belonging to the plaintiff bank. When the territory of the Netherlands was over run by the invading Nazi armies, the gold bars and bank balance became "enemy property" within the meaning of the Trading with the Enemy Act, 1939. It will be convenient at this stage to refer to such parts of that Act and of certain regulations subsequently made which are relevant to the present question. By s. 2 (1) of the Act it was provided that the expression "enemy", for the purposes of the Act, included inter alia "(b) any individual resident in enemy territory". Section 7 provided as follows:

"(1) With a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace, the Board of Trade may appoint Custodians of enemy property for England, Scotland and Northern Ireland respectively and may by order . . . (b) vest in the prescribed Custodian such enemy property as may be prescribed . . . (3) Where, in pursuance of an order made under this section . . . (b) any property, or the right to transfer any property, is vested in a Custodian . . . neither the payment, vesting or direction nor any proceedings in consequence thereof shall be invalidated or affected by reason only that at a material time—(i) some person who was or might have been interested in the money or property, and who was an enemy or an enemy subject, had died or had ceased to be an enemy or an enemy subject, or (ii) some person who was so interested, and who was believed by the Custodian to be an enemy or an enemy subject, was not an enemy or an enemy subject . . . (8) In this section—(a) the expression 'enemy property' means any property for the time being belonging to or held or managed on behalf of an enemy or an enemy subject . . ."

Section 15 (1) defined "enemy territory" so as to include for the purposes of the Act

" . . . any area which is . . . in the occupation of, a Power with whom His Majesty is at war . . ."

Section 16 provided that the Act should be without prejudice to the exercise of any right or prerogative of the Crown. It is unnecessary to set out any further provisions of the Act, but it is pertinent to observe that its scheme in general followed that of the similar legislation passed at the time of the first world war. Two exceptions may be noted. (i) Whereas the Trading with the Enemy Amendment Act, 1914, s. 1 (2), provided that for England the Public Trustee should be appointed to the office of Custodian, in the present instance (under s. 7 (1) of the Act of 1939) the appointment of Custodian was left in the discretion of the Board of Trade. The Board of Trade, in fact, in exercise of its statutory power, appointed the Public Trustee to be Custodian and he remained such until his place was taken by the first defendant to these proceedings. (ii) Whereas under the former legislation (s. 4 (1) of the Act of 1914) vesting orders had to be made by the court, under s. 7 (1) (b) of the Act of 1939 such orders were to be made by the Board of Trade.

The Defence (Trading with the Enemy) Regulations, 1940 (S.R. & O., 1940, No. 1092, as amended), made under the Emergency Powers (Defence) Acts, 1939 and 1940, made certain provisions as to Custodians. The most important of these, for present purposes, is reg. 4 (3), which was added by S.R. & O., 1940, No. 1381, and reads:

"Notwithstanding anything in . . . s. 7 [of the Trading with the Enemy Act, 1939], a Custodian shall, if the Treasury so directs, pay or transfer, to such persons as may be specified in the direction—(a) any money so specified which has been paid to the Custodian as being money which,

but for the existence of a state of war, would have been payable to or for the benefit of—(i) an individual resident in any enemy territory . . . (ii) an individual or body of persons . . . carrying on business in any such territory . . . (b) any property so specified, being property which, or the right of transfer of which, has been vested in the Custodian as being property belonging to, or held or managed on behalf of, any such individual or body of persons as is mentioned in para. (i), [or] para. (ii) . . . of sub-para. (a) of this paragraph.”

By reg. 6 (i), which was added by S.R. & O., 1943, No. 1034, it was provided that, if any area ceased to be enemy territory as defined in the Act by reason, inter alia, of its no longer being in the occupation of a Power with whom His Majesty was at war, the area should nevertheless, for the purposes of s. 7 of the Act and of any order made thereunder, be treated as if there had been no such cessation until such time as the Board of Trade might by order specify. In fact, in the case of the Netherlands, pursuant, as we understand, to arrangements between Her Majesty's Government and the Royal Netherlands Government, no order by the Board of Trade as contemplated by para. 6 of the regulations of 1939, as amended, has ever been made, so that the territory of the Netherlands still, strictly speaking, remains enemy territory for the purposes of the Trading with the Enemy Act, 1939, and regulations made thereunder.

The Trading with the Enemy (Custodian) Order, 1939 (S.R. & O., 1939, No. 1198), art. 3, provided:

“(i) The Custodian shall, subject to the provisions of the next succeeding paragraph and except in so far as the Board of Trade either generally or in any specific case may otherwise direct or order, hold any money paid to him under this order and any property or the right to transfer any property vested in him under any vesting order until the termination of the present war, and shall thereafter deal with the same in such manner as the Board of Trade shall direct. (ii) The Custodian, acting under a general or special direction of the Board of Trade, may at any time pay over any particular money paid to him under this order or transfer any particular property in respect of which a vesting order has been made to or for the benefit of the person who would have been entitled thereto but for the operation of the Act or any order made thereunder or to any person appearing to the Custodian to be authorised by such person to receive the same. (iii) Any money paid to the Custodian under this order and any property in respect of which a vesting order has been made shall not be liable to be attached or otherwise taken in execution. (iv) The receipt of the Custodian or any person duly authorised by him to sign receipts on his behalf for any money paid to him under this order shall be a good discharge to the person paying the same.”

It was by virtue of the provisions of the Trading with the Enemy Act, 1939, s. 7 (1), and of a vesting order duly made by the Board of Trade thereunder that the gold bars and bank balance above mentioned became vested in the Custodian. In exercise of powers vested in him (to which it is not necessary to allude specifically) the Custodian sold the gold bars and from time to time invested their proceeds and the bank balance in the purchase at discount of Treasury bills. The result of these transactions was to produce in the hands of the Custodian, as “fruits” or interest arising from the principal sums in question, a total gross figure of £151,454 17s. 2d. No orders or directions, general or specific, were ever given to the Custodian in regard to the principal sums or the interest or “fruits” received by him. He continued, accordingly, to hold such amounts until the happening of the events which I shall presently relate. He could, indeed, do no other than he did. He could not pay such sums or any part thereof to or for the benefit of the British Exchequer or to or for the benefit of any other person or body of persons. But during all the time that

he so retained these sums it appears to have been supposed that, though they had come to him as assets in this country of the plaintiff bank, they belonged, in fact, to Baron Heinrich Thyssen-Bornemisza, who was the principal shareholder in the plaintiff bank and who was a Hungarian national. It is this circumstance that accounts for the intrusion into the story of the second defendant, the Administrator of Hungarian Property.

The Treaties of Peace (Italy, Roumania, Bulgaria, Hungary and Finland) Act, 1947, s. 1 (1), provided that His Majesty might make such appointments, establish such offices, make such Orders in Council, and do such things as appeared to him to be necessary for carrying out the respective treaties and for giving effect to any of their provisions. These provisions included (as regards the Hungarian treaty) the subjection of property in this country belonging, or formerly belonging, to Hungarians to a charge in favour of persons having claims against such nationals or against the Hungarian State [art. 29 of the Treaty of Peace with Hungary (Cmd. 7485)]. By the Treaty of Peace (Hungary) Order, 1948 (S.I., 1948, No. 116), His Majesty in Council, in pursuance of s. 1 of the Act of 1947, and after reciting that section, ordered (*inter alia*) as follows. Article 1 (1) defines the expression "property, rights or interests" for the purposes of the article, and art. 1 (2) imposes the treaty charge on all "property, rights or interests" to which the paragraph applied. By art. 1 (3):

"Paragraph (2) of this article applies to any property, rights or interests within His Majesty's dominions and Protected Territories (except the Dominions) belonging to or held or managed on behalf of the government of Hungary or a Hungarian national and shall include:—(i) Any such property, rights or interests in the possession of a Custodian of Enemy Property under or by virtue of an order made by the Board of Trade under s. 7 of the Trading with the Enemy Act, 1939, and the net proceeds of the sale, liquidation or other dealings by a Custodian of Enemy Property with any such property, rights or interests that are or have been in his possession as aforesaid."

Article 1 (4) states that with a view to making effective and enforcing the charge:

"(a) The Board of Trade may appoint on such terms as they may specify an Administrator who shall act under the general direction of the Board and shall have such powers and duties as are hereinafter provided."

Finally, art. 1 (5) (g) is in the following terms:

"a certificate by the Administrator that any property, rights or interests are subject to the charge shall be *prima facie* evidence of the facts stated in the certificate, and where any requirement or demand for payment by the Administrator as aforesaid is accompanied by such a certificate, the person in possession of the property transferable by delivery, or the person by whom a sum of money is due, shall comply with the requirement or demand and shall not be liable to any action or legal proceeding in respect of such compliance, but if it is subsequently proved that the property, rights or interests were not subject to the charge, the owner thereof shall be entitled to recover the same from the Administrator, or if it has been sold, the proceeds of sale, but not to any other remedy."

In pursuance of art. 1 (5) (g) the Administrator proceeded to serve on the Custodian a certificate and requirement relating to the principal sum of £2,002,910 19s. 1d. to which this action relates (but not relating to any "fruits" or interest in respect thereof), and on receipt of such certificate and requirement the Custodian transferred the sum in question to the Administrator. The effect of this proceeding may have, perhaps, been fortunate for the plaintiff bank. Having regard to the fact that the territory of the Netherlands (though, in

fact, a friendly and allied country) remained enemy territory for the purposes of the Trading with the Enemy Act, 1939, the plaintiff bank, according to counsel for the bank, could make no effective claim against the Custodian. This may well have been so, since to any such claim the provisions of the Trading with the Enemy legislation would appear to have provided a complete answer. But, the principal sum having passed into the hands of the Administrator, the plaintiff bank then issued the writ in the present proceedings, joining both the Custodian and the Administrator as defendants and claiming the return of the moneys as being the property of the plaintiff bank. The trial of the action took several days. DEVLIN, J., decided that, notwithstanding the Thyssen interests in the plaintiff bank, the latter was, on well established principles, an entity wholly separate from its corporators and, therefore, could make good the assertion that it was the owner of the principal moneys, which were, accordingly, in no way subject to the charge created by the Hungarian Peace Treaty. It has not been necessary for us to examine the learned judge's judgment ([1951] 2 All E.R. 779), the first of two judgments delivered by him in the case, for there has been no appeal against any part of his conclusion. During the course of the hearing, however, the question was raised of the rights of the plaintiff bank to the "fruits" or interest which had arisen from the investments in Treasury bills by the Custodian. Since these "fruits" still remained in the hands of the Custodian, the plaintiff bank was faced with the difficulty already indicated of making good any claim thereto against the Custodian. In the circumstances, it was conceded by the Solicitor-General on behalf of both defendants (if I may say so, in plain recognition of the justice of the matter) that for the purposes of the judgment the certificate of the Administrator should be treated as having comprehended not only the principal sums in question but also their "fruits" or interest. The learned judge indicated, therefore, that the form of the judgment should be (a) for the principal sum of £2,002,910 19s. 1d., (b) for the proper amount due to the plaintiff bank in respect of the "fruits" or interest, and (c) for interest at four per cent. from Aug. 12, 1950, to the date of the judgment (July 30, 1951). It was at this point that the matter with which we are now concerned arose. The actual gross sum earned in respect of "fruits" or interest was not in doubt. I have already mentioned the figure of £151,454 17s. 2d. It was, however, contended on the defendants' behalf that, income tax having been paid in respect thereof, the plaintiff bank was entitled to recover only the net sum after deduction of such tax. No agreement could be reached on this matter, and the case was accordingly restored to DEVLIN, J., for further argument. His second judgment, dated Jan. 18, 1952, in favour of the plaintiff bank, is the judgment now under appeal. As appears therefrom, a further concession was made on behalf of the Administrator for reasons similar to those which prompted the concession last mentioned, and its nature is thus stated by DEVLIN, J. ([1952] 1 All E.R. 318):

"I think that the Administrator acted wisely and properly in the end when, at the conclusion of the argument, he intimated that, if on the true view of the law the Custodian was not liable to tax, he would concede that judgment should be for the higher sum."

The result was that the judgment to which the plaintiff bank became entitled was for a total amount which included the gross amount of the "fruits" or interest without any deduction in respect of income tax. The present appeal relates only to that aspect of the matter, and, in the circumstances, the Administrator is the sole appellant. The Custodian, being no longer interested, has taken no part in the appeal.

I have referred to two important concessions made in the course of this case. There is a third to which I must also now refer. It was and is conceded by counsel for the plaintiff bank (and agreed by the Attorney-General) that the

produce or "fruits", as they have been called, of the investment of the principal fund are "annual profits or gains" within the ambit of the charge created by the Income Tax Act, 1918, sched. D. They are, it is said, annual profits or gains arising or accruing to a person residing in the United Kingdom (viz., the Custodian) from property situate in the United Kingdom within the meaning of para. 1 of the schedule. They would, therefore, *prima facie* fall within the terms of the Miscellaneous Rules Applicable to sched. D, r. 1, which reads:

"Tax under this schedule shall be charged on and paid by the persons . . . receiving . . . the income in respect of which tax under this schedule is hereinbefore directed to be charged."

But the plaintiff bank said in the court below and say now that the person receiving the income, viz., the Custodian, was, by virtue of his office and the "Crown status" (to use the language used by SCOTT, L.J. ([1948] 2 All E.R. 434) in *London County Territorial & Auxiliary Forces Assocn. v. Nichols* (1), and borrowed by DEVLIN, J.) with which his appointment and the nature of his official functions invested him, immune from liability to assessment on the general and well-known principle, expressed in popular language, that "the Income Tax Acts do not bind the Crown". I should add that it is agreed by both parties that the "fruits" or interest, having been derived from the realisation of Treasury bills bought at a discount, must be treated as "created income" for income tax purposes and is, therefore, exempt from the provisions as regards the Custodian's liability for tax contained in the Finance Act, 1944, s. 42, and sched. IV.

It is here that the issue is joined. DEVLIN, J., accepted the argument of the plaintiff bank, but, with deference to his view, I have reached a different conclusion. It was not (as I understand his judgment) the view of the learned judge that the office of Custodian was such, of itself and without anything more, to confer on its holder the immunity belonging to the Crown. Certain of the great offices of State, whose powers may be said to be directly derived from those in earlier times exercised by the King in person, may be able to assert that "Crown status" attaches to them, inevitably and with all its consequences, while acting in the exercise of their official duties. The office of the Custodian is clearly not of this character—which could not, indeed, be easily attributed to an official bound, as regards the moneys with which we are concerned, to obey the directions or demands of the Treasury, the Board of Trade and (later) the Administrator of Hungarian Property. And I agree with the learned judge that the matter is not advanced by the use of such expressions as "emanations of the Crown", which convey no meaning capable of precise significance. It is clear that the modern machinery of government is exercised in many of its aspects by officials appointed by the Executive under powers created or conferred by Acts of Parliament and that "Crown immunity" will only belong to such officials if and so far as it is the logical and necessary consequence of the character of their powers and responsibilities or, as regards any property in their hands, of the purposes to which it must be applied. It was the view of DEVLIN, J.—and counsel for the plaintiff bank has not sought to go further in this respect—that the case of the Custodian fell within this class. But the judge thought that the character of the Custodian's duties satisfied the condition requisite for Crown immunity. He said ([1952] 1 All E.R. 321):

" . . . his duties bring him within the sphere of two of the most ancient and peculiar prerogatives of the Crown—the power to make war, including the power to take for itself the property of an enemy found within the realm, and the power to make peace."

In this view of the Custodian's functions, DEVLIN, J., thought *Austrian Property Administrator v. Russian Bank for Foreign Trade* (2) conclusive. And, therefore, he held (*ibid.*, 323) that the Custodian received the income in question

“ . . . as a person having Crown status, or, at the least, that he received it for a Crown purpose.”

The question being whether, as respects the income received by him (being income admittedly within the charging provisions of sched. D), it is taxable in the Custodian's hands, it is first necessary to examine the purposes for which he received it, to ask what were the Custodian's duties in regard to such income when it came into his hands. That this is the proper approach in a matter of this kind appears to me to follow from such cases as *Coomber v. Berkshire Justices* (3). In that case, the question being whether the respondents were liable to be assessed to income tax under sched. A or sched. B of the Income Tax Acts, 1842 and 1853, the House of Lords based their answer (which was favourable to the respondents) by considering the purposes for which the premises were occupied and concluding that such purposes were wholly public purposes, that is, purposes of the central government of the country. So much appears—to make but one citation—from the beginning of LORD WATSON'S speech. He said (9 App. Cas. 72):

“ I entertain no doubt that the occupiers of buildings used as courts of assize, or as county police stations, are within the privilege of the Crown and are therefore not liable to be rated under s. 1 of the Act of the 43 Eliz. c. 2 [Poor Relief Act, 1601]. In the case of *Mersey Docks v. Cameron* (4), my noble and learned friend (LORD BLACKBURN), delivering the opinion of five of the consulted judges, said (11 H.L. Cas. 464): ‘ Long series of cases have established that where property is occupied for the purposes of the government of the country, including under that head the police and the administration of justice, no one is rateable in respect of such occupation. And this applies not only to property occupied for such purposes by the servants of the great departments of State, such as the post office, *Smith v. Birmingham Union* (5); the Horse Guards, *Lord Amherst v. Lord Sommers* (6); or the Admiralty, *R. v. Stewart* (7), in all which cases the occupiers might strictly be called the servants of the Crown; but also to property occupied by local police, *Lancashire Justices v. Stretford Overseers* (8); to county buildings occupied for the assizes, and for the judge's lodgings, *Hodgson v. Carlisle Local Board of Health* (9); or occupied as a county court, *R. v. Manchester Overseers* (10); or for a jail, *R. v. Shepherd* (11). In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the Sovereign, so as to make the occupation that of Her Majesty; but the purposes are all public purposes of that kind which, by the constitution of this country, fall within the province of government, and are committed to the Sovereign; so that the occupiers, though not perhaps strictly servants of the Sovereign, might be considered in consimili casu. And the decisions are uniform, and were not disputed at the Bar, that the exemption applies so far; but there is a conflict between the decisions as to whether the exemption goes farther ’.”

In the present case, on a like inquiry, I am unable to agree with the answer given by DEVLIN, J. ([1952] 1 All E.R. 323), that the Custodian received the income “ for a Crown purpose ”, if by that language he intended that the income in the Custodian's hands was “ Crown income ” and applicable exclusively for Crown purposes, i.e., public purposes or purposes of the central government. In the absence of some further direction or order on the part of the Treasury or the Board of Trade, the Custodian could not lawfully apply the sums in question or any part thereof to any purposes whatever, public or private. He was bound to hold the sums, to keep them, as it were, in medio until such time as he received some effective direction to apply them or otherwise dispose of them as directed—in the event to hand them over to the Administrator of Hungarian Property. Counsel for the plaintiff bank contended that during this period of inactivity the beneficial interest of the plaintiff bank was wholly

extinguished, that there was, in truth, no beneficial interest at all in any part of those sums, and that there remained, accordingly, only the legal interest of the Custodian. Counsel concedes, of course, that the Custodian could not put the moneys in his own pocket. He was bound by statute to hold them as he did, but (said counsel for the plaintiff bank) he, an officer of the Crown, so held them, and the purposes for which he so held them were none the less public purposes because they were negative, more especially since the Crown could at any time (by its executive officers) divert them as it might think fit, and since also the aim and object of the vesting and all that followed on it was none other than the prosecution of the war and the worsting of the King's enemies, matters peculiarly within the ambit of the Sovereign's war-making prerogative. A

I have been unable to accept this argument. I cannot agree that during the period of retention by the Custodian the rights and interests of the plaintiff bank were wholly removed or extinguished. The corresponding situation under the Trading with the Enemy Amendment Act, 1914, was considered by RUSSELL, J., in *Re Munster* (12), where that learned judge held ([1920] 1 Ch. 279) that the beneficial interests of persons or bodies in the position of the plaintiff bank in this case must be regarded during the period of retention as being in "statutory suspense". And the ratio of that decision has been held to be equally applicable to similar cases arising under the Trading with the Enemy Act, 1939, by SIMONDS, J. ([1942] 2 All E.R. 607) in *Re Gourju's Will Trusts* (13), and by this court ([1952] 1 All E.R. 1114) in *Re Pozot's Settlement Trusts* (14). The conception of beneficial rights being "in suspense" is, no doubt, at first sight somewhat strange and novel. But, in my judgment, it does not involve—indeed, it negatives—extinction, which would be equivalent to confiscation. So much, to my mind, clearly follows from the language of RUSSELL, J., who considered and founded himself on the relevant earlier decisions. I find it, therefore, sufficient to cite one passage from the judgment of RUSSELL, J., in *Re Munster* (12) ([1920] 1 Ch. 278): B C D

"To this reading of the Act two objections have been raised in argument on behalf of the Commissioners of Inland Revenue. First, it is said that this is confiscation, and it is further said that confiscation of the property of enemy subjects is not the law of this country. For this latter proposition various statements from different judgments were cited. Two will serve as examples. In *Hugh Stevenson & Sons v. Aktiengesellschaft für Cartonnagen Industrie* (15), LORD FINLAY, L.C., says ([1918] A.C. 244), 'It is not the law of this country that the property of enemy subjects is confiscated. Until the restoration of peace the enemy can, of course, make no claim to have it delivered up to him, but when peace is restored he is considered as entitled to his property with any fruits which it may have borne in the meantime'. LORD HALDANE in the same case remarks (*ibid.*, 247): 'The law of this country does not in general confiscate the property of an enemy. He cannot claim to receive it during war, but his right to his property is not extinguished; it is merely suspended'. These passages no doubt accurately state the law of this country apart from the provisions of any statute or of the treaty of peace. LORD PARKER in *Daimler Co., Ltd. v. Continental Tyre & Rubber Co. (Great Britain), Ltd.* (16) makes this clear when he says ([1916] 2 A.C. 347): 'Subject to any legislation to the contrary or anything to the contrary contained in the treaty of peace when peace comes, enemy property in this country will be restored to its owners after the war just as property in enemy countries belonging to His Majesty's subjects will or ought to be restored to them after the war'. In my judgment the Act of 1914 does not depart from these principles or involve confiscation. Under its provisions the enemy is deprived of beneficial ownership during the war, and the Custodian after the termination of the war is bound to E F G H

A deal with it in such manner as His Majesty (keeping no doubt in view the arrangements made at the conclusion of peace) may by Order in Council direct. The second objection urged against this view of the Act of 1914 is that it involves the existence of a period of time during which there is no beneficial owner of the property and that this state of affairs is contrary to ordinary legal conceptions and principles. That is quite true, but it is the result of a statute which, in my judgment, causes the beneficial ownership to be and remain in statutory suspense or abeyance during the period in question, during which period the Custodian has certain limited powers of dealing with the property."

If it be necessary to define it further, I should say that the formula "statutory suspense" means what it says—that the beneficial interests, though their
 B existence is preserved, are by force of the statute "suspended", i.e., they cannot be presently asserted and enforced in our courts. That the beneficial interests of the plaintiff bank were liable to be wholly defeated and extinguished, i.e., by an order or direction of the Treasury or the Board of Trade having that effect, I do not doubt. But, pending such diversion, I think that in some real and intelligible sense they remained, and certainly in the events that have
 C happened I think that they must now unquestionably be taken to have persisted throughout the period of the Custodian's retention. Indeed, on no other view (save that of pure gift by the Crown which cannot be supposed) could it properly have been conceded in the court below that the plaintiff bank was entitled to be paid not only the principal sum but its "fruits" also. The notion that proprietary rights should be suspended, that they should (wholly or to some
 D extent) not be presently enforceable in the courts, is one capable of other illustrations arising out of war-time legislation, e.g., in the case of mortgagees by virtue of the Courts (Emergency Powers) Acts. Nor is it clear (though it is unnecessary to decide) that a person in the position of the plaintiff bank could in no circumstances invoke the jurisdiction of our courts to protect and preserve his rights, albeit suspended. Thus, in the case of an individual
 E Dutchman who succeeded in escaping to this country, it is not clear that the courts would not, at his suit, restrain an unauthorised and, therefore, unlawful diversion of his former property by the Custodian.

However that may be, I think that the perseverance of the interests of the plaintiff bank in the sums in question, however remote their character, makes it impossible to say that the sums were held by the Custodian exclusively for
 F "public" purposes. But, whether or no some discernible interest remained in the plaintiff bank, still the purposes for which the Custodian held the sums, and his duties in respect of them, were purposes and duties of preservation—unless and until he was otherwise directed, and such direction might be in favour of purely private persons or bodies. And the purposes and duties were specifically defined and imposed by statute. They were by nature no less than
 G by the manner of their creation quite distinct, in my judgment, from the prerogative rights of making war or peace—apart altogether from the particular fact that they extended to the property not only of enemies but of nationals of allied countries whose territory had been over run by the enemy. No doubt, the measures were taken as war measures. But it seems to me impossible to contend, sensibly or by reference to history, that all war measures
 H are manifestations of the King's war-making prerogative. Total war has been an experience thrust on twentieth century humanity and required, for its efficient prosecution, restrictions and controls on property and individual activities never formerly dreamt of. It could not, in my view, be contended that all the many officials appointed by the Executive to make effective the machinery of such restrictions and controls were invested with Crown immunity because their purposes were purposes of war. Nor do I think that the case is altered by the circumstance that the duty of preservation imposed by s. 7 (1)

of the Act of 1939 was expressed to be "in contemplation of arrangements to be made at the conclusion of peace", for it could not be predicted that such "arrangements" would be exclusively derived from the exercise of the prerogative right of treaty-making and any power strictly analogous thereto. And, finally, in this connection I attach importance to s. 16 of the Act, which seems to me to emphasise—if emphasis were necessary—that the particular statutory obligations of collection and preservation imposed on the Custodian were distinct, as by nature they are distinct, from the Sovereign's war-making and other prerogatives, including his right of seizure of the property of his enemies. If, then, the office of Custodian is from the circumstances of its creation distinct in character from those great and ancient offices whose history places them, as it were, close to the Crown and invests them naturally with Crown immunity, and if, therefore, the availability of "Crown status" for the Custodian depends on the nature of his duties and, as regards property in his hands, the purposes for which he must apply it, it seems to me, for the reasons which I have given, that, unless there is binding authority to the contrary, the true conclusion is that in the present case the Custodian was liable to tax in respect of the interest in question.

It remains then only to consider *Austrian Property Administrator v. Russian Bank for Foreign Trade* (2), a decision of this court, which counsel for the plaintiff bank strongly urged was, in principle, indistinguishable from the present case. In that case the question was whether the Administrator (who had been appointed to his office, like the present defendant Administrator, not by Order in Council but by the Board of Trade in exercise of a power to appoint conferred by Order in Council) enjoyed Crown immunity from the effect of the Statute of Limitations. I will assume that, if any official has "Crown status" so as to be immune from the Limitation Acts, he will also have immunity from the Income Tax Acts. I have, however, come to the conclusion that the *Austrian Administrator* case (2) must be distinguished from the present case, for, in my judgment, the ratio decidendi of the former case was that the office of the Administrator was created exclusively for the purpose of providing the mechanism for giving effect to the Treaty of Peace made by the Sovereign by virtue of his prerogative treaty-making power and for fulfilling the promises made in the treaty by the Sovereign. That such was the purpose appears from the recital in the Treaty of Peace (Austria) Order, 1920, from which the office was derived—a recital corresponding to that which I have referred to in regard to the Treaty of Peace (Hungary) Order, 1948. It is true that SCRUTTON, L.J., near the end of his judgment (48 T.L.R. 39), uses the broad and general language:

"The Administrator is an agent of the Crown. He is therefore not bound by the statute."

But earlier in his judgment (*ibid.*, 38) he had plainly pointed out the nature of the agency:

"Now, in my view, he [the Administrator] is an agent of the Crown to carry out the promises which the King has made by virtue of his prerogative."

I refer also to the words used by GREER, L.J. (*ibid.*, 39):

"There are some expressions used in some parts of the treaty and some parts of the order, upon which an argument might be based—to the effect that the order, which has a statutory effect, seems to assume that the Administrator is not the servant of the Crown, but in my judgment any such argument must give way to the logic of the position which is created by the fact that the Crown gets the rights, which are to be administered by the Administrator, entirely by reason of its prerogative as the war-making power and the peace-making power. The Crown has no interest in these debts at all, and could get none except by the Treaty of Peace confirmed

A by the Act of Parliament and the orders made thereunder. Having got that power by reason of the prerogative, the Crown had to see what was the wise and right way in which it could use the property which it had obtained by reason of its prerogative, and it seems to me that the provisions contained in the Treaty of Peace and in the order confirming it . . . show that what the Administrator is doing is, as agent of the Crown, distributing the funds which the Crown has obtained by reason of its prerogative. For these reasons the Statute of Limitations is just as much inapplicable as if the words of the order had been 'The King in Council', though the words of the order are 'The Administrator of Austrian Property'."

B In the result, I am of opinion that the *Austrian Administrator* case (2) does not bind me to hold otherwise than that the Custodian was properly assessable for the sum of income tax here in question. In my judgment, accordingly, the appeal should be allowed and the sum for which the plaintiff bank is entitled to judgment should be reduced by the amount of such tax, namely, £76,325 18s. 11d. I add only that this conclusion seems to me to be conformable to common sense. For if the plaintiff bank is properly entitled not only to the principal sum but also (as it is conceded that it is) to the fruits which the principal sum earned during the period of its retention by the Custodian, why should not the plaintiff bank, like any other person or corporation similarly entitled to interest accrued in another's hands, suffer deduction of tax thereon? In truth, as was pointed out during the argument, the commonly used formula that the Income Tax Acts do not bind the Crown conceals the true principle, which is that, in the absence of express provision to the contrary, the Crown and the rights of the Crown are not thereby prejudiced. In the present case it is plain that the deduction of tax does not touch or affect the personal or prerogative rights of the Sovereign, and it is difficult to see how in any other respect the Crown is prejudiced by the retention for the purposes of the public revenues of part of a sum of interest now treated as having been earned for and payable to the plaintiff bank.

E DENNING, L.J. : As a result of concessions made in the course of the trial, we are left to determine this one question: When the Custodian of Enemy Property invests money in his hands, is he liable to pay income tax on it? DEVLIN, J., held ([1952] 1 All E.R. 323) that he receives the income

F "... as a person having Crown status, or, at the least, that he receives it for a Crown purpose "

G and is, therefore, exempt from tax. This ruling of the judge is based on the maxim that the Crown is not bound by a statute unless expressly named therein. This maxim is, as counsel for the Administrator said, too widely expressed. It would be more accurate to say that the Crown is not to be prejudiced by a statute unless it is clear that Parliament intended it should be. The reason for this rule lies in history. The King is historically a constituent part of the legislature and, by assenting to an Act, he cannot be intended to prejudice himself. That is how it was put in 1560 in *Willion v. Berkley* (17) (1 Plowd. 239):

H "And because it is not an Act without the King's assent, it is to be intended that when the King gives his assent, he does not mean to prejudice himself or to bar himself of his liberty and privilege, but he assents that it shall be a law among his subjects."

It was similarly expressed in 1615 in the *Magdalen College, Cambridge, Case* (18) (11 Co. Rep. 74 b).

Such being the rule which we have to apply, I ask myself: Will the Crown be prejudiced if the Custodian is made liable to pay income tax? The answer is plain. The Crown will not be prejudiced at all. The truth is the other way about. The Crown will be seriously prejudiced if the Custodian does not pay tax. There is no room, therefore, in this case for applying the maxim. Neither

Parliament nor the Crown can ever have intended to exempt the Custodian from tax and thus prejudice the public revenue. A contrary view is only reached by starting with the inaccurate maxim: "The Income Tax Acts do not bind the Crown", and then asking: Has the Custodian Crown status? as if that settled the matter, whereas it does nothing of the sort. The Attorney-General pointed out the fallacy when he observed that DEVLIN, J., had placed too much emphasis on the status of the Custodian and not enough on his activities. If the Custodian is to be exempt from paying tax, it is not only because he has Crown status, but also because the income he receives is public revenue, i.e., the revenue of the central government. If his income is public revenue, it will be exempt. The reason why public revenue is exempt from tax is because there is no point in the Crown taking money from one of its pockets and putting it into another. But if the revenue of the Custodian is not public revenue, there is no reason why it should not be taxed. A study of the Trading with the Enemy Act, 1939, shows that his income does not go in aid of the public revenue. It is held in suspense pending later arrangements. Therefore, it is not exempt from tax.

I would have liked to finish this judgment at this point, but the approach suggested by the Attorney-General is so important that it should be verified from the authorities. These, I think, support the view that Crown immunity depends not only on whether the person has Crown status, but also on whether the activity in question is a Crown activity. Thus, in all the rating and taxing cases since 1863 it has been held that exemption from rates depends, not only on whether the occupier has Crown status, but also on whether his occupation is exclusively for Crown purposes: see *Mersey Docks v. Cameron* (4), *Greig v. Edinburgh University* (19), *Coomber v. Berkshire Justices* (3), and *Worcestershire County Council v. Worcester Union* (20). A neat illustration is also to be found in a traffic case. Where an army driver exceeded the speed limit for locomotives, it was held that his immunity depended, not only on the fact that he was a servant of the Crown, but also on the fact that he was exceeding the speed limit exclusively for Crown purposes. If he had exceeded it simply because he liked driving fast, he would not have been immune: see *Cooper v. Hawkins* (21), decided in 1903. Not only must the activity be a Crown activity, but also, in accordance with the original rule which I have mentioned, the activity must be such that the Crown purposes would be prejudiced unless immunity were afforded to it. This appears from all the cases. It was the basis of the decision in the *Magdalen College Case* (18), where there was no prejudice to the Crown, and is well illustrated by three modern cases where there was prejudice. The collection of debts to implement a treaty of peace—which is a Crown purpose—would be prejudiced if the Administrator of Enemy Property were to be barred by the lapse of time. He is, accordingly, immune from the Statute of Limitations: see the *Austrian Administrator* case (2). The development of Crown property for Crown purposes would be prejudiced if the local authorities could insist on their local Acts being observed unconditionally by the Crown. The Crown is, therefore, exempt from them: see *Bombay Province v. Bombay Municipal Corpn.* (22), decided in 1946. The defence of the realm would be prejudiced if a territorial association could not recover possession of houses needed for their instructors, and so the association is immune from the restrictions imposed by the Rent Restrictions Acts: see *Territorial Forces Association v. Nichols* (1), decided in 1948.

The immunity can, I think, only be claimed by a person having Crown status. He must be either a servant of the Crown or, at any rate, be in consimili casu: see per BLACKBURN, J. (11 H.L. Cas. 465) in the *Mersey Docks* case (4). But I confess that there are two decisions of a Divisional Court, *Clark v. Downes* (23) and *Rudler v. Franks* (24), which suggest the contrary. They seem to show that the Crown immunity can be claimed even by a private person, if it can be shown that Crown purposes would be prejudiced unless immunity was granted to him.

In *Clark v. Downes* (23) it was held that a purchaser of Crown property was not bound by the Rent Restrictions Acts as regards a tenancy created by the Crown, for to hold otherwise would prevent the Crown from obtaining a higher price. In *Wirral Estates, Ltd. v. Shaw* (25) ([1932] 2 K.B. 251), TALBOT, J., considered that to be an extreme application of the doctrine of immunity. In *Rudler v. Franks* (24), decided in 1947, it was held that a tenant who held from the Crown could eject his sub-tenant in spite of the Rent Restrictions Acts. It does not seem to have been argued in either *Clark v. Downes* (23) or *Rudler v. Franks* (24) that Crown immunity can be claimed only by a person having Crown status. That point was, however, raised before this court in *Tamlin v. Hannaford* (26) in 1949, but it was unnecessary to give any decision on it. The Divisional Courts do not seem to have been referred to some observations of LORD WATSON (9 App. Cas. 72) and LORD BRAMWELL (ibid., 79) in *Coomber v. Berkshire Justices* (3) which go to show that immunity of Crown property extends only to the Crown interest therein and not to any other interests, and this is, I think, the correct view. *Clark v. Downes* (23) and *Rudler v. Franks* (24) have now been overruled, in effect, by the Crown Lessees (Protection of Sub-Tenants) Act, 1952, and need not be further considered

The question remains, however: What is meant by the "Crown" in these cases? What is meant when we speak of "Crown status", "Crown activities", "Crown purposes", "Crown interest" and so on? So far as "Crown status" is concerned, the Privy Council, in *International Ry. Co. v. Niagara Parks Commission* (27) ([1941] 2 All E.R. 462), found no guidance in the phrase "emanation of the Crown". DEVLIN, J. ([1952] 1 All E.R. 318), finds none in the phrase "servant or agent of the Crown", although it is the phrase used in the Crown Proceedings Act, 1947. I find no guidance in the phrase "Crown status" by itself. All that can be said is that Crown status attaches to the Ministers of the Crown, to the government departments of which they are the heads, and to the servants of those departments. In this connection I would observe the test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organisation: see *Cassidy v. Ministry of Health* (28), and *Stevenson Jordan & Harrison, Ltd. v. MacDonald & Evans* (29), both decided in 1951. Outside the government departments Crown status also attaches to a number of persons in consimili casu, as BLACKBURN, J., described them (11 H.L. Cas. 465) in *Mersey Docks v. Cameron* (4). These are persons who acquire Crown status by acting exclusively for Crown purposes, such as occupiers of assize courts and police stations, the territorial associations, and the Administrator of Enemy Property under a peace treaty. This category of persons is extremely vague because of the difficulty of deciding what are "Crown purposes". If by "Crown purposes" is meant the purposes of the executive government, these have been vastly enlarged in the last century. In former days they were almost confined to justice, defence and foreign affairs. Nowadays they include transport, fuel, hospitals, forestry, new towns, and, indeed, almost every purpose beneficial to the public at large. I am quite sure that the great judges who spoke of "the province of government" in the nineteenth century did not mean to include in it the wide range of activities in which governments now embark, and we have recently in this court refused to extend immunity to these activities. The point was distinctly raised in *Tamlin v. Hannaford* (26) when Mr. Redmond Barry, K.C., said that the real question was: "What at this date is the true province and sphere of central government?" and we answered it by declining to give Crown immunity to the commercial activities of government.

We have now to decide whether Crown status attaches to the Custodian of Enemy Property. He is appointed by the Board of Trade, he is subject to a large measure of control by the Board of Trade, the fees he receives go into the Exchequer, and he is paid out of the Consolidated Fund. The present holder

of the office, Mr. Slatford, is himself an official of the Board of Trade, he has his office in the Board of Trade, and he may, for aught I know, do work for the Board of Trade when he is not engaged in his work as Custodian. All this makes it look at first sight as if he had Crown status. But it does not touch the crucial question, which is: What are his activities? Are they Crown activities? Although the Board of Trade have a large measure of control over him, his activities as Custodian are his own activities. They are not Board of Trade activities. Whilst doing them, he is not acting as a servant of the Board of Trade, but as Custodian. And, as Custodian, he is not implementing any of the Crown's prerogatives, as the Administrator was in the *Austrian Administrator* case (2). He is collecting debts due, not only to alien enemies, but also to alien friends resident in territory occupied by the enemy. The Crown has no prerogative to seize the property of British subjects or alien friends who are resident, against their will, in territory occupied by the enemy. When the Custodian has collected the money, he does not hold it on behalf of the Crown. He holds it pending arrangements to be made later. It is inconceivable that, under those arrangements, the property of alien friends would be confiscated. Even the property of alien enemies would probably be used to pay English creditors. At any rate, all the property is held in suspense. It is not Crown property and his activities are not Crown activities. He is a public officer carrying out public purposes, but they are not Crown purposes.

The Attorney-General submitted that the burden was on a person asserting Crown immunity to show that he was entitled to it. I agree with this submission. In recent years Parliament has set up many corporations, boards, persons and bodies, entrusted them with public duties, paid them out of the public purse, and put them under the direction or control of a Minister. It would be a strong thing for the courts to give these persons Crown immunity when Parliament has not done it. If Parliament has said nothing in the matter, the presumption should be that they are as much subject to the statutes at large as anyone else. They have no special privileges or immunity. They are under the law. This principle was applied in striking fashion recently [in *R. v. Yorkshire Electricity Board* (30)] when an electricity authority was heavily fined for doing building work in contravention of an authorisation granted by the Ministry of Fuel and Power, and it is most important that it should be maintained. Applying this principle, the Trading with the Enemy Act, 1939, does not say that the Custodian is to have Crown immunity. He should not, therefore, be given it by the courts. For all these reasons, I am of opinion that the Custodian has not Crown status. His income is no part of the public revenue and he was liable to pay income tax as he did. The appeal should be allowed.

ROMER, L.J. : I agree that this appeal must be allowed. It cannot be, and was not, disputed by the plaintiff bank that, if the interest or profits which are in question in this appeal had been received by a private citizen for private purposes, they would have been chargeable to tax under the Income Tax Act, 1918, s. 1 and sched. D. Immunity, however, is sought to be claimed for them from this *prima facie* liability by an application of the general principle that the Sovereign is, by virtue of the prerogative, exempted from every Act which imposes a tax on the subject. As the profits now in question never formed part of the personal revenue of the Sovereign, they cannot, as I see it, qualify for protection from taxation under the principle of Crown immunity unless it can be shown that they were applicable by the Custodian, who received them, exclusively for the purposes of the Crown—or, in other words, for public purposes. In my judgment, revenue which is so applicable is exempt from income tax whatever be the status of the recipient, and, on the other hand, income which is received by any servant of the Crown, but is not so applicable, is chargeable to tax notwithstanding the status of the person who receives it. I emphasise this aspect of the matter because it would appear that in the court below attention

was mainly concentrated on the question of the status of the Custodian. In my opinion, that point (if relevant to the present problem at all) is material only in so far as it throws light on the one question which is of real significance, viz. : To what purposes could the income under discussion be applied ? The importance of this question becomes apparent at once if one considers the position, for example, of a Minister who is in charge of one of the spending departments of Her Majesty's government. Such a Minister is, undoubtedly, a servant of the Crown, but it is as obvious that his own private income is, notwithstanding his status, chargeable to income tax as it is that revenue placed at his disposal for the purposes of his department is not. From this it follows that immunity from taxation of income which is otherwise chargeable attaches (if at all) to the income and not to the recipient—except, of course, in the case of Her Majesty herself. The question, therefore, and the only relevant question for the purposes of the appeal, is whether the purposes to which profits in the hands of the Custodian were applicable were public purposes or not. As a preliminary to this inquiry, it must, of course, be ascertained what is meant by the phrase “public purposes”. As to this, the following criteria were laid down by LORD WESTBURY, L.C., in *Mersey Docks v. Cameron* (4) and *Greig v. University of Edinburgh* (19). In the former he said (11 H.L. Cas. 505) that public purposes

“... must be such as are required and created by the government of the country, and are therefore to be deemed part of the use and service of the Crown.”

In the second case he somewhat amplified this definition by saying (L.R. 1 Sc. & Div. 354) that such purposes are “the purposes of the administration of the government of the country”.

Was, then, the income in the hands of the Custodian applicable to public purposes as so defined ? The destination of property which became vested in the Custodian was prescribed by the Trading with the Enemy Act, 1939, s. 7, and by the various regulations to which reference has already been made in the judgment which SIR RAYMOND EVERSHED, M.R., has delivered. No distinction need be drawn in this regard between the property itself and the income which could be expected to derive from it by reason of the authority which the Board of Trade gave to the Custodian to invest it. Under the Trading with the Enemy (Custodian) Order, 1939, art. 3 (ii), the assets in the Custodian's hands (both capital and income) might, if the Board of Trade so directed, be paid over at any time to or for the benefit of the person who would have been entitled thereto but for the operation of the Act of 1939 or any order made thereunder. Subject to this, the Custodian was to retain such assets until the termination of the war and thereafter deal with them in such manner as the Board of Trade should direct (art. 3 (i)). In addition, there was the general power of direction exercisable by the Treasury (which was apparently never in fact exercised) established by the Defence (Trading with the Enemy) Regulations, 1940, reg. 4 (3). Unless and until some direction was given to the Custodian by the Board of Trade or the Treasury, the ultimate destination of the assets remained uncertain. Two things, however, at least, are clear. The first is that the assets might at any time during the war be restored to their former owner. The second (which in fact occurred) was that they might be so restored after the war was over. In view of these manifest possibilities, it seems to me impossible to say—as, in my judgment, must be said if the plaintiff bank is to succeed—that the only purposes to which the assets could properly be applied are “the purposes of the administration of the government of the country”.

This view of the matter appears to me to be destructive of the plaintiff bank's case. It was argued on behalf of the plaintiff bank that the Custodian cannot be assessed to income tax under r. 1 of the Miscellaneous Rules Applicable to sched. D because he possesses Crown status. This contention, however, is essentially interlocked with the question whether or not the income which he

receives is applicable to public or to private purposes. If the former, *cadit quaestio*—for the income itself is immune from taxation and, consequently, no question of assessment arises. If the latter, he is just as liable to assessment as is any servant of the Crown in respect of income which he receives for private purposes. There are only two further points which I should like to mention. The first is that I agree that, for the reasons which the Master of the Rolls has indicated, the conclusion at which we have arrived is in no way inconsistent with *Austrian Property Administrator v. Russian Bank for Foreign Trade* (2). Secondly, I entirely concur with the observations of the Master of the Rolls with regard to the “suspense” of beneficial rights in relation to enemy property during such time as the property remains vested in the Custodian. To those observations I have nothing to add. I, accordingly, agree that this appeal should be allowed.

Appeal allowed.

Solicitors : *Solicitor, Board of Trade* (for the Administrator) ; *Hardman, Phillips & Mann* (for the plaintiff bank).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

PRACTICE NOTE.

R. v. CRABTREE.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Parker and Havers, JJ.), October 27, 1952.]

Criminal Law—Evidence—Evidence before sentence of accused's history—Details to be communicated to defending counsel.

APPEAL against sentence.

The appellant was convicted at Preston Quarter Sessions on two charges of receiving stolen lead and was sentenced to nine years' imprisonment. Before sentence, evidence was given by a police officer of the appellant's history. The evidence was given in the form prescribed by Home Office Circular No. 188/1950, dated Sept. 14, 1950, the police officer stating, *inter alia*, that, in his opinion, the appellant was a member of a gang of thieves and safebreakers. Counsel representing the appellant at the trial was unaware that this evidence was going to be given and he allowed it to go unchallenged.

Dorothy Dix for the appellant.

LORD GODDARD, C.J. : Questions have been raised as to the propriety of certain evidence which was given by the police after conviction, and also as to the Home Office circular which has been issued for the guidance of chief constables and police officers generally with regard to giving evidence as to previous history and character.

The circular starts by suggesting the type of evidence that the officer should be prepared to give, and then goes on to say:

“It appears that as a rule the courts are willing to receive information about the offender's general reputation and associates, if this is relevant to the offence of which he has been convicted, but every care should be taken to ensure that this opinion is based on a reasonable foundation of fact. As a general rule this information should not appear on the officer's proof and should not be volunteered unless the question is asked or allowed by the court. The officer giving evidence should be in possession of any further information that the police may have about the offender in order that he may supplement his evidence if necessary.”

That is an accurate and proper description of the situation. This court has said that courts may properly receive evidence with regard to the prisoner's general associates, so long as the officer tendering the evidence is speaking of matters which are within his knowledge, and is speaking to facts and not merely to stories he may have heard. The circular continues:

- A "Applications are occasionally received from solicitors acting for the defence that the police should before trial disclose details of their clients' previous convictions and past records generally; and the question whether this information should be disclosed has been raised from time to time. Although this is a matter in which chief officers of police must exercise their discretion, the Secretary of State is of opinion that details of previous convictions should not be given to defending solicitors before trial unless
- B the chief officer of police is satisfied that the solicitor has his client's authority for requesting this information."

- Generally, the solicitor would be well advised to find out from his client before the trial whether his client has a criminal record, because otherwise counsel may be instructed in such a way that he may unwittingly let in evidence of his client's convictions. It is, therefore, desirable that the solicitor should know
- C if the client for whom he is appearing has previous convictions, but no objection can be taken to the warning given by the Secretary of State that the police officer should be sure that the solicitor has his client's authority for requesting information.

- There is, however, one paragraph in the circular of which the court does not approve:

- D "As regards details of antecedent history other than convictions the Secretary of State suggests that there is no reason why this should be given."

- We think that if the officer is going to say, if asked, although it is not to be contained in the proof he puts before the court, that the accused has a bad character through being known as an associate of thieves and so forth, that
- E ought to be communicated to counsel for the defence who may wish to take his client's instructions whether the evidence which the police officer is going to give is disputed or not. In the present case if the appellant had instructed his counsel to dispute this evidence, counsel could, though it would have been an unwise thing to do, have cross-examined the police officer. The officer would then, no doubt, mention the persons with whom the appellant was associating
- F and what their history was at the time he was associating with them. However, I think we shall suggest to the Secretary of State that the circular should be altered in some particulars with regard to evidence before sentence.

Sentence reduced.

Solicitor : *Registrar of Court of Criminal Appeal* (for the appellant).

J.D.P.

BOYER v. WARBEY.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Romer, L.JJ.), October 9, 10, 13, 14, 17, November 3, 1952.]

County Court—Appeal—Raising in Court of Appeal of point of law not argued in court below.

Court of Appeal—County court—Appeal from—Raising of point of law not argued in court below.

Except in cases which involve such points as arise out of the mandatory terms of the Rent Restrictions Acts, the rule laid down in *Smith v. Baker & Sons* ([1891] A.C. 325), that for a point of law in a county court appeal to be open for argument in the Court of Appeal, it must have been taken in the court below, is of universal application.

Elvins v. Slaney ([1948] W.N. 129), explained.

Note to R.S.C., Ord. 58, r. 4, in ANNUAL PRACTICE, 1952, p. 1250, criticised.

AS TO APPEALS FROM COUNTY COURTS ON QUESTIONS OF LAW, see HALSBURY, Hailsham Edn., Vol. 8, p. 378, para. 812; and FOR CASES, see DIGEST, Vol. 13, pp. 527-530, Nos. 787-815.

Cases referred to:

(1) *Elvins v. Slaney*, [1948] W.N. 129; 2nd Digest Supp.

(2) *Smith v. Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 13 Digest 527, 789.

APPEAL by the defendant against a decision of His Honour JUDGE REID, sitting at West London County Court.

The plaintiff was the landlord of premises which the defendant, being then a statutory tenant thereof, vacated in 1951. The landlord claimed (i) £78 11s. 11d. on the ground that this sum was "rent" owed by the tenant by reason of his failure to give notice of giving up possession, in accordance with s. 15 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920; and (ii) £40 which, it was alleged, became payable by the tenant on his leaving the premises under an obligation of the original contract of tenancy of which the tenant had been the assignee. The county court judge gave judgment for the landlord, and the tenant appealed.

It was contended in the Court of Appeal on behalf of the tenant, inter alia, that the assignment of the original tenancy agreement did not transfer the obligation to pay the sum of £40, and it was objected on behalf of the landlord that this point had not been taken in the court below. The case is reported solely on the question whether the point was open to the tenant.

Platts-Mills for the tenant.

L. A. Blundell for the landlord.

Cur. adv. vult.

Nov. 3. SIR RAYMOND EVERSLED, M.R.: There is a preliminary matter of some importance with which I desire to deal. The case has involved consideration of points of difficulty. It was said by counsel for the landlord that some of the tenant's arguments were never put to the county court judge. Counsel for the tenant says that the general defence of non-liability was put forward, and that, in any case, all the materials necessary to decide all the points were before that court. He relies particularly on a note to R.S.C., Ord. 58, r. 4, in the ANNUAL PRACTICE, 1952, p. 1250, which is as follows:

"The Court of Appeal has jurisdiction to allow a point of law not raised at the trial to be taken on appeal: the matter is one of discretion . . . The same principle applies on an appeal from a county court (*Elvins v. Slaney* (1))."

The general rule in regard to county court appeals was laid down as long ago as 1891 by the House of Lords in *Smith v. Baker & Sons* (2), the rule being that

for a point in a county court appeal to be open for argument in this court it must have been taken in the county court. Apart from such points as arise out of the mandatory terms of s. 3 (1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, to the effect that:

"No order . . . for . . . possession . . . shall be made . . . unless . . ."

(and whatever be the exact ambit of that exemption, it has clearly no application here), the general rule must be followed. In that respect, county court appeals differ from High Court appeals. In my judgment, therefore, the note in the ANNUAL PRACTICE is incorrect, and it is in any case, as I read it, unsupported by *Elvins v. Slaney* (1), on which it purports to be founded.

Elvins v. Slaney (1) was a case in which the landlords had brought an action against the tenant of a house within the Rent Restrictions Acts, claiming possession on the ground of non-payment of rent. The statement of claim set out the proviso for re-entry, and alleged that certain rent was in arrear, and the registrar of the county court made an order for possession, the order to be suspended on payment of the current rent and the rent for two months named on a certain date. The county court judge dismissed the tenant's appeal, stating that it was vexatious. The point was then taken that the order did not properly comply, not with some provision in the Rent Restrictions Acts, but with s. 180 (1) of the County Courts Act, 1934. The judgment of TUCKER, L.J., in the note is to the following effect so far as material. He said ([1948] W.N. 130) that it had been contended for the tenant on the appeal that the registrar's order was invalid for failure to conform with s. 180 (1) (b) of the Act of 1934 in that it ordered payment on May 5 of the rent due, that was, before the expiration of four weeks, and that in any event judgment for possession was suspended so long as the current rent was paid. There was, however, no indication on the county court judge's note that any such point had been taken before him. It was then argued that it was not necessary that those points should have been taken before the judge because the Rent Restrictions Acts applied to the premises and the Court of Appeal had said more than once that it was the county court judge's duty to satisfy himself, before he made an order for possession of premises within the Acts, that all the requirements of the Acts had been complied with. It was not, however, suggested there that any requirement of the Acts had not been complied with. That being so, the case did not fall within the principle on which the Court of Appeal entertained a point not raised before the county court judge. After a reference to certain rules, TUCKER, L.J., finished his judgment by saying that the matters shown by counsel's statements to be in controversy between the parties only proved how necessary it was that such a point as was then raised should be raised before the judge and that he should be asked to make a note of it for the information of the Court of Appeal. The appeal was dismissed. As I read that judgment, except in the limited class of cases which involve the question of compliance with the Rent Restrictions Acts, the rule as laid down by the House of Lords in *Smith v. Baker & Sons* (2) is of universal application and, as I have already indicated, it seems to me that the note, as at present found in the ANNUAL PRACTICE, is not correct.

DENNING, L.J.: I agree.

ROMER, L.J.: I also agree.

Solicitors: *Silverman, Miller & Fraser* (for the tenant); *Cooode, Kingdon, Cotton & Ward* (for the landlord).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

VINCENT v. VINCENT.

Approved. EVANS v. EVANS.
1 All E.R. 70.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), November 14, 1952.]

*Divorce—Costs—Security for wife's costs—Husband an "assisted person"—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 65 (3).**Legal Aid—Costs—Security for costs—Application by wife in divorce proceedings—Husband an "assisted person"—Legal Aid and Advice Act, 1949 (c. 51), s. 12 (2) (b) (ii).*

The wife's right to apply for security for her costs in the Divorce Division is not lost merely because her husband is an "assisted person".

On Apr. 23, 1951, the husband filed a petition for divorce on the ground of the wife's desertion. On Jan. 14, 1952, he obtained a civil aid certificate to enable him to carry on the proceedings. On July 22, 1952, the wife obtained a civil aid certificate limited to obtaining an order for security against the husband. On Aug. 28, 1952, the wife's application to the registrar for such an order was dismissed on the ground that no order for security could be made against an "assisted person". On appeal,

HELD: it was a well-established practice in the Divorce Division that a wife had a right to apply for her security for costs, and this was not affected by the husband being an "assisted person", and, therefore, the registrar was bound to comply with r. 65 (3) of the Matrimonial Causes Rules, 1950, and the case would be referred to him for that purpose.

Observations of LORD MERRIVALE, P., in *Re A.B.'s Petition* ([1928] P. 27), and of HILL, J., in *Williams v. Williams* ([1929] P. 118), applied.

Conway v. George Wimpey & Co., Ltd. ([1951] 1 All E.R. 56), distinguished.

AS TO A WIFE'S SECURITY FOR COSTS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 724-727, paras. 1107-1115; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 505, 506, Nos. 4482-4492.

FOR THE LEGAL AID AND ADVICE ACT, 1949, s. 12, see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 548.

FOR THE MATRIMONIAL CAUSES RULES, 1950, r. 65 (3), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 10, p. 228.

Cases referred to:

- (1) *Conway v. George Wimpey & Co., Ltd.*, [1951] 1 All E.R. 56; [1951] 2 K.B. 266; 2nd Digest Supp.
- (2) *Jackson v. John Dickinson & Co. (Bolton), Ltd.*, [1952] 1 All E.R. 104.
- (3) *Re A.B.'s Petition*, [1928] P. 25; *sub nom. S. v. S. & P.*, 97 L.J.P. 37; 138 L.T. 302; 27 Digest, Replacement, 505, 4487.
- (4) *Williams v. Williams*, [1929] P. 114; 98 L.J.P. 40; 140 L.T. 383; 27 Digest, Replacement, 505, 4484.

SUMMONS adjourned into court.

Trapnell for the wife.

G. N. Black for the husband.

Cur. adv. vult.

Nov. 14. BARNARD, J., read the following judgment. This is an appeal by a wife from a refusal by the Leeds district registrar on Aug. 28, 1952, to make an order for security for her costs in a divorce suit instituted by her husband.

The relevant facts are as follows. The parties were married in March, 1943, and there is one child of the marriage, a boy born in July, 1943. On Jan. 12, 1948, the husband left the wife and on Feb. 18, 1948, the wife obtained an order against him in a court of summary jurisdiction sitting at Southampton on the ground of his desertion, the court ordering him to pay her 5s. a week for her maintenance and 10s. a week for the maintenance of the child. On Apr. 23, 1951,

A a petition for divorce, on the ground of his wife's desertion, was filed by the husband in the Leeds district registry. On May 25, 1951, the wife obtained a civil aid certificate to defend her husband's petition, and on May 30, 1951, her answer was filed denying the alleged desertion. On Jan. 14, 1952, the husband obtained a civil aid certificate in respect of these proceedings. On Mar. 26, 1952, the wife's civil aid certificate was discharged, but on July 22, 1952, she obtained a further civil aid certificate limited to obtaining an order for security against the husband. Her application came before the Leeds district registrar, who dismissed it out of hand without in any way complying with r. 65 (3) of the Matrimonial Causes Rules, 1950. I was informed that the registrar felt himself precluded from complying with r. 65 (3) by reason of a registrar's direction which was dated Jan. 29, 1951, with an addendum dated Oct. 4, 1951. The direction reads as follows:

B "Legal Aid. Costs, security for. In the absence of any regulations under s. 12 of the Legal Aid and Advice Act, 1949, the decision in *Conway v. George Wimpey & Co., Ltd.* (1), must be taken to prevent the making of any order for security for costs against an assisted person *unless there are special circumstances*. The fact that a legally aided husband has been directed by the local committee to pay a contribution less than the maximum contribution may be regarded as a special circumstance, and an order to secure for the wife's costs a sum not greater than the difference between the actual and maximum contributions may be made in a proper case."

D This direction, as is stated therein, is based on the decision of the Court of Appeal in *Conway v. George Wimpey & Co., Ltd.* (1). In that case the order for security for costs was made against the plaintiff who was appealing to the Court of Appeal, but ten days later he obtained an emergency certificate under the Legal Aid and Advice Act, 1949, and became an assisted person. In those circumstances the Court of Appeal discharged the order for security, and in the course of his judgment COHEN, L.J., stated ([1951] 1 All E.R. 57):

E "... I think we must proceed on the basis that, generally speaking, and in the absence of special circumstances, it would be inappropriate to make an order for security for costs at a time when an emergency certificate is in force. In those circumstances, I think it is inappropriate that the order for security should stand. For these reasons, I think, in the present case, there being no special circumstances to which our attention has been directed, we should discharge the order made by the court on Nov. 6."

F The security ordered in that case was in respect of an appeal to the Court of Appeal and was applied for under what is now R.S.C., Ord. 58, r. 15 (2), which reads as follows:

G "The Court of Appeal may in special circumstances order that such security shall be given for the costs of the appeal as the court may direct."

H In a later case before the Court of Appeal, *Jackson v. John Dickinson & Co. (Bolton), Ltd.* (2), it was held that a plaintiff who was resident abroad could be ordered to find security for costs, notwithstanding the fact that he was an assisted person, and the Court of Appeal distinguished that case from *Conway v. George Wimpey & Co., Ltd.* (1). SOMERVELL, L.J., in the course of his judgment, said ([1952] 1 All E.R. 106):

"In *Conway's* case (1) COHEN, L.J., was careful to make it clear that he was not seeking to lay down a general rule covering all classes of case and all circumstances."

The registry, by their direction, have interpreted the decision in *Conway's* case (1) as applying to a wife's application for security for costs in the Divorce

Division. I have come to the conclusion that this direction is a misinterpretation of the decision in *Conway's* case (1). It is a well-established practice of this Division that a wife has a right to apply for security for her costs, and LORD MERRIVALE, P., once said, in *Re A.B.'s Petition* (3) ([1928] P. 27) :

"... there is something in the nature of a prescriptive right upon cause shown to secure to the wife the means for defence."

In *Williams v. Williams* (4) HILL, J., dealt in the course of his judgment with the subject of security, and I cannot do better than repeat his words ([1929] P. 118) :

"The main object of security, in recent years at any rate, is that justice may be done by the wife being enabled to procure the assistance of solicitor and counsel and come to court. That is the main object in modern times. The old basis for the rule, namely, that all the wife's property on marriage passes to the husband, and therefore the husband alone can foot the bill, has gone altogether, and now you must consider whether in the circumstances the wife can foot the bill, and it is a very important matter to consider whether the solicitor can conduct the business without something in court to pay him up to setting down and without security."

I think that the present case is a different class of case from *Conway v. George Wimpey & Co., Ltd.* (1), by reason of the peculiar nature of a wife's security for costs in the Divorce Division, which I have already indicated and is not covered by *Conway's* case (1). I, therefore, allow this appeal and refer the matter back to the Leeds registrar to comply with r. 65 (3) of the Matrimonial Causes Rules, 1950. The registrar will, of course, take into account the fact that the husband is an assisted person and will also have regard to the facts stated in the civil aid certificate and it may well be that he will come to the conclusion that this is a case in which no security should be ordered.

Appeal allowed.

Solicitors: *White & Leonard*, agents for *Geoffrey Wells & Woodford*, Southampton (for the wife) ; *Church, Adams, Tatham & Co.*, agents for *Day & Yewdall*, Leeds (for the husband).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

Re ABERCONWAY'S SETTLEMENT TRUSTS.

McLAREN v. ABERCONWAY (BARON) AND ANOTHER.

[CHANCERY DIVISION (Danckwerts, J.), November 5, 1952.]

Settlement—Powers of tenant for life—Limitation tending to discourage exercise of powers—Application of income under personalty settlement for benefit of settled land—Limitation over on land ceasing to be settled—Sale of settled land—Settled Land Act, 1925 (c. 18), s. 106.

A settlor, by a settlement (the Bodnant settlement) dated Sept. 15, 1921, settled the Bodnant estate (except Bodnant Hall and the gardens, pleasure grounds and demesnes usually occupied therewith) on trust for A. for life with remainder to his issue. By a further settlement, dated Feb. 22, 1926, the settlor directed the trustees to hold certain shares on trust for sale and to invest the proceeds and to hold the shares and investments on the trusts of the Bodnant settlement, but provided that, if the gardens at Bodnant should be settled on, or acquired by the trustees on, the trusts of the Bodnant settlement, then "during so much of the lives of the children and grandchildren of the settlor living at the date of this indenture and the lives and life of the survivors and survivor of them and the period of twenty-one years from the death of such survivor as the said gardens at Bodnant shall be and remain settled as aforesaid or shall remain vested in the trustees or trustee (which portion of the said period of lives and years is hereinafter referred to as 'the prescribed period') the trustees or trustee shall with the consent of the person or persons for the time being beneficially entitled to the possession or receipt of the rents and profits of the freehold hereditaments settled by the Bodnant settlement of 1921 apply the income of the premises hereby settled and of the investments and property from time to time representing the same (all of which are together hereinafter referred to as 'the settled fund') in or towards securing and assisting and developing the use of the said gardens at Bodnant for the cultivation of plants and flowers of home and foreign countries of botanical and horticultural interest . . ."

It was further declared that as from the expiration of the prescribed period the settled fund should be held on other specified trusts. On Jan. 4, 1933, the settlor died, and by her will directed that Bodnant Hall and the gardens, pleasure grounds and demesnes forming part of the Bodnant estate not settled by the Bodnant settlement should be held on substantially the same trusts as were declared by the Bodnant settlement. On Nov. 11, 1949, A. sold five-sixths of the gardens to the National Trust.

HELD: on the sale to the National Trust the gardens at Bodnant ceased to be settled on the trusts of the Bodnant settlement, but, as the provision terminating the prescribed period under the settlement of 1926 tended to discourage the sale of the gardens by A. in exercise of his statutory power as tenant for life, notwithstanding that the income from the settlement of 1926 was not payable to A., that provision was invalidated by the Settled Land Act, 1925, s. 106, and the income arising under that settlement continued to be applicable for the purposes of the gardens on the footing that the prescribed period had not terminated.

Re Patten ([1929] 2 Ch. 276), applied.

AS TO PROHIBITION AGAINST EXERCISE OF SETTLED LAND ACT POWERS, see HALSBURY, Hailsham Edn., Vol. 29, p. 697, para. 976; and FOR CASES, see DIGEST, Vol. 40, pp. 743, 744, Nos. 2736-2752.

Case referred to:

(1) *Re Patten*, [1929] 2 Ch. 276; 98 L.J.Ch. 419; 141 L.T. 295; Digest Supp.

ADJOURNED SUMMONS to determine whether on the true construction of a settlement dated Feb. 22, 1926 ("the Garden settlement"), made by the Rt. Honourable Laura Elizabeth, Baroness Aberconway, and in the events which

had happened (i) the period therein defined as "the prescribed period" had expired, and, if so, on what date it expired; and (ii) the declaration therein contained providing that after the expiration of "the prescribed period" as therein defined the fund thereby settled should be held on the trusts and with and subject to the powers and provisions declared by "the Prestatyn settlement of 1909" as so defined or such of the same as should be subsisting and capable of taking effect was to be deemed to be void under the Settled Land Act, 1925, s. 106.

By a settlement, dated Oct. 28, 1909, called the Prestatyn settlement and made between the Rt. Honourable Laura Elizabeth, Baroness Aberconway (the settlor), of the one part, and the Rt. Honourable Charles Benjamin Bright, Baron Aberconway (the first baron), the Rt. Honourable Henry Duncan, Baron Aberconway (the second baron) (Lord Aberconway), and Francis Walter Stafford McLaren, as trustees, of the other part, an estate at Prestatyn and elsewhere in the county of Flint was conveyed by the settlor to the trustees on trust for sale and to hold the proceeds of sale and investments for the time being representing the same on the trusts therein expressed for the children and remoter issue of the settlor.

By a further settlement, dated Sept. 15, 1921, called the Bodnant settlement, and made between the settlor, of the one part, and the first baron, Lord Aberconway, and Horace Stanley Pochin, of the other part, an estate known as the Bodnant estate (except the mansion house, called Bodnant Hall, and the gardens, pleasure grounds and demesnes usually occupied therewith and the home farm adjoining) was settled on trust for Lord Aberconway for life with remainder on the trusts therein set out, for the benefit of his issue and otherwise.

By a further settlement, dated Feb. 22, 1926, called the Garden settlement, and made between the settlor, of the one part, and the first baron, Lord Aberconway, and the said Horace Stanley Pochin, as trustees, of the other part, after reciting the Prestatyn settlement and the Bodnant settlement and that the settlor was seised in fee simple of Bodnant Hall

"with the gardens pleasure grounds and demesnes usually occupied therewith And whereas the late Henry Davis Pochin the father of the settlor and the settlor herself encouraged the use of the gardens at Bodnant aforesaid for the cultivation of a large collection of plants and flowers of home and foreign countries of botanical and horticultural interest and for experiments in the production and hybridization of plants and of flowers of all kinds and it is the settlor's desire that the gardens at Bodnant should continue to be used for the cultivation production and hybridization of foreign and domestic flowers and plants and the continuance of such experiments and the development of the results therefrom and is of opinion that it may be necessary for the furtherance of such objects that money should be expended in the erection and heating of greenhouses for the growth of rare plants and in other directions hereinafter more particularly mentioned And whereas the said gardens at Bodnant aforesaid are visited by a large number of visitors many of whom are specially interested in horticulture . . ."

and that the settlor, being desirous of making some special provision for the effectuation of the said purposes and desires, had transferred twenty thousand non-cumulative preference shares of £1 each in Commercial Securities, Ltd., to the said trustees to be held on the trusts thereafter expressed, it was declared that the said shares should be held on trust for sale and to invest the proceeds and it was directed that

"the trustees or trustee shall hold the said shares and the investments so purchased or made upon the trusts and with and subject to the powers and provisions upon and with and subject to which the same would be held

A if the same were originally settled by the Bodnant settlement of 1921
B Provided always that if the said gardens at Bodnant shall be settled upon
C or shall be acquired by or become vested in the trustees or trustee upon
D the trusts declared by the Bodnant settlement of 1921 concerning the
E freehold hereditaments thereby settled or substantially upon the same trusts
F (and the trustees or trustee shall have power to decide and determine
G conclusively any question whether such trusts are the same or substantially
H the same as aforesaid) then during so much of the lives of the children and
grandchildren of the settlor living at the date of this indenture and the lives
and life of the survivors and survivor of them and the period of twenty-one
years from the death of such survivor as the said gardens at Bodnant shall
be and remain settled as aforesaid or shall remain vested in the trustees or
trustee (which portion of the said period of lives and years is hereinafter
referred to as 'the prescribed period') the trustees or trustee shall with the
consent of the person or persons for the time being beneficially entitled to
the possession or receipt of the rents and profits of the freehold hereditaments
settled by the Bodnant settlement of 1921 apply the income of the premises
hereby settled and of the investments and property from time to time
representing the same (all of which are together hereinafter referred to as
'the settled fund') in or towards securing and assisting and developing
the use of the said gardens at Bodnant for the cultivation of plants and
flowers of home and foreign countries of botanical and horticultural interest
and for experiments in the production and hybridization of foreign and
domestic flowers and plants of all kinds and the continuance and making
of experiments in connection therewith and the development of the results
thereof and for the purposes aforesaid the trustees or trustee may with such
consent as aforesaid expend in the erection and heating of greenhouses for
the growth of rare plants any such sums out of the income of the settled
fund as the trustees or trustee shall think fit but no part of the income of the
settled fund shall be applied in or about the erection or maintenance of
greenhouses for the production of grapes peaches melons or other fruits and
the trustees or trustee shall have the complete and uncontrolled discretion
as to the portion or portions of the said gardens in which the income of the
settled fund shall from time to time be applied and as to the time of such
application and as to the mode of such application whether in the erection
and maintenance of greenhouses for the growth of rare plants or for the
purchase of plants of all kinds or of implements for cultivation or in the
salary of an agent or skilled gardener or gardeners or in the payment of
wages of ordinary gardeners and the trustees or trustee shall have power at
their or his discretion to impose as a condition of the application of the
income of the settled fund or any part thereof for any of the purposes
aforesaid that the person or persons for the time being entitled to the
possession or receipt of the rents and profits of the said Bodnant estate under
the Bodnant settlement of 1921 shall permit visitors either of a class speci-
ally interested in horticulture or possessing any special qualification in
connection with horticulture or at their discretion all visitors to visit and
inspect the said gardens at Bodnant under such reasonable conditions as to
supervision payment for admission or otherwise as the trustees or trustee
may approve and if at any time the person or persons entitled to such
possession or receipt of rents and profits as aforesaid shall decline to allow
the said income to be applied for the purposes aforesaid or to permit such
persons as aforesaid to visit and inspect the said gardens then and so often as
the same shall happen the trustees or trustee shall apply the income of the
settled fund as if the same were income of the property settled by the
Prestatyn settlement of 1909 but if and when the person or persons so
entitled as aforesaid shall again comply with the conditions hereinbefore

laid down the trustees or trustee shall thenceforth again apply the income of the settled fund or so much thereof as the trustees or trustee shall think fit for the purposes of the gardens at Bodnant as hereinbefore provided And it is hereby agreed and declared that from and after the expiration of the prescribed period the settled fund shall be held upon the trusts and with and subject to the powers and provisions declared by the Prestatyn settlement of 1909 or such of the same as shall be subsisting and capable of taking effect."

On Jan. 4, 1933, the settlor died, and by her will, dated Dec. 2, 1931, she devised Bodnant Hall and the gardens, pleasure grounds and demesnes and the home farm to trustees on (as the trustees of the Garden settlement determined) substantially the same trusts as were in the Bodnant settlement declared concerning the Bodnant estate. On Nov. 11, 1949, Lord Aberconway sold the major part (about five-sixths) of the gardens to the National Trust, and provided an endowment fund for the upkeep of the portion sold.

Rawlence for the plaintiff, one of the trustees of the Garden settlement, and also of the Prestatyn settlement.

Sir Lynn Ungood-Thomas, Q.C., and *H. E. Francis* for the first defendant, Lord Aberconway.

C. Montgomery White, Q.C., and *Burnett-Hall* for the second defendant, a trustee of the Prestatyn settlement.

DANCKWERTS, J. (having stated the facts): It is contended that, though five-sixths of the original gardens, or the gardens which were maintained prior to the conveyance, have been conveyed to the National Trust, the objects of the settlement of 1926 are carried out substantially in the way which was contemplated. The trusts which are material refer to "the said gardens at Bodnant". There is no definition in the settlement of 1926 of "the gardens at Bodnant" except so far as one can glean it from the recitals which are contained in that deed. The two recitals which seem to be material are, first, that which refers to the settlement of 1921 as being a settlement of "the Bodnant estate (except the messuage or mansion house known as Bodnant Hall with the gardens pleasure grounds and demesnes usually occupied therewith and the home farm adjoining or near thereto)", and, secondly, the recital that Lady Aberconway, the settlor,

"is seised in fee simple of the said mansion house known as Bodnant Hall with the gardens pleasure grounds and demesnes usually occupied therewith".

It is argued that the whole purpose of the settlement and the recitals contemplates that the gardens may expand and contract, and that the said gardens would still remain subject to the provisions which are material, though portions of them were disposed of. That may be true, and it may also be true that the method which has been adopted of conveying part of the land included in the other gardens to the National Trust was a very practical way of securing the real intention of the settlor as contained in the settlement of 1926, but it seems to me impossible to say that the conditions which are required to be fulfilled if the prescribed period is still to be operative are, in fact, fulfilled if five-sixths of the gardens (which I think must be "the said gardens") have been conveyed to some other party. It seems to me that a different result might have followed if different words had been used in the provisions concerning the prescribed period. The words in question are "as the said gardens at Bodnant shall be and remain settled as aforesaid or shall remain vested in the trustees or trustee". There is not anything about the gardens substantially remaining in that condition. Accordingly, while I have considerable sympathy with the contention which has been put forward on the other side, I think I am bound to come to the

conclusion that the conditions required for the continuance of the prescribed period are no longer operative according to the terms of the settlement of 1926.

[HIS LORDSHIP heard argument on the second question.]

DANCKWERTS, J. : I have now to consider whether the provisions of the Settled Land Act, 1925, s. 106, have any effect on the trusts of the Garden settlement, and, if so, what the effect is. The material provision of the settlement is:

"Provided always that if the said gardens at Bodnant shall be settled upon or shall be acquired by or become vested in the trustees or trustee upon the trusts declared by the Bodnant settlement of 1921 concerning the freehold hereditaments thereby settled or substantially upon the same trusts [which happened] then during so much of the lives of the children and grandchildren of the settlor living at the date of this indenture and the lives or life of the survivors and survivor of them and the period of twenty-one years from the death of such survivor as the said gardens at Bodnant shall be and remain settled as aforesaid or shall remain vested in the trustees or trustee (which portion of the said period of lives and years is hereinafter referred to as 'the prescribed period') . . .".

I have held that one cannot say, when five-sixths of the gardens at Bodnant have been sold to the National Trust, that those gardens remain settled as aforesaid or remain vested in the trustees or trustee. So, *prima facie*, "the prescribed period" as described in this settlement would have come to an end, but it may be that s. 106 makes that attempt to determine it void in certain circumstances.

The Settled Land Act, 1925, s. 106, provides:

"(1) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act a provision is inserted—(a) purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life or statutory owner to exercise any power under this Act, or his right to require the settled land to be vested in him; or (b) attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this Act, or his right to require the settled land to be vested in him; that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void. (2) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any such power or right as aforesaid shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power or right, discharged from liability to determination or cesser by or on his exercising the same."

It is clear on the authorities that a provision of this kind (as is indicated by the section) need not be contained in the settlement of the land under which the tenant for life gains his Settled Land Act power. It is sufficient if some provision of a personalty settlement, as here, may have the effect of tending to discourage the exercise by the tenant for life of his statutory powers. What I have held on the construction of this document is that if, the tenant for life exercising his statutory power of sale, the gardens pass out of the settlement, then on the terms of the document "the prescribed period" would have come to an end, and the trust which follows, which is, shortly, for the application of the income of the settled personalty in or towards securing and assisting and developing the use of the said gardens at Bodnant in a certain way would also have come

to an end. It seems to me that though the income is not to be paid to the tenant for life, if the effect of the tenant for life selling the gardens would be that this income would cease to be applicable to property which is his, it does tend to discourage the tenant for life from exercising his powers. It has been pointed out by counsel for the second defendant that, at the date of the Garden settlement, the gardens in question were not settled land, but were the free property of the late Lady Aberconway. But it is plain that the whole basis of this document is that the document is intended to operate if and when the gardens at Bodnant shall be brought into the settlement of 1921, and it is providing for that event. That event did, in fact, happen, and it seems to me, therefore, that the vice which s. 106 of the Settled Land Act, 1925, is attempting to deal with is the kind of trouble with which this settlement is concerned. To put it another way, some provision which is intended to deal with a future settlement of land if and when it takes place is within the provisions of the Settled Land Act, 1925, s. 106, when the event of the property coming into settlement does occur. Accordingly, it seems to me that that point is not material for the decision which I have to consider. In my judgment, this provision determining the trusts if the property passes out of settlement is such a provision as is declared shall be void by s. 106.

Both sides have relied on *Re Patten* (1), but it seems to me that there are parts of that decision which are consistent with the result at which I have arrived. In that case there was a provision for the payment of rates and taxes out of the income of a fund of £3,000 so long as a certain lady should be in occupation of the property, and it was held that the provision determining that trust if she went out of occupation of the property was avoided so far as it tended to discourage her from operating her leasing powers under the Settled Land Act, 1925. It seems to me in the same way that this provision, which may tend to discourage the tenant for life from exercising his statutory power to sell the gardens at Bodnant, is similarly invalidated by the provisions of the Act.

What is the effect, therefore, in that case? It was held in *Re Patten* (1) that the provision for payment of rates and taxes could not operate if, instead of leasing, the tenant for life sold the property in question out of the settled estate altogether, because there was then no subject-matter in respect of which the provisions of the trust for payment of the rates and taxes could apply. In the present case it seems to me that the effect of avoiding the termination of "the prescribed period" is to leave a period which is mentioned in the trusts, i.e., during "the lives and life of the survivors and survivor of them" (that is, of the children and grandchildren of the settlor living at the date of the indenture) "and the period of twenty-one years from the death of such survivor" untouched, and, consequently, the trusts in question will remain effective for assisting and developing the use of the gardens at Bodnant in a certain manner. There are portions of the gardens which are still part of the settled property and which would be within the trusts which are laid down, and it may be that the portions of the gardens which have been parted with to the National Trust are also within the purview of the powers of the trustees. I am not, I think, asked to decide that question, and I merely say that it seems to me that during the rest of that period, by reference to the lives and twenty-one years from the death of the survivor, the trusts which are contained in the document of Feb. 22, 1926, in respect of "the gardens at Bodnant" will continue to operate.

Order accordingly.

Solicitors: *Farrer & Co.* (for the plaintiff and the first defendant); *Field, Roscoe & Co.* (for the second defendant).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

BATES v. PARKER.

[BIRMINGHAM ASSIZES (Lynskey, J.), October 16, 17, 1952.]

Negligence—Invitee—Duty of occupier—Protection against unusual danger—Window cleaner—Danger created by occupier.

From October, 1947, to Feb. 18, 1949, the plaintiff, a window cleaner, was employed by the defendant to clean the windows of his premises once a fortnight. In the middle section of one of the upstairs windows, instead of a pane of glass, there was a piece of plywood, which was bolted to the pillars of the window and had a round opening in the centre where a fan had once been fixed. To clean that window the plaintiff had to stand on a ladder placed against the wall of the premises, and it was his practice to hold on to the piece of plywood with one hand, with his fingers through the hole, so as to steady himself on the ladder. On Feb. 17, 1949, the defendant unbolted the piece of plywood and removed it from the window as he intended to put a pane of glass there. Being unable to do the glazing that day, he re-inserted the piece of plywood into the pillars of the window, but did not bolt it or secure it in any way, and, although he knew that the plaintiff would be coming to clean the window on the following morning, he failed to give him any notice of the danger. On Feb. 18 the plaintiff went up the ladder to clean the window and, as usual, caught hold of the piece of plywood to steady himself, but the plywood came away in his hand and he overbalanced, fell to the ground, and was injured.

HELD: the plaintiff's injuries were the result of the existence of an unusual danger which was created by and known to the defendant and was not known to the plaintiff, and, therefore, as the plaintiff, who was an invitee, was not warned of the danger and had no opportunity of avoiding it, the defendant was liable to him in damages in respect of his injuries.

Indermaur v. Dames (1866) (L.R. 1 C. P. 274), applied.

Christmas v. General Cleaning Contractors, Ltd. ([1952] 1 All E.R. 39), explained and distinguished.

AS TO DUTY TO INVITEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 600-609, paras. 851-858; and FOR CASES, see DIGEST, Vol. 36, pp. 41, 42, Nos. 247-258.

Cases referred to:

- (1) *Indermaur v. Dames*, (1866), L.R. 1 C.P. 274; 35 L.J.C.P. 184; 14 L.T. 484; *affd.* Ex. Ch., (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 36 Digest 35, 208.
- (2) *Christmas v. General Cleaning Contractors, Ltd.*, [1952] 1 All E.R. 39; [1952] 1 K.B. 141.
- (3) *Sutcliffe v. Clients Investment Co.*, [1924] 2 K.B. 746; 94 L.J.K.B. 113; 132 L.T. 83; 36 Digest 41, 246.

ACTION for damages for personal injuries.

The plaintiff was a window cleaner in partnership with his brother-in-law. From October, 1947, to Feb. 18, 1949, they were employed to clean the windows of premises known as 94, Weoley Castle Road, Weoley Castle, Birmingham, which were occupied by the defendant. Their usual practice was to clean the windows every other Friday morning, but occasionally they went to the defendant's premises on Thursday afternoon, instead of on Friday morning, and, as the defendant was then carrying on his business as a hairdresser, they asked for his permission before starting to clean the windows. When they went on Friday morning they did not notify the defendant of their arrival, but started cleaning as soon as they arrived. An upper window at the rear of the premises consisted of three sections, and the middle section originally had a dormer window which was capable of being opened. Some years earlier,

when the room was used as a hairdressing saloon, the dormer window was taken out and a fan was built into the open space. For this purpose a piece of plywood, with a round opening in the centre, was fixed to the pillars of the window and bolted to them, a grill was placed in the round opening and a fan was fixed on the grill. Before October, 1947, the room had ceased to be used as a hairdressing saloon and was used only as a store room, the fan and grill had been removed, but the piece of plywood, with the hole in it, remained. It was the plaintiff's practice when cleaning that window to put his ladder against the wall, with the top of the ladder just under the sill of the window, to mount the ladder up to the third rung from the top, and to hold on to the piece of plywood with one hand, with his fingers through the hole, to steady himself and to protect himself from falling off the ladder, while cleaning first one section of the window and then the other section with his other hand. Intending to change the use of the room from a store room to a living room, the defendant wished to substitute a pane of glass for the piece of plywood. On Feb. 17, 1949, he unbolted the piece of plywood from the window and removed it. Being unable to complete the glazing that day, he re-inserted the piece of plywood into the window space by pushing it into position, where it was held by the close fit of the plywood to the pillars of the window, but he did not bolt or secure it in any way. He knew that the plaintiff and his brother-in-law would be coming to clean the windows on the following morning, but he failed to give them any warning that the plywood was no longer secured to the window pillars. In his evidence he said that he did not know the manner in which the plaintiff carried out his work on that window. On Feb. 18 the plaintiff, seeing the piece of plywood apparently in its usual position, and having hitherto always found it secure and fixed, held on to it as usual to steady himself, but the piece of plywood came away in his hand, he overbalanced and fell to the ground, and was injured. The defendant denied liability for the accident.

R. K. Brown for the plaintiff.

The defendant appeared in person.

LYNSKEY, J., stated the facts and continued: The question which I have to consider is whether or not, in the circumstances of the case, there was a duty owed by the defendant to the plaintiff either to warn the plaintiff of the dangerous condition of affairs which had been created or to remedy it. The plaintiff was engaged on work in which he and the defendant had a common interest and there is no doubt that in law the plaintiff was an invitee.

The general law in those circumstances as regards duty has been stated repeatedly, usually in the words of **WILLES, J.** (L.R. 1 C.P. 288), in *Indermaur v. Dames* (1), that an invitee

" . . . using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined . . . as matter of fact."

That law has been applied repeatedly, and I should have had no doubt about the matter if it had not been for a fairly recent decision of the Court of Appeal in *Christmas v. General Cleaning Contractors, Ltd.* (2). In that case a window cleaner stood on a sill outside a window to clean the window, and while he was holding on to the bottom cross-piece of the top and outer sash with his right-hand he pushed it up to the top of the window frame. By reason of its weights being ill-balanced, the lower sash, which was raised a few inches from the bottom of the frame, then came down on his hand, without being touched

by him, so that he lost his balance, fell and was injured. He brought proceedings both against the occupiers of the premises, Caledonian Club Trust, Ltd., and against his employers. JONES, J., found that both were liable, but in the Court of Appeal it was held that, although the plaintiff could recover from his employers, there was no duty owed to him by the owners of the club in the circumstances of that case.

In his judgment DENNING, L.J., said ([1952] 1 All E.R. 41):

"Is a householder responsible for seeing that windows are safe for window cleaners to hold on to? I think not. The householder is concerned, of course, to see that the windows are safe for his servants to open and close, and, indeed, to clean, but he is not concerned to see that they are safe for a window cleaner to hold on to. The duty which a householder owes to his servants is much higher than that which he owes to a window cleaner who is only an invitee. The householder employs the window cleaner as an independent contractor to clean his windows, and leaves it to him to decide how he shall do it and what safeguards he shall take, whether he shall use ladders or cradles or simply stand on the sill. The householder does not know what strains or stresses the window cleaner is going to put on the window. If the window cleaner chooses to rely on the window for his safety, then it is for him, and not for the householder, to take steps to see that it is safe for his special purposes."

If those words are intended to be of general application, it seems to me, with all respect to DENNING, L.J., that they rather conflict with some of the earlier decisions and, in particular, with *Sutcliffe v. Clients Investment Co.* (3), in which a workman employed by contractors, who were repairing the premises, was killed by falling from a balcony which was in a dangerous condition. I read the decision in *Christmas v. General Cleaning Contractors, Ltd.* (2) as a decision on the facts of that particular case, and it seems to me to be, not an extension of the accepted law, but an exemplification of it. The duty to an invitee arises only in respect of unusual dangers, and the effect of the decision in *Christmas v. General Cleaning Contractors, Ltd.* (2) is that it was said that the risk of a sash window moving, either because its balance is defective or for some other reason, was a usual risk for window cleaners to have to take. HODSON, L.J., said ([1952] 1 All E.R. 42):

"As the learned judge said in one part of his judgment, window sashes do occasionally move, and, if they move, are liable to cause the hand of a cleaner to be caught between the two sashes or to be knocked off the sash he is holding. The risk of a sash window moving was, I think, clearly recognised by the plaintiff in his evidence. The balance must vary with the position of the window, and, as Mr. Harrington pointed out, the window was suspended by a chain, not an ordinary sash cord, and when the lower sash was near the bottom it was prone to run down. Even if the window can be regarded as defective, it cannot, in my view, be regarded as a danger unusual for window cleaners."

That seems to me to be the whole basis of the judgment. The Court of Appeal there took the view that the danger of sashes moving is a common one, which window cleaners know is likely to happen, and it is a usual danger to them in their work. In effect, the Court of Appeal held that there was no unusual danger in that case, and, therefore, the duty to warn the plaintiff of unusual danger did not arise. Apart from that, the evidence was that the club had no knowledge of the existence of the danger, and the court further held that it was not a case where they ought to have known, because the view taken was that, as they had no report by their servants of any accident or defect in the window, there was no general obligation on them to make an examination of all their windows before they allowed the window cleaner to work on them.

The result, in my view, is that *Christmas v. General Cleaning Contractors, Ltd.* (2) does not alter or extend the ordinary law. If the accident in the present case had been due to a defective window sash or window fastening, or anything of that kind, I would, of course, have followed the Court of Appeal, and held that that was, not an unusual danger, but a usual danger to window cleaners. But in this case the position is that the defendant himself deliberately created the danger, because I am satisfied that the way in which the plaintiff cleaned this window was a safe way so long as the piece of plywood was properly bolted into the window pillars. Unfortunately, on this occasion the defendant had removed the fastenings and had put the piece of plywood back into the position it occupied before without securing it, and the result was to create, not merely an unusual danger, but what in effect became to the plaintiff a trap, because what appeared to be, and had been, safe until Feb. 4, had become, on Feb. 18, although apparently safe, completely dangerous if it was used as a hand-hold. Therefore, I am satisfied here that the defendant had created an unusual danger and knew of that unusual danger. In those circumstances there was a duty on him either to warn the plaintiff or to fence the danger so that it could not cause injury to the plaintiff.

[HIS LORDSHIP reviewed the evidence on the question whether the defendant had taken proper steps to warn the plaintiff, and continued:] I am satisfied that there was an opportunity to warn and that the defendant had forgotten about the matter and did not realise that there was a danger to the plaintiff in cleaning the windows. As the defendant knew that the plaintiff would be coming on the following day to clean his windows, even if there was no opportunity of oral warning, having regard to the nature of the danger created there ought to have been some notice either on or near the board, saying that it was loose, or something of the sort to indicate its danger. Therefore, I am compelled to find that the plaintiff's injuries were caused as a result of the existence of an unusual danger which was known to the defendant and was not known to the plaintiff, and the plaintiff was not warned of that danger nor given any opportunity of avoiding it. The result is that the plaintiff is entitled to recover.

Judgment for the plaintiff.

Solicitors: *T. H. Ekins & Son*, Birmingham (for the plaintiff).

[*Reported by MISS GWYNEDD LEWIS, Barrister-at-Law.*]

DAVIES v. DU PAVER.

[COURT OF APPEAL (Singleton, Birkett and Morris, L.J.J.), July 17, 18, November 6 1952.]

Easement—Right to graze—Prescription—Interruption—Enjoyment as of right—Interval of thirteen months between last letter of protest and issue of summons—Long occupation of servient tenement by tenant—Owner without knowledge of prescriptive user—Prescription Act, 1832 (c. 71), s. 1, s. 5.

Since about 1884-1889 the servient tenement, which was a hill farm in Wales, was in the occupation of a succession of tenants. In 1949 the defendant purchased the tenement and from that time onwards he occupied it. In May, 1950, he commenced erecting a fence along the boundaries of the land. On July 6, 1950, the plaintiff, the owner and occupier of a neighbouring farm, through his solicitors wrote objecting to the erection of the fence on the ground (as afterwards formulated) that he had a prescriptive right to graze sheep on twelve and a half acres of the defendant's land, acquired by user of the land for a period of at least sixty years. The fencing of the land proceeded, and the plaintiff's solicitors continued to write letters of complaint until Aug. 1, 1950, when they stated that their client was compelled to take the necessary steps to assert his rights. On Aug. 9, 1950, the fencing was completed and the plaintiff's sheep became entirely excluded from the land. No other step was taken by or on behalf of the plaintiff until Sept. 28, 1951, when he issued a summons claiming damages and an injunction to restrain interference with his prescriptive right. Although the tenants occupying the servient tenement up to 1949 might have been aware of the user by the plaintiff's sheep, there was no evidence to show that the defendant himself was ever aware of it.

HELD: (i) (SINGLETON, L.J., dissentiente) the question whether the plaintiff had submitted to or acquiesced in the interruption of his enjoyment of user for more than one year, within the meaning of s. 1 of the Prescription Act, 1832, was one of fact; the failure to make any further complaint between Aug. 9, 1950, when the fence was completed, and Sept. 28, 1951, when the summons was issued, was not conclusive evidence of submission, and certainly not of acquiescence; and, accordingly, the finding of the learned county court judge that enjoyment had been without "interruption" should not be disturbed; but,

(ii) as there was no evidence to show that the defendant was aware of the plaintiff's user of the land, the user could not be said to be as of right within s. 5 of the Act of 1832, and, accordingly, the plaintiff's claim failed both under the Act and at common law.

AS TO EASEMENT UNDER DOCTRINE OF PRESCRIPTION, see HALSBURY, *Hailsham Edn.*, Vol. 11, pp. 289-309, paras. 528-557; and FOR CASES, see DIGEST, Vol. 19, pp. 57-75, Nos. 326-449.

Cases referred to:

- (1) *Glover v. Coleman*, (1874), L.R. 10 C.P. 108; 44 L.J.C.P. 66; 31 L.T. 684; 19 Digest 131, 890.
- (2) *Bennison v. Cartwright*, (1864), 5 B. & S. 1; 33 L.J.Q.B. 137; 10 L.T. 266; 28 J.P. 501; 122 E.R. 733; 19 Digest 74, 447.
- (3) *Dalton v. Angus*, (1881), 6 App. Cas. 740; 46 J.P. 132; *sub nom. Public Works Comrs. v. Angus & Co.*, *Dalton v. Angus & Co.*, 50 L.J.Q.B. 689; 44 L.T. 844; 19 Digest 8, 4.
- (4) *Lloyds Bank, Ltd. v. Dalton*, [1942] 2 All E.R. 352; [1942] Ch. 466; 112 L.J.Ch. 10; 167 L.T. 343; 2nd Digest Supp.
- (5) *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557; 71 L.J.Ch. 791; 87 L.T. 381; 19 Digest 20, 68.

- (6) *Phillips v. Halliday*, [1891] A.C. 228; 61 L.J.Q.B. 210; 64 L.T. 745; 55 J.P. 741; 19 Digest 469, 3215.
- (7) *Powers v. Bathurst*, (1880), 49 L.J.Ch. 294; 42 L.T. 123; 26 Digest 294, 258.
- (8) *Bright v. Walker*, (1834), 1 Cr. M. & R. 211; 3 L.J.Ex. 250; 149 E.R. 1057; 19 Digest 54, 308.
- (9) *Sturges v. Bridgman*, (1879), 11 Ch.D. 852; 48 L.J.Ch. 785; 41 L.T. 219; 43 J.P. 716; 19 Digest 19, 57.

APPEAL by the defendant from an order made by His Honour JUDGE EVANS, Q.C., at Portmadoc and Blaenau Festiniog County Court on May 16, 1952, awarding the plaintiff £10 damages for trespass and an injunction restraining the defendant from obstructing the plaintiff in the enjoyment of his right of pasturage. The county court judge found that the plaintiff had enjoyed pasturage over part of the defendant's land as of right for the requisite statutory period, and that there had been no interruption within the meaning of the Prescription Act, 1832.

Mars-Jones for the defendant.

Dare for the plaintiff.

Cur. adv. vult.

Nov. 6. The following judgments were read.

SINGLETON, L.J. : The plaintiff, Mr. John Davies, is the owner and occupier of a farm known as Tryfal in the parish of Festiniog in the county of Merioneth. He and his ancestors have been there for very many years. In the hill country nearby there are certain Crown wastes on which the plaintiff, in common with other neighbouring farmers, has acquired rights of pasture. On Sept. 22, 1949, a neighbouring farm, Hafod Ysbytty, was conveyed to the defendant, and since that time he has occupied it. In 1950, with government help, he put a fence around his farm. The fence encloses an area of about twelve and a half acres of land over which the plaintiff claims that he has the right to graze his sheep, and thus there arose the dispute which occupied considerable time in the county court and which has given much cause for thought to the members of this court. It is clear from the particulars of claim dated Sept. 27, 1951, that the plaintiff regarded the land in respect of which the claim is made as part of the Crown wastes. In his amended particulars dated Nov. 28, 1951, he makes his claim in respect of lands sometimes described as Crown wastes. It is now clear beyond dispute that the land (the twelve and a half acres) was included in the conveyance to the defendant and it belongs to him. Thus the plaintiff claims a right to pasture his sheep on a part of the defendant's land, and in his suit he sought an injunction to prevent the defendant interfering with that alleged right. The claim was at first that the plaintiff was entitled to the right by prescription under the common law, but at the hearing the particulars were further amended to include a claim under the Prescription Act, 1832, and the case was confirmed by the learned county court judge on that ground alone.

The case was heard before His Honour JUDGE ERNEST EVANS, Q.C., who gave judgment in favour of the plaintiff with £10 damages for trespass and granted an injunction in the terms prayed. The judgment as drawn up, in so far as it affects the plaintiff is in these terms:

"It is adjudged that the plaintiff John Davies is entitled to enjoy as appurtenant to the ownership and/or occupation of a certain farm known as 'Tryfal' in the parish of Festiniog in the county of Merioneth, certain rights of sheep pasturage over part of a certain farm belonging to the defendant, known as 'Hafod Ysbytty', Festiniog, aforesaid, the said part of Hafod Ysbytty aforesaid, over which the said rights exist, being for the purpose of identification only more particularly shown on the plan attached hereto and thereon edged red. It is adjudged that judgment be entered accordingly for the plaintiff John Davies against the defendant. And it is ordered (a) That the plaintiff John Davies do recover against the defendant

the sum of £10 for damages, such sum to be paid to the registrar of this court forthwith. (b) That the defendant, his servants, agents, and workmen be strictly enjoined from obstructing the said plaintiff John Davies in the enjoyment of the said rights of pasturage as aforesaid ”;

and then there is a provision as to costs.

A The defendant appeals against that judgment, and the main contention put forward arises on para. 8 of the amended defence, which reads:

“ In the further alternative, such enjoyment has been interrupted for more than one year in that the plaintiff has submitted to or acquiesced in the enclosing of the said area as aforesaid from about Aug. 9, 1950, until Sept. 28, 1951, when this action was brought.”

B The finding of the learned county court judge on this defence is stated in this way. I read from his judgment:

C “ But the question then arises as to whether the user was uninterrupted. So far as Davies is concerned it was suggested that there was interruption caused by the action of the witness William Roberts in driving some of Davies’ sheep off the land which his sheep grazed, forming part of Hafod. But there was no evidence that Davies knew of this and indeed Roberts admitted that he had never complained to Davies that the latter’s sheep were trespassing on his land, or ever mentioned the matter to Davies. Then it was argued that there had been effective interruption by the erection of the fences by the defendant. But this in itself is not sufficient to defeat the plaintiff’s claim. The defendant must prove that the plaintiff submitted to or acquiesced in the interruption for one year after he had notice of it. The defendant started erecting the fences in May, 1950. When this came to the knowledge of the plaintiff he took action. It was not drastic action. He did not pull down the fence or commence an action for trespass. What he did was to consult the National Farmers’ Union with a view to getting advice, and then met the defendant and the representative of the union on the site. He hoped to avoid a dispute, but made it clear to the defendant that he objected to his action. Then he instructed solicitors to act on his behalf. The solicitors wrote on July 6, 1950, to the defendant saying that, unless the defendant refrained from further work on the fencing, proceedings would be taken. The defendant continued with the fencing which was completed on Aug. 9, 1950. It is true that proceedings were not initiated until Sept. 28, 1951, but in the meantime protracted correspondence between the solicitors for both parties had taken place, in which the plaintiff did not abandon his protest against the defendant’s action, but continued to assert his rights. I think this is sufficient. In order to negative submission it is not necessary to bring an action or to remove the obstruction: see *Glover v. Coleman* (1). On the evidence, I hold that the plaintiff neither submitted to nor acquiesced in the interruption.”

H It is necessary to look at the facts with care. After the defendant bought Hafod Ysbytty in September, 1949, he submitted a scheme to the Ministry of Agriculture under the Hill Farming Act, 1946, and fencing was given first priority. Erection of the fence was commenced in May, 1950, by the county agricultural committee. The fencing, so far as material to this action, was completed on Aug. 9, 1950, as the learned judge found. From that time onwards the plaintiff’s sheep were prevented from grazing on the twelve and a half acres of land on which the plaintiff claims he has a right to graze his sheep. While the work was being done the plaintiff’s solicitors made complaints which began by letter of July 6, 1950, and the defendant’s solicitors rejected the complaints. The

complaints continued until Aug. 1, 1950, on which date the plaintiff's solicitors wrote:

"We thank you for your letter of yesterday's date contents of which we observe. We have today heard further from our clients, and we understand that your client's acts of fencing are interfering with our client's rights of pasture, and we have instructed our client to take such steps as he thinks necessary to prevent further infringement. Owing to your client's conduct our client is compelled to take the necessary steps to assert his rights."

That letter brought a reply from the defendant's solicitors on Aug. 2, 1950:

"We thank you for your letter of yesterday's date herein. We can only repeat that if the steps which you have advised your client to take to assert his alleged grazing rights in any way interfere with or infringe our client's rights as the owner of the freehold, he will be compelled to take action to protect his rights. We trust this letter makes our client's position perfectly clear as we would not like your client to be under any misapprehension as to the consequences which would flow from the commission of unlawful acts."

The fence was, as I have already said, completed on Aug. 9, 1950. No other step was taken by, or on behalf of, the plaintiff until the issue of the summons. The particulars bear date Sept. 27, 1951, nearly thirteen months after the last complaint of objection made by the plaintiff's solicitors. On Oct. 1, 1951, the plaintiff's solicitors write to the defendant's solicitors saying that the summons had been issued.

The Prescription Act, 1832, provides as follows:

"Whereas the expression 'time immemorial, or time whereof the memory of man runneth not to the contrary', is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof, Be it enacted . . . that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of our Sovereign Lord the King, his heirs or successors, or any land being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

Section 4 reads:

"... Each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question; and . . . no act or other matter shall be deemed to be an interruption, within the meaning of this statute,

unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same to be made."

A To establish a claim under s. 1 of the Prescription Act, 1832, the user relied on must have been "without interruption", and by s. 4 the period of years "shall be deemed and taken to be the period next before some suit or action wherein the claim or matter . . . shall have been . . . brought into question."

B The case for the defendant was that there was complete interruption as from the date of the completion of the fence on Aug. 9, 1950, that thereafter nothing was done, said or written by the plaintiff until the issue of the summons more than one year after the plaintiff had notice, and that this interruption must be taken to have been submitted to or acquiesced in by the plaintiff and that consequently he could not succeed under the Act. There is no evidence to show that there was between Aug. 1, 1950, and Sept. 28, 1951, any protest, verbal or other, against the obstruction caused by the fence erected by the defendant. It is clear that from Aug. 9, 1950, there was complete interruption of the user of the land by the plaintiff's sheep, but it is claimed that it was not submitted to or acquiesced in by the plaintiff for one year. Whether it can be said that there was acquiescence may be doubtful. On the other hand, I find it exceedingly difficult to say that there was not submission to the interruption of user by the plaintiff. He had protested up to Aug. 1, 1950, but no reply was sent to the defendant's solicitors' letter of Aug. 2, 1950, and thereafter nothing by way of protest or complaint was done for almost fourteen months, that is, until the issue of the summons. I regard that as submission to the interruption of the user for more than a year and as a bar to the plaintiff succeeding in his claim. The judge put it in this way:

E "It is true that proceedings were not initiated until Sept. 28, 1951, but in the meantime protracted correspondence between the solicitors for both parties had taken place, in which the plaintiff did not abandon his protest against the defendant's action, but continued to assert his rights. I think this is sufficient. In order to negative submission it is not necessary to bring an action or to remove the obstruction: see *Glover v. Coleman* (1). On the evidence, I hold that the plaintiff neither submitted to nor acquiesced in the interruption."

F I am not sure that the words "in the meantime" can be regarded as strictly accurate, for the correspondence ceased on Aug. 2, 1950, and there was no protest after that date until the issue of the summons.

G The view I take of the position is that, if there is no protest, no objection, or no complaint, for a year during which there is interruption of user, there is at least submission to the interruption. I cannot accept the argument put before us that the protest made in the correspondence would be effective for some time at least, and that consequently time would not run against the plaintiff. The acceptance of any such argument would mean the substitution of a reasonable time for the period of one year in s. 4 of the Act. That would never do. I agree that it is a question of fact which has to be decided, and the question is: Was there submission to the interruption for one year? That question, I consider, must be answered in the affirmative, though there were protests and objections beforehand. I do not obtain help from anything said in *Glover v. Coleman* (1), the decision in which was that a party was not submitting to, or acquiescing in, the interruption if he complained of, and protested against, it so as to show the party causing the interruption that he really did not submit to or acquiesce in it. The question before us did not arise in that case; it could not, having regard to the facts stated (L.R. 10 C.P. 108, 109) (and I draw attention to the argument at p. 111, from which it appears that it was assumed that the owner of the premises had a right to sue, and that he only knew of the obstruction six months before action brought.)

I gain more help from *Bennison v. Cartwright* (2). It is unnecessary to go into the facts of that case, which was heard before BLACKBURN, J., at the Yorkshire Summer Assizes. It was a claim for trespass. The trespass for which the action was brought was committed on Feb. 3, 1863, and the writ was issued on the following day. The headnote reads:

"The judge left to the jury the question whether the defendant had submitted to or acquiesced in the interruption for one year within the meaning of stat. 2 and 3 Will. 4, c. 71, s. 4, and they said that he had not, and found for him on both pleas. *Held*, per CROMPTON, BLACKBURN and MELLOR, JJ. :—1. That the question was properly left to the jury, as an interruption might be shown to have been not submitted to or acquiesced in within the meaning of stat. 2 and 3 Will. 4, c. 71, s. 4, though no suit or action had been brought."

CROMPTON, J., said (5 B. & S. 15):

"The more important question is whether there has been a non-acquiescence by the defendant in the interruption of his easement. That depends on s. 4 of stat. 2 and 3 Will. 4, c. 71: and upon reading the words of that section I have no doubt that this was a matter for the jury and not one on which the judge would have been authorised to stop the case. It was argued by Mr. Temple and Mr. Jones that there was acquiescence unless some suit or action was brought for the act or other matter which constituted the interruption. But there is nothing in the statute to warrant that construction and their argument has not convinced me that it is right. They lay down as the ground of their argument, what indeed must now be taken to be law, that the party claiming the right must show that it has been enjoyed continuously up to the time of the commencement of the suit or action. One would have thought that for justifying an alleged trespass it would be necessary to show a right to do the act at the time of committing it. And the notion of an inchoate right being perfected at the time of the commencement of the action is very strange; probably it was suggested by the words in the first clause of s. 4—each of the periods shall be deemed to be the period 'next before some suit or action' wherein the claim shall be brought into question."

MELLOR, J., said (*ibid.*, 17):

"When a statute for shortening the time of prescription, after, in aid of that attempt, prescribing the period during which the right must be enjoyed without interruption, goes on to say that no act or other matter shall be deemed to be an interruption unless 'submitted to or acquiesced in for one year' after the party interrupted shall have notice thereof, the natural and obvious meaning of the words is that an obstruction shall not be effectual unless the party shall allow it to continue for one year, without any act on his part to show that he resists it. In the present case correspondence and negotiation upon the matter show that the question was more properly a question for the jury than the judge; and the jury were warranted in finding that the interruption was not submitted to, or acquiesced in, for a year, within the meaning of the statute."

BLACKBURN, J., said (*ibid.*, 18):

"The first point turns on the construction of ss. 2 and 4 of the Prescription Act, 2 and 3 Will. 4, c. 71. Where a claim of an easement is made by reason of its having been enjoyed for twenty or forty years three things must concur:—First, An enjoyment by a person claiming right thereto; Secondly. An enjoyment without interruption; and, Thirdly. It must have been an enjoyment for the full period of twenty or forty years. On the construction of the first clause in s. 4 Mr. Temple and Mr. Jones say the cases have decided that the period of enjoyment must expire at the com-

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mencement of some suit or action; and we cannot help that apparent absurdity, because the words of the Act are express. But, construing the words of the second clause in that section according to their plain meaning, I am unable to see how it follows that an interruption is acquiesced in for a year unless a suit or action be brought within that time. In the present case I thought that there was not an acquiescence in the obstruction during the time of the correspondence between the attorneys of the parties, but I left the question to the jury, and they found that there was not. Excluding that time the obstruction was not submitted to, or acquiesced in, for one year, whether we reckon the time to the act of the alleged trespass or to the issuing of the writ; though I think that, if the question arose, it would turn rather upon when the act was done than upon when the writ issued. Therefore on that point I think the direction was right, and the finding of the jury right."

The words "excluding that time the obstruction was not submitted to, or acquiesced in, for one year" are important. Protests by correspondence or otherwise may well show that a party is not submitting or not acquiescing. Excluding the period during which there were protests, there is in the present case a period of more than one year in which nothing whatever was done. I regard this as fatal to the plaintiff's claim under the statute.

Counsel on behalf of the plaintiff submitted that the judge's findings were sufficient to entitle him to rely on prescription at common law, and that he was not limited to a claim under the Prescription Act. The claim was originally drawn in this way, and was amended at the trial to cover a claim under s. 1 of the Act, and the whole contest seems to have been under the Act. To this submission counsel for the defendant made answer: (i) There is no proof that the owner of the servient tenement had knowledge or means of knowledge that a small portion of his land was being used by the plaintiff's sheep. The land now owned and occupied by the defendant had been let for most of the sixty years. (ii) In any event, the owner had had no power to stop that user. He relied on the opinion of FRY, J., accepted in the House of Lords in *Dalton v. Angus* (3), and he drew our attention to pp. 221 and 222 of GALE ON EASEMENTS, 12th ed., where the authorities are conveniently set out. Counsel for the plaintiff cited the judgment of BENNETT, J., in *Lloyds Bank, Ltd. v. Dalton* (4), and he placed particular reliance on the words of ROMER, L.J. ([1942] 2 All E.R. 356), cited from *Union Lighterage Co. v. London Graving Dock Co.* (5). He submitted that the onus was on the defendant, and for that proposition he relied on the words of LORD HERSCHELL in *Phillips v. Halliday* (6), and on *Powers v. Bathurst* (7). The reply of counsel for the defendant to this is that there is no case showing that the onus is on the defendant where the right claimed is of a private nature. That appears to be right.

I am not disposed to decide this appeal in favour of the plaintiff on the claim under the common law, a claim which was not really considered by the learned judge. I do not think that it is right to say that, in the circumstances of this case, the onus is on the defendant. The right test to adopt is that stated by ROMER, L.J., in *Union Lighterage Co. v. London Graving Dock Co.* (5), where the learned lord justice said ([1902] 2 Ch. 570):

"That being so, the only remaining question is whether an easement has been acquired as against the plaintiffs under the Prescription Act. Now, on principle, it appears to me that a prescriptive right to an easement over a man's land should only be acquired when the enjoyment has been open—that is to say, of such a character that an ordinary owner of the land, diligent in the protection of his interests, would have, or must be taken to have, a reasonable opportunity of becoming aware of that enjoyment. And I think on the balance of authority that this principle has been recognised as the law, and ought to be followed by us."

We are considering a small piece of land in hill country in a remote part of Wales where there is, or until lately there was, little or no fencing. There must always be some give and take between neighbouring farmers in such circumstances. The owner of Hafod Ysbytty did not live in the neighbourhood, yet, if the claim of the plaintiff is to succeed, the defendant is virtually deprived of the use of this piece of land, for the plaintiff can graze on it an uncertain and unstated number of sheep at any time of the year. And the evidence of William Roberts, a former tenant of the defendant's farm, that when he saw other people's sheep on this land he drove them off, should not be overlooked. I do not consider that the plaintiff established his claim, and, in my opinion, this appeal should be allowed, and the judgment of the learned county court judge in favour of the plaintiff should be set aside.

BIRKETT, L.J.: This action was tried before His Honour JUDGE ERNEST EVANS on Dec. 7, 1951, and Mar. 10, 1952. After taking time to consider the facts and the law applicable thereto, the learned judge delivered a reserved judgment which showed the care and thought he had devoted to an unusual and difficult case. When the particulars of claim were originally delivered in September, 1951, the claim of the plaintiff, John Davies, with which we are solely concerned in this appeal, was based on the fact that he was the owner and occupier of a farm and lands in the parish of Festiniog and enjoyed certain exclusive rights of pasturage over the Crown wastes of the parish, and that the defendant had wrongfully erected certain fences on the Crown wastes preventing the plaintiff from enjoying his rights. In November, 1951, the plaintiff delivered an amended statement of claim in which the rights claimed were said to be "certain rights of common pasture over lands sometimes described as Crown waste."

At the hearing of the action the learned judge found that the land in question was, in fact, land belonging to the defendant, which he had owned and occupied since Sept. 22, 1949. This is a most important matter, because it is one thing to claim rights over Crown wastes and quite another thing to claim rights over land that is in the ownership of another, though, no doubt, the principles of law to be applied are the same. The defendant answered the amended claim of the plaintiff by saying that the fences he had erected were against the boundary of his own farm, and that he was lawfully exercising his own rights in erecting the fences, and he denied that the plaintiff was entitled to any rights of pasturage on the land enclosed by the fences. He further pleaded that, if the plaintiff had enjoyed any such rights as he alleged, they had not been enjoyed by him or his predecessors in title for thirty years before the action was brought or for any other period required by law; that such enjoyment had been a secret enjoyment without knowledge of the defendant or his predecessor in title; and that the enjoyment of the plaintiff had been interrupted for more than one year in that the plaintiff had submitted to, or acquiesced in, the enclosing of the land from about Aug. 9, 1950, until Sept. 28, 1951. When the case for the plaintiff was opened before the learned judge, counsel for the plaintiff referred to s. 1 of the Prescription Act, 1832, and said that the plaintiff claimed that the user of the land on which he relied had existed for sixty years. At the adjourned hearing the claim was amended to allow s. 1 of the Act of 1832 to be pleaded, and the learned judge says that it was on this basis that the hearing was conducted. The sections of the Act have been read by my Lord, and I will not recite them again, but they must be kept clearly in mind, and in particular s. 4. The main point of this appeal was that the user of the plaintiff had been interrupted before action brought from about Aug. 9, 1950, to Sept. 28, 1951, and that the plaintiff had submitted to, or acquiesced in, that interruption. It is clear, I think, that whether the claim is for the shorter or the longer period set out in the Act, the user must be proved for the period computed next before the commencement of the action in which the claim is contested.

The learned judge, on the evidence before him, came to the conclusion that the plaintiff had proved that he and his predecessors in title had exercised the disputed rights of pasturage for over sixty years, and that the user was nec vi, nec clam, nec precario. He further held that the plaintiff had not submitted to, or acquiesced in, the interruption for one year after he had notice of it. On the facts of the case, it is quite clear that there was an interruption for one year after the plaintiff had notice of the interruption. The important question is: Did he submit to it, or acquiesce in it, for one year after he had notice? The learned judge said that he had not found it easy to arrive at a conclusion, and I most respectfully sympathise with him and share his view. The first strong fact is that for a full year after he had notice of the interruption nothing overt was done by him or his solicitors. The fencing seems to have been finished by Aug. 9, 1950, and the first protest after that date was the issue of the summons dated Sept. 28, 1951. The question, easy to state but difficult to answer, is: Is the lapse of that thirteen months to be taken as conclusive evidence of "submission to, or acquiescence in, the admitted interruption"? After all, "submission to or acquiescence in" is a state of mind evidenced by the conduct of the parties, and I am of opinion that it was a question of fact for the learned judge to decide on all the facts of the case, and that it was not to be decided merely by saying that there was, in fact, a period of a year in which nothing was done without considering all the surrounding circumstances. This is not a case under the Statute of Limitations. It is not a case where the words "a reasonable time in all the circumstances of the case" may be substituted for the words of the statute. It is a case where a judge must decide as a question of fact whether there has been submission to, or acquiescence in, the interruption for one year after the party interrupted had notice of the interruption. On July 6, 1950, the solicitors for the plaintiff threatened proceedings against the defendant unless the interruption was removed; on July 28 they renewed their protest; on Aug. 1 they stated that they had instructed the plaintiff to take such steps as he thought necessary to prevent further infringement; and then nothing outwardly was done until Sept. 28, 1951. I am of opinion that, following the decision in *Bennison v. Cartwright* (2), it is a question of fact whether these circumstances show a submission to, or acquiescence in, the interruption for one year, despite the fact that one year had admittedly gone by during which no outward protest was made or any other action taken. The fact that there was a complete year in which the plaintiff did nothing is some evidence that he had submitted to, or acquiesced in, the interruption, but the fact also that he protested most strongly up to August, 1950, and then actually took proceedings in September, 1951, is some evidence that he did not. It was a question of fact for the learned judge. I can quite understand the view being taken that the letter of Aug. 1, 1950, or the completion of the fence by Aug. 9, 1950, were not dates from which automatically the statutory period of one year was to run. The fact that action was taken in September, 1951, shows that there was not acquiescence in the interruption, and the judge was quite entitled to take the view that, although it could not be denied that there had been a period of one year in which nothing was done by the plaintiff or his advisers, nevertheless there had not been acquiescence for that year or submission to interruption for that year when the full history of the matter was considered. The learned judge considered *Glover v. Coleman* (1), and his reference to "but in the meantime protracted correspondence between the solicitors for both parties had taken place" was not a mistake on his part, as was suggested in argument, but was a reference to the correspondence in July and August, 1950, which, in his view, had an important bearing on the question of fact he had to decide. The passage reads: "The solicitors wrote on July 6, 1950, to the defendant saying that, unless the defendant refrained from further work on the fencing, proceedings would be taken." It could be no other, for the judge was writing a considered judgment with the

correspondence before him, and the words "in the meantime", though not strictly true as a matter of English, must plainly mean "before the date of Sept. 28, 1951." This being a question of fact, therefore, I am not disposed to decide this appeal on the ground that that finding of fact ought to be disturbed.

Difficult as, I think, the question I have just discussed to be, there is another submission made by the defendant that I find more difficult still. The claim made by the plaintiff in this case must be "as of right", as would appear from s. 5 of the Act, and the observations of PARKE, B., in *Bright v. Walker* (8). This would seem to involve some knowledge, or means of knowledge, on the part of the servient owner against whom the right is claimed, and reference may be made to *Dalton v. Angus* (3) and *Union Lighterage Co. v. London Graving Dock Co.* (5). The learned judge found that during the whole of the period in which the plaintiff had claimed to exercise his rights of pasturage on the land in question there had been a sitting tenant at the defendant's farm. In 1946 one William Roberts was the tenant, and he gave evidence that he drove away the plaintiff's sheep whenever he found them there, but the judge found that the plaintiff was in ignorance of this. The two findings made by the learned judge are set out in his judgment, and they are these:

"On this point I find: (i) that it was common knowledge that the plaintiff was grazing his cattle on these pieces of land; (ii) that even though the owner of the servient tenement might not have been able to take action in the courts he could have acted in such a way as to show that he did not acquiesce in what the plaintiff was doing."

I think there can be no doubt that the question of knowledge in the servient owner is a question of fact for the judge. There is equally no doubt that in this case the learned judge has purported to find that the servient owner had knowledge, or the means of knowledge, by his use of the phrase: "It was common knowledge that the plaintiff was grazing his cattle on these pieces of land." He also purports to find that the owner of the servient tenement, having the requisite knowledge, could have acted in such a way as to show that he did not acquiesce in what the plaintiff was doing. I think the important question here is: Was there any evidence before the learned judge on which he could so find? Is it shown that the common knowledge included the servient owner during the relevant period? The evidence given in the case is before us, and it is difficult to say that there is any evidence that the common knowledge spoken of by the learned judge extended to the servient owner. Nothing is said as to the steps the servient owner could have taken, and these steps would depend on what was the state of the knowledge brought home to the servient owner. If the proof of the knowledge of the servient owner lies on the plaintiff, I am of opinion that he has failed to discharge it, and I see no evidence on which the learned judge could find that the common knowledge extended to the servient owner, or any evidence that the servient owner had the means of knowledge. It is on this ground that I would allow the appeal, for the claim "as of right" cannot in these circumstances be established. Having formed this conclusion, I do not feel it necessary to deal with the claim at common law for the same objection, in my opinion, would be fatal.

MORRIS, L.J.: The first point raised by the defendant is that there was a fatal interruption of the enjoyment by the plaintiff of his alleged right of pasturage. In the notice of appeal this contention is formulated on the basis that there was no evidence that the plaintiff "had asserted his alleged rights or protested at the interruption of his alleged rights of pasturage" between Aug. 1, 1950, and Sept. 28, 1951, and "that accordingly the learned judge was wrong in law in holding that the plaintiff did not acquiesce in, or submit to, such interruption which had continued for more than one year." This language raises the question as to the meaning of an "assertion of rights or a protest". But the

real question is not whether there was an assertion of rights or a protest during some period, but whether there was in this case a submission or an acquiescence. It is provided by the Prescription Act, 1832, that no act or other matter is deemed to be an interruption within the meaning of the Act unless submitted to, or acquiesced in, for one year after the party interrupted has notice of the interruption and of the person making it or authorising it to be made.

A There is no doubt that there was an actual interruption for more than a year before Sept. 28, 1951. The question to be determined is whether there was acquiescence in such interruption or submission to it lasting for one year. This is, in my judgment, a question of fact. If a case were being tried with a jury, it would be a question for the jury to determine: see *Bennison v. Cartwright* (1)). In *Glover v. Coleman* (1) GROVE, J., said (L.R. 10 C.P. 121):

B “Then we come to the words ‘submitted to or acquiesced in’. Now, the statute does not prescribe any particular mode of resistance. The statute does not, indeed, use the word ‘resistance’, although Mr. Bosanquet in the course of his argument used it as opposed to submission or acquiescence. There being, then, nothing in the statute to guide us as to what shall be the nature of the submission or acquiescence, that must necessarily be a question of fact,—has the party interrupted, by his words or conduct, submitted to or acquiesced in the interruption, or has he resisted or protested against it? There are, no doubt, various modes of resistance or of expressing dissatisfaction.”

C The plaintiff noticed in May, 1950, that the defendant was starting to put up the fence. He consulted the National Farmers’ Union, and with the secretary of that body saw the defendant on the site and told him that they objected to the fence. Then solicitors were consulted, and on July 6, 1950, the letter was written to which my Lord has referred. The reply to that letter was dated July 10. Certain letters then passed, from which I will only read brief extracts. On July 27 the defendant’s solicitors wrote that, unless sheep were, within the next seven days, taken away, there would be the necessity to move them off the land. Then the letter goes on to say:

“He also complains that your client, Mr. Davies, has been seen crossing Hafod Ysbytty lands in the company of another man, presumably a surveyor . . .”

Then on July 28 the plaintiff’s solicitors wrote:

F “. . . The position our clients take up is that from time immemorial there have been certain grazing rights and that they have done nothing except in exercise of those rights . . .”

Then there is a reference to the surveyor. In the letter of July 31 is this sentence:

G “. . . We have, in our previous letter, made it perfectly plain that your client’s claims to grazing rights are strongly denied by our client.”

In the letter of Aug. 1 is this sentence:

H “We have today heard further from our clients, and we understand that your client’s acts of fencing are interfering with our client’s rights of pasture, and we have instructed our client to take such steps as he thinks necessary to prevent further infringement . . .”

There followed the letter of Aug. 2 to which my Lord has already referred.

The fence was completed on Aug. 9. Could it be said that the plaintiff had submitted to, or acquiesced in, the existence of the fence by that date? Having regard to the events that had happened and to the correspondence, I would have thought, had it been for me to decide this question of fact, that the answer would be in the negative. The parties were breathing fury on either side of a newly erected fence. Could it be said that the challenging protests of the plaintiff

must, as the August days passed, be deemed to have signified nothing, and that his former claims and assertions should be regarded as supplanted by submission and acquiescence? As time went by it might well be that silence and inaction could be interpreted as submission or acquiescence, but the date when submission or acquiescence begins must be determined as a question of fact, having regard to all the circumstances. Had there been a beginning by Jan. 1, 1951, or by Dec. 1, 1950, or by Nov. 1, 1950? These are all questions of fact. Unless it is held that there was submission or acquiescence by Sept. 28, 1950, there would not be a period of one year. The learned judge referred to *Glover v. Coleman* (1) and stated:

"On the evidence, I hold that neither of the plaintiffs submitted to nor acquiesced in the interruption."

This was a finding of fact which the learned judge was, in my view, entitled to make, and, accordingly, I consider that the first submission fails.

The second and only remaining effective submission of the defendant was expressed in the notice of appeal in the following words:

"That the learned judge was wrong in law and misdirected himself in holding that the fact that the servient tenement was in the occupation of a tenant throughout the period during which the plaintiff and his predecessors in occupation of the dominant tenement were alleged to have exercised the said alleged rights up to 1941, and from 1946 to 1950, did not prevent the plaintiff from establishing his alleged rights under the Prescription Act."

It is not without significance that the claim as first advanced was that the defendant had wrongfully erected fences on land forming part of the Crown wastes over which it was claimed that the plaintiff had exclusive rights of pasturage. The plaintiff claimed such rights as appurtenant to his ownership and occupation of the farm and lands known as "Tryfal". He claimed that the erection of the fences prevented him from enjoying his rights of pasturage. There was a second plaintiff, Jones [who did not appeal], who was the owner and occupier of a farm and lands known as "Teiliau Mawr". He also claimed that he enjoyed exclusive rights of pasturage over certain other parts of the Crown wastes, and asserted that the defendant had wrongfully erected fences on the part of the Crown wastes over which he had his rights of pasturage. To these claims the defendant made answer that the fences that he had erected were not on the Crown wastes at all, but were on his own land. He said that they were along the boundary of his farm and lands situate at and known as "Hafod Ysbytty"—otherwise known as "Gamallt." The plaintiffs, Davies and Jones, later amended their claims and referred to the rights which they claimed as being "rights of common pasture over lands sometimes described as Crown waste." In their amended claims they set out that their rights were in the alternative claimed "by prescription and/or the Prescription Act, 1832, s. 1, the plaintiffs having enjoyed the said rights as of right and without interruption for sixty years before this action." The evidence showed that the father of the plaintiff, Jones, had been tenant of Hafod Ysbytty for some forty to forty-five years when he died in 1929. At such date Mrs. Casson was the owner. She died while the plaintiff, Jones, was tenant. Mr. Casson, her late husband, had previously been the owner. The plaintiff, Jones, remained as tenant of Hafod Ysbytty after 1929, and in 1941, together with his wife, he became by purchase the owner. In 1944 one Sontag in turn purchased the farm. In 1946 William Roberts became tenant of the farm (but not of the house itself). It was said that he drove away the plaintiff's sheep daily. The learned judge held, however, that the plaintiff was not aware of this. In September, 1949, the defendant purchased Hafod Ysbytty and thereafter occupied it.

As the case proceeded it became quite clear that the defendant had erected his fences on his own land. There is now no dispute as to this. The contest became

one whether the plaintiffs could prove that they had acquired prescriptive rights over the defendant's land, and the trial was conducted, as the learned judge recites in his judgment, on the basis that the issue was whether the plaintiffs proved a user for sixty years which enabled them to rely on the Prescription Act. The claim of the plaintiff, Jones, failed for reasons which it is not necessary now to state, and no appeal by him is before us. The plaintiff, Davies, seeks to hold his judgment by relying on prescription at common law as well as under the statute.

In his careful judgment the learned judge records his finding that Davies and his predecessors at Tryfal exercised rights of pasturage for over sixty years, but he also finds that during the whole period there was a sitting tenant at Hafod Ysbytty. In fact, from 1929 to 1941 the sitting tenant was the co-plaintiff Jones, and for some forty to forty-five years before 1929 the tenant was the father of Jones. Before Davies could establish a claim based on prescription the evidence would have to show that the owner of the servient tenement had knowledge of what was happening, or as an ordinary owner must be taken to have had reasonable opportunity of knowing, and that, having power to prevent it, he did not intervene: see the opinion of FRY, J., in *Dalton v. Angus* (3). In *Sturges v. Bridgman* (9) THESIGER, L.J., said (11 Ch.D. 863):

"Consent or acquiescence of the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, *nee vi nec clam nec precario*; for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavours to interrupt, or which he temporarily licenses. It is a mere extension of the same notion, or rather it is a principle into which by strict analysis it may be resolved, to hold, that an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence."

The learned judge found that it was common knowledge that the plaintiffs were grazing their cattle on the pieces of land in question. But this invites the inquiry—common knowledge among whom? Local hill farmers might well be able to identify which sheep and whose sheep were on particular land at any particular time, but I do not consider that the evidence supported the view that the owner of the land, who lived some miles away, was to be included within the group of those who shared this common knowledge. The learned judge further held that

"even though the owner of the servient tenement might not have been able to take action in the courts, he could have acted in such a way as to show that he did not acquiesce in what the plaintiffs were doing."

With every respect, I do not find myself able to share this view. If the owner of Hafod Ysbytty had for some reason known that there were certain sheep belonging to the owner of Tryfal on the land in the occupation of the tenant of Hafod Ysbytty it does not follow that he would have known that any right was being asserted, or that he would necessarily think that it was other than as a result of some arrangement with the tenant.

I do not consider that the evidence supported a finding of knowledge in the owner of Hafod Ysbytty or showed that there was any reason why, in the ordinary course of things, he should have known. On this part of the case, therefore, I feel impelled to the conclusion that the claim of the plaintiff, Davies, was not made out, and in consequence that the appeal succeeds.

Appeal allowed.

Solicitors: *Hall Clark, Goldhawk and Jutsum & Co.*, agents for *Gwynndaf Williams & Roberts*, Portmadoc (for the defendant); *Jaques & Co.*, agents for *David Thomas, Williamson & Co.*, Llanrwst (for the plaintiff).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

PRACTICE NOTE.**COLLYER v. DRING.**

[QUEEN'S BENCH DIVISION (Slade and Havers, JJ.), November 4, 1952.]

Practice—Case stated—Appeal from quarter sessions—Extension of time for appeal—“Special circumstances”—Solicitor's inadvertence or negligence—R.S.C., Ord. 59, r. 30 (2).

MOTION for extension of time.

On Jan. 25, 1952, the applicant was convicted by a court of summary jurisdiction at Epping, Essex, of having driven a car on a road without due care and attention and without a licence, contrary to s. 12 (1) and s. 4 (1) of the Road Traffic Act, 1930, and of having used a car on a road without a policy of insurance or security in respect of third party risks in relation to such use, contrary to s. 35 (1) of the Act. On Mar. 13, 1952, her appeal against the three convictions was dismissed by Essex Quarter Sessions sitting at Chelmsford, who stated a Case for the opinion of the High Court.

By R.S.C., Ord. 59, r. 30:

“(1) An appeal from a court of quarter sessions by way of Case Stated, shall not be entered for hearing unless and until—(a) the Case and a copy of the judgment, order or decision in respect of which the Case has been stated and, if that judgment, order or decision was given or made on an appeal to quarter sessions, a copy of the judgment, order or decision appealed from, have been lodged in the Crown Office and Associates' Department; and (b) the appellant has, for the purpose of securing the prosecution of the appeal, entered into a recognisance in the sum of £50 with sufficient sureties before the court of quarter sessions, or paid the said sum into the High Court, except where the parties by consent in writing dispense with such recognisance or payment . . . (2) No such appeal as aforesaid shall be entered for hearing after the expiration of six months from the date of the judgment, order or decision in respect of which the Case was stated, except by leave of the Divisional Court on special circumstances being shown . . .”

On Sept. 13, 1952, an application to enter the appeal for hearing was made to the Crown Office, but it was refused because of the absence of the recognisance. On Sept. 18 a further application, which was accompanied by the recognisance, was refused as being made “after the expiration of six months from the date of the judgment”, and, therefore, out of time under R.S.C., Ord. 59, r. 30 (2). The applicant sought the leave of the court to enter the appeal out of time on the ground that her solicitor's inadvertence constituted “special circumstances” for the granting of such leave within the meaning of the rule.

D. J. L. Fitzgerald for the applicant.

Waddilove for the respondent.

SLADE, J. : The question is whether a lay client in a criminal cause or matter must suffer on account of her ignorance of purely procedural matters through the inadvertence or negligence of a professional man, or whether such inadvertence or negligence can amount to “special circumstances” conferring a discretion on the court to grant an extension of time under R.S.C., Ord. 59, r. 30 (2). The court will deal with the application on the basis that such inadvertence or negligence may constitute “special circumstances” and on the facts of the case it holds that such “special circumstances” have been shown. That must not be taken to mean that an extension of time will always be granted in case of inadvertence or negligence of professional clients.

HAVERS, J. : I agree.

Application granted.

Solicitors: *J. H. Fellowes* (for the applicant); *A. Morgan*, prosecuting solicitor, Essex County Council (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

PRACTICE NOTE.

ORMSBY v. ORMSBY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Davies, J.), October 13, 1952.]

- A *Justices—Husband and wife—Appeal to High Court—Failure of justices to supply to High Court statement of reasons for their decision—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 71 (3).*

Rule 71 (3) of the Matrimonial Causes Rules, 1950, provides that, in the event of an appeal in a case under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949: "The appeal shall be entered by lodging at the Divorce Registry two copies of the notice of motion. There shall be lodged at the same time two certified copies of the summons and of the order appealed against, two copies of the justices' clerk's notes of the evidence and two copies of the reasons of the justices for their decision".

- B A failure by the justices and their clerk to provide a complete and intelligible note of the proceedings and a statement of the reasons for the justices' decision is a dereliction of duty on their part.

- C AS TO NOTES OF PROCEEDINGS BEFORE MAGISTRATES, see HALSBURY, Hailsham Edn., Vol. 10, p. 850, para. 1359; and FOR CASES, see DIGEST, Replacement Vol. 27, p. 734, Nos. 7014-7023, and Digest Supp.

FOR THE MATRIMONIAL CAUSES RULES, 1950, r. 71 (3), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 10, p. 231.

- D Case referred to:

(1) *Sullivan v. Sullivan*, [1947] P. 50; 111 J.P. 27; 27 Digest, Replacement, 734, 7023.

APPEAL by the wife against the decision of Liverpool city justices on Jan. 16, 1952, whereby they reduced an award of maintenance payable to her under an order of Nov. 10, 1943.

- E The wife applied to the justices' clerk for the reasons for the justices' decision and received a reply which read:

"The magistrates did not give any reasons in writing for their decision in the case against your husband, and I am unable, therefore, to supply any 'reasons' for the purpose of your appeal."

- F The husband likewise made an application and received a similar reply.

The wife appeared in person.

Pain for the husband.

- G LORD MERRIMAN, P., in the course of his judgment, said: It is not a question whether the justices, either in writing or orally, gave their reasons at the time of the decision. What we are entitled to have—and we have repeatedly said that it is the duty of the justices' clerk to supply us with it—is a statement of the justices' reasons, which is a very different thing. Rule 71 (3) of the Matrimonial Causes Rules, 1950, is quite explicit on the subject. It is the duty of the appellant to provide

- H "two copies of the justices' clerk's notes of the evidence and two copies of the reasons of the justices for their decision."

The rule does not say the reasons which the justices gave in open court—the reasons which they recorded in writing at the time. It says: "the reasons . . . for their decision." I am surprised that it is necessary to tell the clerk to the Liverpool city justices that that is his duty, and to remind him that it is his duty to provide an intelligible note of the proceedings and complete notes of the proceedings and of the orders made. In the circumstances it is

impossible for us to deal with this matter, and, lamentable as it is to have to send the case back to the justices, we have no alternative.

DAVIES, J., said that he thought it right to read once more the well-known passage from the judgment of LORD MERRIMAN, P., in *Sullivan v. Sullivan* (1), where he said ([1947] P. 51):

"I am about to make some general observations, and I hope they will receive sufficient publicity to ensure that they reach justices' clerks throughout the country. This is the third time during this batch of appeals that words to the above effect have been employed by a justices' clerk in response to the demand for the reasons for the justices' decision. For very many years past this court has insisted, in reported cases, and over and over again in unreported cases, that it is the duty of justices not merely to take a proper note of the evidence, but also, in the event of an appeal, to give this court a statement of the reasons for their decision. Justices are not, like judges of the High Court, obliged to give their reasons at the time of the decision. They are entitled to make the order, or decline to make the order, without giving reasons, but they are bound to give this court, in the event of an appeal, a proper and sufficient statement of the reasons upon which their decision was based. There should never be any difficulty whatever in doing so, for whether the court is or is not bound openly to express the reasons for its decision in court; whether it be the highest court in the land or the humblest and whatever its jurisdiction may be, no court can give a proper decision in any case without formulating to itself at the time of the decision the reasons upon which such decision is based. It is, therefore, no answer—(indeed, it is a defiance of this court)—for justices' clerks to state that no reasons were given in court for the decisions of the justices, and I wish to say quite plainly that if this court is treated in this way again after this warning, it may be necessary for us to consider what powers we have to ensure that the parties are not put to unnecessary expense owing to dereliction of duty on the part of justices' clerks. I have spoken plainly, and I intended to speak plainly, and I hope that on this occasion some notice will be taken of what we are saying. This case is a glaring example of the inconvenience which arises from this dereliction of duty. We are not going to decide the case; we are going to send it back for hearing by some tribunal which will carry out its duties properly, and, therefore, I propose to say as little as possible about the facts . . ."

Appeal allowed.

Solicitors: *Helder, Roberts & Co.*, agents for *John A. Behn, Twyford & Reece*, Liverpool (for the husband).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

BROOM v. MORGAN.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), November 12, 17, 1952.]

Master and Servant—Liability of master—Liability to third person for acts of servant—Act within course of employment—Injury to servant's wife due to servant's negligence.

A Where a servant, while acting in the scope of his employment, negligently harms another, the fact that he is in such a relation to the injured person that suit cannot be brought against him does not relieve the master from liability.

The plaintiff and her husband were employed by the defendant to manage a beer and wine house. The plaintiff was injured through the negligence of her husband in the course of his employment. In an action by her against the defendant for damages in respect of the injury,

B HELD: an employer was liable to a person injured by the negligence of his servant notwithstanding any legal immunity of the servant vis-à-vis the injured party, and, therefore, the defendant was liable to the plaintiff although the plaintiff could not have sued her husband for the injury.

C AS TO LIABILITY OF MASTER TO THIRD PERSONS FOR TORT COMMITTED BY SERVANT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 221-229, paras. 397-408; and FOR CASES, see DIGEST, Vol. 34, pp. 125, 126, Nos. 964-972.

Cases referred to:

(1) *Phillips v. Barnet*, (1876), 1 Q.B.D. 436; 45 L.J.Q.B. 277; 34 L.T. 177; 40 J.P. 564; 27 Digest, Replacement, 261, 2110.

D (2) *Smith v. Moss*, [1940] 1 All E.R. 469; [1940] 1 K.B. 424; 109 L.J.K.B. 271; 162 L.T. 267; 27 Digest, Replacement, 262, 2118.

(3) *Hern v. Nichols*, (1701), 1 Salk. 289 (91 E.R. 256); 1 Holt, K.B. 462 (90 E.R. 1154); 1 Digest 588, 2247.

(4) *Wayland's Case*, (1706), 3 Salk. 234; 91 E.R. 797; 1 Digest 582, 2215.

E (5) *Bartonshill Coal Co. v. Reid*, (1858), 3 Macq. 266; 31 L.T.O.S. 255; 22 J.P. 560; 34 Digest 126, 971.

(6) *Schubert v. August Schubert Wagon Co.*, (1928), 164 N.E. 42; 249 N.Y. 253.

ACTION for damages for negligence.

F The plaintiff, Phyllis Muriel Broom, claimed damages in respect of personal injuries arising out of the negligence of her husband in the course of his employment by the defendant, Lilian Alice Morgan, or, alternatively, out of the negligence of the defendant in failing to provide a safe entrance to the place in which the plaintiff was employed by the defendant. The defendant denied that she had been guilty of negligence, and contended that, as the plaintiff could not have sued her husband for his negligent act, she could not bring an action in respect thereof against the defendant.

G *Marshall, Q.C.*, and *F. G. Paterson* for the plaintiff.
John Thompson for the defendant.

Cur. adv. vult.

H Nov. 17. LORD GODDARD, C.J., read the following judgment. The defendant is the tenant of a beer and wine house known as the "Bird in Hand", West End Lane, and by an agreement in writing dated Jan. 2, 1950, she employed the plaintiff and her husband to manage the house for a period of three months from Jan. 20. By this agreement, the husband was made the manager, and was personally to reside on the premises and to manage and conduct the business thereof to the best possible advantage of the defendant, and for such purpose both the plaintiff and her husband were to devote the whole of their time and attention to the said business. There was no other specific reference to the plaintiff in the agreement except that it was provided that the defendant

should pay to the husband for his services and for the plaintiff's services a salary of £7 a week, and in addition thereto the plaintiff and her husband should live rent free, should be boarded at the expense of the business in the usual way, and should receive heat and light free of charge. The plaintiff and her husband duly entered on this service, the plaintiff concerning herself for the best part of the day with domestic duties and the preparation of light refreshments, serving in the bar only in the evening. To get behind the bar counter from the other part of the premises there was a low door with a flap over it, and immediately inside that door there was a trap-door in the floor which covered a shaft or space up which a lift could rise from the cellar, this lift being used for the purpose of bringing up bottled beer and so forth from the cellar to the bar. A

On Feb. 4, 1950, just a fortnight after the plaintiff and her husband had entered on their employment, I think between 10 and 10.30 a.m., the plaintiff had occasion to go behind the bar, and she passed through the small door for that purpose. The trap-door had been left open. Her husband seems to have been somewhere near, but no warning was given to the plaintiff and no step had been taken to protect the lift shaft. She fell down it and sustained injuries, and I am satisfied that, if liability is established, she is entitled to a substantial sum by way of damages. The special damage claimed was £17 5s., and on the evidence I had before me, if I award her another £350, that would be a fair sum. B C

The negligence alleged was twofold. It was said that the husband was negligent in leaving the trap-door open and unprotected and giving the plaintiff no warning, and, secondly, it was said that the defendant herself was negligent in failing to provide a safe entrance to the place in which the plaintiff had to work. This last allegation was not pressed, and in any case I do not think that the plaintiff makes out any cause of action on that ground. She had been on the premises for a fortnight and was aware of the trap-door which was in daily use, and the premises were perfectly safe provided that someone did not negligently leave the trap-door open. On the other hand, the defendant appeared to accept the position that the husband was negligent, as I think he was. She called no evidence, and contended that, as the negligent act was that of a husband towards his wife, for which she could not have sued him, the defendant could not be made vicariously liable. Putting it compendiously, it was submitted for the defendant that the doctrine respondeat superior could only apply if a cause of action existed against the person for whose action it was sought to make the employer liable. Neither before nor after the Married Women's Property Act, 1882, could a wife sue her husband for tort committed during the marriage. This was not because of the procedural requirement that before the Act a married woman had, for conformity as it was called, to join her husband with her when suing, but because the common law regarded husband and wife as one person (see *Phillips v. Barnett* (1)), and so neither spouse could sue the other. Section 12 of the Act allows a wife to sue her husband for the protection of her separate property, though no similar right was given to a husband. Subject to this exception, the Act preserved the immunity or disability, whichever one likes to call it. D E F G

There is a curious lack of authority in English law on the question that now arises, and I hope that some day the matter will receive consideration in a court of appeal. The only authority directly in point is a decision of CHARLES, J., in *Smith v. Moss* (2). That was a case in which the plaintiff was riding in a motor car, owned by her mother-in-law, which was being driven by her husband. The husband was driving the car on behalf of his mother, who was also riding in it, and the damage arose owing to his negligence. The learned judge held that at the time of the accident the husband was driving in the capacity of agent for his mother, and that the plaintiff was not deprived of her right to recover damages from the mother as the owner of the car because H

she was the wife of the driver. The learned judge took as an illustration the case which might arise where a woman, married to a chauffeur who worked for a garage, hired a car, and the garage proprietor instructed the husband to drive it. As he put it, the husband would have two capacities, that of husband and that of agent or servant of the garage, and he held that vicarious liability was attached to the employer of the husband. That case did not go to the Court of Appeal, but, as I have said, it is, apparently, the only case in which this point has directly arisen. It was criticised by the learned author in SALMOND ON THE LAW OF TORTS, 10th ed., p. 66, in a passage which reads:

"But it is submitted that by the use of the ambiguous word 'agent' CHARLES, J., obscured the issue. If the husband was a servant, which appears to have been the case, he himself had committed no tort, since it was his wife who was injured. How then could his mistress be vicariously liable for it?"

Now the doctrine of vicarious liability has become firmly established in English law although, as SIR WILLIAM HOLDSWORTH has pointed out (A HISTORY OF ENGLISH LAW, vol. 8, pp. 472-482), there is some confusion in the authorities as to the true reason for the rule. In his opinion, the reason is public policy, and he supports his view by citing (pp. 475, 477) two decisions of HOLT, C.J., in *Hern v. Nichols* (3), and *Wayland's Case* (4). In the former case HOLT, C.J., said (1 Salk. 289):

"... somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger."

There is a passage in *Wayland's Case* (4) (3 Salk. 234) to the same effect. He was there, no doubt, dealing with the tort of deceit, but his words are, of course, applicable to any other wrong. In *Bartonshill Coal Co. v. Reid* (5) LORD CRANWORTH said (3 Macq. 283):

"In all these cases . . . the person injured has a right to treat the wrongful or careless act as the act of the master: Qui facit per alium facit per se. If the master himself had driven his carriage improperly . . . he would have been directly responsible, and the law does not permit him to escape liability because the act complained of was not done with his own hand. He is considered as bound to guarantee third persons against all hurt arising from the carelessness of himself or of those acting under his orders in the course of his business."

In his ESSAYS ON JURISPRUDENCE AND ETHICS, p. 128 (cited in SIR WILLIAM HOLDSWORTH'S A HISTORY OF ENGLISH LAW, vol. 8, p. 479), SIR FREDERICK POLLOCK puts it thus:

"The liability of an employer to the public for injuries caused by the acts and defaults of his servants is analogous to the duties imposed with various degrees of stringency on the owners of things which are or may be sources of danger to others."

These decisions seem to me clearly to show that, although it is common to speak of the master's liability as vicarious, it is none the less regarded as the liability of a principal. The master is just as much liable as though he commits the tort himself because the servant's act is his act.

At first sight the argument that the master can only be liable for an act of his servant for which the latter would himself be liable has a certain attraction, and, indeed, this view found favour at one time in the American courts. And as there is no other authority but *Smith v. Moss* (2) in England, I have done my best to find what view the American lawyers and courts have taken on this subject. I desire to acknowledge my indebtedness to the LAW QUARTERLY REVIEW for assistance in this research. There are authorities

which say that, in view of the master's right to look to the servant whose acts have made him liable, such a suit would seem to be an indirect action against the husband in favour of a wife who was barred from the direct action, and I suppose that in this case, if the defendant is liable, she will be able to bring an action (if it is worth her while) against the husband whose negligence has caused her to pay damages to his wife. But it appears that since 1928 the American cases have gone a different way, beginning with *Schubert v. August Schubert Wagon Co.* (6). This was a decision of CARDOZO, C.J., in the New York Court of Appeals, and I need not stress his eminence as a common law lawyer, or the respect with which English judges regard his judgments. In that case he took, I think, exactly the same view as did CHARLES, J., in *Smith v. Moss* (2). He said (164 N.E. 43):

A

"A trespass, negligent or wilful, upon the person of a wife, does not cease to be an unlawful act, though the law exempts the husband from liability for the damage. Others may not hide behind the skirts of his immunity . . . As well might one argue that an employer, commanding a husband to commit a battery on a wife, might justify the command by the victim's disability."

B

In the AMERICAN RESTATEMENT, s. 880, I find the matter put thus:

C

"Where two persons would otherwise be liable for a harm, one of them is not relieved from liability by the fact that the other has an absolute privilege to act or an immunity from liability to the person harmed . . . Where a servant while acting in the scope of his employment negligently harms another, the fact that he is in such relation to the injured person that suit cannot be brought against him does not relieve the master from liability."

D

The American view seems to me, if I may say so, to be eminently in accordance with good sense, and in modern times I do not think that the consequences of the doctrine of husband and wife being one person in law should be carried any further than the authorities require, though, had the doctrine of common employment not been abolished, I should not have felt reluctant to apply it in this case. For these reasons, I am of opinion that the plaintiff has a cause of action, and, accordingly, I enter judgment for her for £367 5s.

E

Judgment for the plaintiff.

Solicitors: *R. I. Lewis & Co.* (for the plaintiff); *Gascoin & Co.* (for the defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re BUZZACOTT (deceased). MUNDAY AND ANOTHER v. KING'S COLLEGE HOSPITAL AND OTHERS.

[CHANCERY DIVISION (Wynn-Parry, J.), November 13, 14, 19, 1952.]

National Health Service—Hospital—Teaching hospital—Gift of share of residue—Gift to lapse if the funds should have come under “government control”
—National Health Service Act, 1946 (c. 81), s. 7 (1) (2).

A By his will, dated Sept. 27, 1948, a testator, who died on July 23, 1949, devised and bequeathed all his real and personal property to his trustees on trust for sale and conversion, and, after giving the usual directions for payment of his debts and funeral and testamentary expenses, directed that his trustees should hold the residue of such moneys (his “residuary trust fund”) as to one equal fourth part thereof in trust to divide the
 B same equally between four institutions including the Royal Eye Hospital and the Royal Cancer Hospital “provided that if any of the funds of the above mentioned institutions shall have come under government control at the date of my death then the share payable to such institutions shall not be paid to them and the share or shares which thereby lapse shall be divided equally between the remaining institutions”. Each of the
 C two hospitals was designated part of a teaching hospital by virtue of the National Health Service (Designation of Teaching Hospitals (No. 2)) Order, 1948 (S.I., 1948, No. 979, as amended by S.I., 1948, No. 1920), and on July 5, 1948, under the National Health Service Act, 1946, s. 7 (1) and s. 7 (2), all endowments of the hospitals vested free of any trust in the appropriate board of governors constituted under the Act.

D HELD: on the true construction of the Act of 1946, a teaching hospital was under the overriding control of the Minister of Health by virtue of (a) the vesting in him (by s. 6) of the buildings, equipment, furniture and movable property of the hospital free of any trust, (b) the control by the Minister of the boards of governors by reason of his power (under s. 12 (3))
 E to give directions to and make regulations affecting them, and the facts that (under s. 12 (3)) they exercised their functions on his behalf, were to a large extent appointed by him (under sched. III, Part II), and could be removed by him (under s. 57); and, therefore, the funds of the hospitals taken over by the boards of governors were, within the meaning of the will, under government control, and the gifts to the two hospitals did not
 F take effect.

FOR THE NATIONAL HEALTH SERVICE ACT, 1946, see HALSBURY'S STATUTES, Second Edn., Vol. 15, p. 333 et seq.

ADJOURNED SUMMONS to determine, inter alia, whether at the date of death of the testator, Frederick William Buzzacott, on July 23, 1949, any funds either of the Royal Eye Hospital or the Royal Cancer Hospital had “come
 G under government control” within the meaning of that expression in cl. 8 (c) of the testator's will.

Droop for the plaintiffs, the executors and trustees of the deceased's will.

H. E. Francis for the first and second defendants, the boards of governors of King's College Hospital and the Royal Cancer Hospital.

E. I. Goulding for the third, fourth, fifth and sixth defendants, other
 H institutions claiming to be beneficially interested under the deceased's will.

N. S. S. Warren for the Attorney-General.

WYNN-PARRY, J.: By cl. 8 of his will, the testator constitutes what he calls “my residuary fund”, and, having dealt with three equal fourth parts thereof, he proceeds in para. (c) as follows:

“My trustees shall hold the remaining one equal fourth part of my residuary fund in trust to divide the same equally between the following

institutions namely Royal Eye Hospital Waterloo Road London Benevolent Fund Incorporated Accountants The Royal Cancer Hospital Fulham Road London S.W.3. British Empire Cancer Campaign of 11 Grosvenor Crescent Hyde Park Corner London S.W.1. St. Dunstan's whose headquarters are in Regents Park London and Toc H. Provided that if any of the funds of the above mentioned institutions shall have come under government control at the date of my death then the share payable to such institutions shall not be paid to them and the share or shares which thereby lapse shall be divided equally between the remaining institutions And I hereby declare that the share of my residuary estate bequeathed by me to any institution shall be for the general purposes of such institution and such institution shall have power to apply capital as income."

The phrase which gives rise to the difficulty is that which occurs in the opening part of the proviso—"Provided that if any of the funds of the above mentioned institutions shall have come under government control".

It is to be observed at the outset that the condition is not the more simple condition of "any of the above mentioned institutions coming under government control", but that it is limited to the case of any of their funds coming under such control. The phrase "government control" clearly is in no sense a term of art, and the first question to consider is:—What is the scope of that phrase? In my view, looking at the relevant part of the will to discover such context as one can, the testator here is not using that phrase in any limited sense, so that I reject the suggestion that was put forward by counsel for the first and second defendants in argument that any help could be obtained by consulting the definition of the word "government" in any of the dictionaries. "Government control", as used in this will, appears to me to be synonymous with State control, and what the testator, in my view, was envisaging was the nationalisation of any of the institutions and that nationalisation being carried out in such a way as to extend to their funds.

Both the institutions with which I am concerned, viz., the Royal Eye Hospital and the Royal Cancer Hospital, have, as a result of the coming into force of the National Health Service Act, 1946, been absorbed so as in each case to form a part of what in the Act is called a teaching hospital. The first two defendants respectively represent the teaching hospital into which these two hospitals respectively have been absorbed. It is, therefore, necessary to see whether, within the meaning which I have attached to the phrase "government control", the coming into force of the National Health Service Act, 1946, has brought the funds of those hospitals or either of them under government control. The primary object of the National Health Service Act, 1946, is to be discovered in s. 1 (1), which provides:

"It shall be the duty of the Minister of Health (hereafter in this Act referred to as 'the Minister') to promote the establishment in England and Wales of a comprehensive health service designed to secure improvement in the physical and mental health of the people of England and Wales and the prevention, diagnosis and treatment of illness, and for that purpose to provide or secure the effective provision of services in accordance with the following provisions of this Act."

In s. 3, which is the first section in Part II, a part of the Act which is headed "Hospital and Specialist Services", with the sub-heading "Provision of Services by Minister", it is provided that:

"(1) As from the appointed day, it shall be the duty of the Minister to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements, accommodation and services of the following descriptions, that is to say:—(a) hospital accommodation; (b) medical, nursing and other services required at or for the purposes of hospitals; (c) the services of specialists . . ."

Under the next sub-heading in Part II, "Transfer of hospitals to the Minister", there is first s. 6 which provides, to put it shortly, for the transfer to and vesting in the Minister of the buildings of the hospitals together with their equipment, furniture and other movable property. There is expressly excluded any endowment within the meaning of s. 7 to which I shall come in a moment. By s. 6 (4) it is provided:

A "All property transferred to the Minister under this section shall vest in him free of any trust existing immediately before the appointed day, and the Minister may use any such property for the purpose of any of his functions under this Act, but shall so far as practicable secure that the objects for which any such property was used immediately before the appointed day are not prejudiced by the provisions of this section."

B That latter phrase is clearly a flexible phrase and is designed to leave the ultimate decision to the Minister. Section 7 (1) deals with a hospital which is designated as a teaching hospital and provides:

C "Where any voluntary hospital to which the last foregoing section applies is, before the appointed day, designated by the Minister under this Part of this Act as a teaching hospital or is one of a group of hospitals so designated, all endowments of the hospital held immediately before the appointed day shall on that day, by virtue of this Act, be transferred to and vest in the board of governors constituted under the following provisions of this Part of this Act for the teaching hospital."

By s. 7 (2) it is provided that:

D "All such endowments shall vest in the board free of any trust existing immediately before the appointed day and shall be held by the board on trust for such purposes relating to hospital services or to the functions of the board under this Part of this Act with respect to research as the board think fit, and the board may dispose of any property comprised in those endowments and hold the proceeds thereof on trust for any
E of the said purposes."

It is to be observed that, first, any existing trust affecting the endowment fund of the hospital is to cease to operate, and, although the board is to hold the endowment fund which by sub-s. (1) is vested in it and not in the Minister, it is to hold that endowment fund on trust for hospital purposes, i.e., it is to hold the fund on trusts which will when carried out give effect to the main
F purpose of the Act.

In contradistinction to the endowments of a teaching hospital, the endowments of a non-teaching hospital are, by sub-s. (4), to be transferred to and vest in the Minister by virtue of the Act on the appointed day free from any trust existing immediately before that day, so that in the case of those endowment funds a more direct control is assumed by the Minister. As regards,
G however, both classes of endowment funds this direction is to be found in s. 7 (7):

H "Every board of governors and hospital management committee shall, in the case of any endowment transferred to them under this section, and the Minister shall, in the case of any endowment transferred to him and the hospital endowments fund under this section, secure, so far as is reasonably practicable, that the objects of the endowment and the observance of any conditions attaching thereto, including in particular conditions intended to preserve the memory of any person or class of persons, are not prejudiced by the provisions of this section."

That is in somewhat similar language to the provision which I have already read in s. 6 (4). The result is, however, that as regards both types of endowment fund it is plain that any particular objects of the endowment and the

observance of any conditions can only be taken into consideration and effect can only be given to them if and so far as they are not inconsistent with the primary objects of the Act, objects which in the earlier section have been referred to as hospital purposes.

I pass now to s. 11 which is under the sub-heading: "Local administration of hospital and specialist services". By sub-s. (1) the Minister is directed by order to constitute boards to be called regional hospital boards. By sub-s. (8) it is provided:

"The Minister may, after consultation with the university concerned, by order designate as a teaching hospital any hospital or group of hospitals which appears to him to provide for any university facilities for undergraduate or post-graduate clinical teaching, and the Minister shall, in the case of any hospital or group so designated, by order constitute, in accordance with Part III of sched. III to this Act, a board of governors for the purpose of exercising functions with respect to the administration of that hospital or group; and any group of hospitals so designated shall, as from the appointed day or the date of the designation (whichever last occurs), be deemed for the purposes of this Act to be a single hospital."

Part III of sched. III deals with the constitution of boards of governors of teaching hospitals, and provides:

"The board of governors of a teaching hospital shall consist of a chairman appointed by the Minister and such number of other members so appointed as the Minister thinks fit, and of those members (a) not more than one-fifth shall be nominated by the university with which the hospital is associated; (b) not more than one-fifth shall be nominated by the regional hospital board for the area in which the hospital is situated; (c) not more than one-fifth shall be nominated by the medical and dental teaching staff of the hospital; and (d) other persons shall be appointed after consultation with such local health authorities and other organisations as appear to the Minister to be concerned, including, in the case of the original members of the board of governors of a teaching hospital designated before the appointed day, the governing body of any voluntary hospital comprised or to be comprised in the teaching hospital."

So far as para. (d) is concerned it is to be observed that there is no express provision as to who is to appoint the other persons, but it is obviously intended that this power shall be vested in the Minister. So it is to be seen from a perusal of this provision that the Minister has a very considerable say in the personnel of a board of governors. That is a provision which one would expect having regard to the provision in this Act that it is the duty of the Minister to see to the constitution of this type of body as is also the position in the case of such bodies as regional hospital boards and hospital management committees.

Section 12 (3) appears to be of considerable importance in the resolution of this question. It provides, so far as material:

"It shall be the duty of the board of governors of every teaching hospital . . . generally to manage and control the hospital on behalf of the Minister . . ."

On that language alone it is, to my mind, clear that the board of governors have to discharge their functions under the control of the Minister and on his behalf, and that that is the right view of that sub-section is, I think, emphasised by the opening words of s. 13. By sub-s. (1) of that section it is provided:

"A regional hospital board and the board of governors of a teaching hospital shall, notwithstanding that they are exercising functions on behalf

of the Minister, and a hospital management committee shall, notwithstanding that they may be exercising functions on behalf of the regional hospital board, be entitled to enforce any rights . . .”

The important part of that sub-section for my purpose is the emphasis that is laid on the fact that a board of governors is regarded as exercising functions on behalf of the Minister. That fits in with the language of s. 12 (3).

- A Under s. 57 (1) there is given to the Minister in proper cases a power to declare, *inter alios*, a board of governors as being in default, with the result, as is provided by s. 57 (2), that all “the members of the body shall forthwith vacate their office and the order” by which the Minister declares that body to be in default shall provide for the appointment “in accordance with the provisions of this Act”—no doubt, that refers to Part III of sched. III—
- B “of new members of the body”. Reliance in argument was placed on a number of other sections, but it appears to me sufficient to test this matter by reference to the case of the endowment fund of what has become a teaching hospital or one of a group constituted a teaching hospital. Those appear to me to be the relevant sections of the Act for such purpose. Their effect, I think, can be summed up in this way. The Act sets out to achieve the object
- C of establishing a comprehensive health service in which hospitals are to play a very important part. The overriding control is given to the Minister of Health because his is made the duty of constituting and administering that service. For the purpose of carrying out the objects of the Act the buildings, equipment, furniture and movable property of all hospitals are vested in the Minister. So far as endowment funds are concerned, a distinction is made as
- D between teaching hospitals and non-teaching hospitals. In the latter case the endowment funds are vested in the Minister; in the former case they are vested in boards of governors. They are, however, even in the case of boards of governors, freed from the trusts which, prior to their transfer to such boards of governors, affected them, and the boards of governors are placed under the duty, through the use of the word “trust”, to give effect to the purposes of
- E the Act, bearing in mind any special trusts or conditions under which the endowment funds were previously held, the giving effect to which would not be inconsistent with the main purposes of the Act. But where there would be any such inconsistency the policy of the Act is to prevail over the wishes of those who established the endowment funds. The board of governors in each case is subject to the Minister. It must act under his directions and
- F observe such regulations as he makes. It exercises its functions on his behalf. He has a very substantial voice in the appointment of the members of those boards of governors and in a proper case he can remove the whole board. In those circumstances it appears to me to be impossible to come to the conclusion that the endowment funds taken over by a board of governors of a teaching hospital can any longer be said to be free funds, and, in my view,
- G they are, within the meaning of this phrase in the will of the testator, now “under government control”.

Order accordingly.

Solicitors: *Carter & Barber*, agents for *Neale, Watts & Phillips*, Brighton (for the plaintiffs); *Raymond-Barker, Nix & Co.* (for the first defendant); *Farrer & Co.* (for the second defendant); *Ranger, Burton & Frost* (for the third, fourth, fifth and sixth defendants); *Treasury Solicitor*.

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

HORABIN *v.* BRITISH OVERSEAS AIRWAYS CORPORATION.

[QUEEN'S BENCH DIVISION (Barry, J., with a jury), October 28, 29, 30, 31, November 3, 4, 5, 6, 1952.]

Carriage by Air—Carrier's liability—Limitation—International carriage—"Wilful misconduct"—Breach of safety rules—Error of judgment—Several acts of carelessness—Carriage by Air Act, 1932 (c. 36), sched. I, art. 25.

Having regard to the grave danger to life with which carriage by air is fraught, "wilful misconduct" precluding a carrier from availing himself of the provisions of sched. I, art. 25, to the Carriage by Air Act, 1932, excluding or limiting his liability for injury to passengers and damage to goods may include even a comparatively minor breach of a safety regulation or a minor lapse from accepted standards of safety. It means misconduct to which the will is a party, and it arises when the person concerned appreciates that he is acting wrongfully, or is wrongfully omitting to act, and yet persists in so acting or omitting to act regardless of the consequences, or acts or omits to act with reckless indifference to what the results may be. The same act may constitute negligence in the absence of any intention to do something wrong, but wilful misconduct if that intention is present. In a civil action the jury are entitled to look at the whole of the facts, to draw an inference from them as to the state of mind and intentions of the person responsible for an act, and to decide on the balance of probabilities whether the act is mere negligence or wilful misconduct, wilful misconduct not being established if there are equal degrees of probability.

Opinion of LORD BIRKENHEAD, L.C., in *Lancaster v. Blackwell Colliery Co., Ltd.* (1919) (89 L.J.K.B. 611), applied.

The mere fact that an act was done contrary to a plan or to instructions, or even to the standards of safe flying, to the knowledge of the person doing it, does not establish wilful misconduct on his part, unless it is shown that he knew that he was doing something contrary to the best interests of the passengers and of his employers or involving them in a greater risk than if he had not done it. A grave error of judgment, particularly one apparent as such in the light of after events, is not wilful misconduct if the person responsible thought he was acting in the best interests of the passengers and of the aircraft.

In determining whether or not there has been wilful misconduct, each act must be considered independently, and, though each act may be looked at in the light of all the evidence, it is not permissible to put together several minor acts of carelessness, none of them amounting to misconduct in itself, and find that together they amount to misconduct. But the number of occasions on which acts which might be acts of carelessness are committed may be some evidence that the state of mind of the person committing them was such as to make them wilful misconduct.

FOR THE CARRIAGE BY AIR ACT, 1932, sched. I, art. 25, see HALSBURY'S STATUTES, Second Edn., Vol. 2, p. 73.

Case referred to:

(1) *Lancaster v. Blackwell Colliery Co., Ltd.*, (1919), 89 L.J.K.B. 609; 122 L.T. 162; 12 B.W.C.C. 400; 34 Digest 324, 2647.

ACTION for damages for personal injuries and loss arising from the alleged wilful misconduct of the defendants.

The plaintiff contracted with the defendants to carry him and his goods and chattels by air from the United Kingdom to Lagos, British West Africa, on the air service which they operated between the United Kingdom and British West Africa. The contract was one for the international carriage of the plaintiff and his goods and chattels by aircraft within the meaning of the Carriage by

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Air Act, 1932, sched. I, art. 1. Under the contract, on Jan. 11, 1947, the plaintiff embarked at London airport on a Dakota aircraft owned and controlled by the defendants and manned and operated by their servants or agents. The aircraft left London airport at 9.50 a.m. for Bordeaux, the first of the intermediate stopping places. The plaintiff alleged that permission to land at Bordeaux was given at approximately 12.58 p.m., but the defendants' servants or agents, instead of landing there or flying to an alternative airfield as designated in the plan for the flight, set course north in the direction of London and at about 1.30 p.m. altered course in the direction of Paris, reaching the vicinity of Le Bourget airfield at approximately 2.40 p.m. The aircraft was diverted to land at Cormeilles airfield, but, instead of landing there, it made course for south-east England. At 4.6 p.m., it crashed at Barley Hill, Stowting, near Ashford, Kent. The plaintiff alleged that he suffered personal injuries, destruction and damage to goods amounting to £79 13s. 9d., and special damage amounting to £4,395 8s. 9d.

The plaintiff contended that the defendants, their servants or agents had failed in their duty safely to carry the plaintiff and his goods and chattels in the aircraft to Lagos, and, further or alternatively, to exercise due care and skill so to carry him. He contended that the accident was caused by the negligence or breach of duty, or by the wilful misconduct or default equivalent to wilful misconduct, of the defendants in that, *inter alia*: (i) the defendants by their servants or agents failed to provide an operational crew sufficiently familiar with the route to be flown on the service and provided a captain, first officer and radio officer who had not flown an aircraft on the route and were not conversant with airfields thereon which might be used for landing; (ii) they failed to provide a captain or first officer with sufficient experience of operational flying on Dakota type aircraft in European winter conditions or were in flying practice on such type aircraft in such conditions; (iii) they failed to provide adequate maps of the areas around Toulouse and Marignane airfields, which were designated as alternative airfields for the landing of the aircraft in emergencies; (iv) they failed to provide airfield plans or navigational or landing aid or meteorological information in respect of the designated alternative airfields which were necessary for the flying of the aircraft, and provided or used a route book and other materials which omitted such plans and information; (v) they failed to provide information relating to facilities in France between Bordeaux and Le Bourget and at Cormeilles which would have enabled the aircraft to navigate or land safely in case of need; (vi) the captain of the aircraft failed to land at Bordeaux when given permission; failed to fly to an alternative airfield where a safe landing could be effected; altered course from direction London to direction Paris without ascertaining that it was safe to do so; failed to communicate with the ground signals organisation in France between Bordeaux and Le Bourget between 1.00 and 2.34 p.m. and failed to communicate with Le Bourget airfield until six minutes before his estimated time of arrival there; failed to land at Cormeilles airfield to which the aircraft had been diverted from Le Bourget; failed to communicate with the regional flying control organisation from 2.24 to 3.31 p.m., or to give any position for the aircraft between 2.15 and 4.2 p.m. to the control organisation under the direction of which the aircraft was flying; and when the aircraft was in the vicinity of Paris made course for south-east England when he knew the fuel supply of the aircraft was sufficient for only twenty minutes' flying. Alternatively, the plaintiff said that the defendants were liable for damages for bodily injury and destruction or loss of or damage to goods sustained by him during carriage by air under the Carriage by Air Act, 1932, s. 1 (1) and sched. I.

The defendants admitted the contract, the departure of the aircraft, and the crash by accident, and admitted liability for damages which they said were

limited to 125,000 francs or £2,937 11s. and £79 13s. 9d. in respect of destruction and damage to goods under the Carriage by Air Act, 1932, s. 1 (1) and sched. I, arts. 17 and 22, which, they said, governed the case. They denied the duty which they were alleged to owe to the plaintiff and the negligence and wilful misconduct alleged.

Beney, Q.C., and N. Lawson for the plaintiff.

Paull, Q.C., and King Anningson for the defendants.

The questions submitted to the jury were: (1) Was an agent or were agents of the defendants guilty of wilful misconduct in the course of their employment in selecting the crew? (2) Was an agent of the defendants or were agents of the defendants in the course of his or their employment guilty of wilful misconduct in the omission from the route book of information as to Toulouse and Marignane airfields? (3) Was an agent or were agents of the defendants in the course of his or their employment guilty of wilful misconduct in the omission of the maps of Toulouse and Marignane? (4) Was the pilot guilty of wilful misconduct in not going to Toulouse or Marignane? (5) Was the pilot guilty of wilful misconduct in deciding to return to London at 1.0 p.m.? (6) Was the pilot guilty of wilful misconduct in diverting towards Le Bourget without ascertaining the weather there or whether he could land there? (7) Was the pilot guilty of wilful misconduct in not informing Gloucester until 2.6 p.m. of his decision to go to Le Bourget? (8) Was the pilot guilty of wilful misconduct in not attempting to land at Cormeilles? (9) Was the pilot guilty of wilful misconduct after leaving the Paris area in attempting to cross the Channel and land in England and not to land at any other French airfield? With in each case the question: If so, was the accident caused by such wilful misconduct?

BARRY, J., in his direction to the jury, said: When an accident takes place on land, if the injured person can prove that that accident was caused by the negligence of some other person, such as the driver of a motor car, he can recover from a court or from a jury full compensation for any injuries or losses which he may sustain. On the other hand, if the injured person cannot establish that the accident was due to the negligence of some other person, then, however serious his injury or however great the damage he suffers, he is without a remedy. When a passenger travels by air, if the journey is what is known as international carriage (and it is admittedly international carriage in this case), his position is entirely different. The rights of passengers and the rights of owners of goods and the liabilities of the carriers, i.e., the company or corporation operating the aircraft, are regulated by the Carriage by Air Act, 1932. In effect that Act makes part of the law of this country the provisions of a convention signed in Warsaw in 1929—or to be more accurate the English translation of those provisions—incorporated in sched. I to the Act, by which we are bound.

Under those provisions the carriers are liable for damage sustained in the event of the death or wounding of a passenger, or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. The carriers are thus liable for any physical injuries which result to a passenger while he is travelling in an aircraft belonging to the carriers. That liability is quite irrespective of whether or not the injuries result from any negligence or any form of misconduct on the part of the carriers or their servants for whose acts they are responsible. Under a further provision the carriers, in spite of that general liability imposed on them, are not liable if they can prove that they and their agents have taken all necessary measures to avoid the damage, or that it was impossible for them to take such measures. That imposes on the carriers the heavy burden of proving that they have taken all necessary measures, or that it was impossible for them to take such measures. The defendants in this case do not attempt to rely on that provision.

A Under another provision, if the injuries are due to some contributory negligence on the part of the passenger, he may be unable to recover in respect of the whole, or indeed any, of the damage which he has sustained. Here no one suggests that the plaintiff was in any way a contributor. He was an innocent person travelling on his lawful business in this machine, and as the result of this accident has sustained very terrible injuries, the results of which have not yet passed away, and may never wholly pass away. The Act then provides that the liability of the carriers to their passenger is not an unlimited liability. The carriers are liable only up to a total sum of 125,000 gold francs. In ordinary circumstances, therefore, a passenger who travels in an aeroplane and sustains injuries during the flight is entitled to damages, but the damages are limited to those 125,000 gold francs, representing about £3,000 sterling. That is the end of the matter so far as the passenger is concerned, unless he can prove that the damage which he suffered was caused by the wilful misconduct of the carriers or their servants or agents. By art. 25 (1) of the convention, as enacted in art. 25 of sched. I to the Carriage by Air Act, 1932:

C “The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court seised of the case, is considered to be equivalent to wilful misconduct.”

You need not trouble about the latter phrase, because in the law of this country a default or an omission to do something can be just as much misconduct as the doing of something which is wrong.

D In the present case the plaintiff says that the defendants cannot rely on the limitation of their liability provided for by this Act because his damage was caused by their wilful misconduct or the wilful misconduct of their servants or their agents. It would evidently be much easier for him to prove that this accident was caused by the negligence of one of the defendants' servants, whether the pilot, or anyone else, than to prove that the accident was due to the wilful misconduct of one of them. But he cannot recover the damages he claims, which are vastly in excess of £3,000, unless he can establish that the accident was caused by the wilful misconduct of someone in the employ of the defendants. I have to explain what is meant in our law by the term wilful misconduct, and it is then for you to decide on the evidence whether any particular act of the pilot or of any member of the ground staff amounts to wilful misconduct.

G Wilful misconduct is misconduct to which the will is a party, and it is wholly different in kind from mere negligence or carelessness, however gross that negligence or carelessness may be. The will must be a party to the misconduct, and not merely a party to the conduct of which complaint is made. As an example, if the pilot of an aircraft knowingly does something which subsequently a jury find amounted to misconduct, that fact alone does not show that he was guilty of wilful misconduct. To establish wilful misconduct on the part of this imaginary pilot, it must be shown, not only that he knowingly (and in that sense wilfully) did the wrongful act, but also that, when he did it, he was aware that it was a wrongful act, i.e., that he was aware that he was committing misconduct.

H The first problem to consider in this case is whether or not any act or acts on the part of the pilot or of any of the other servants of the defendants (such as the official responsible for the issue of maps), in fact, constituted something which amounted to misconduct. You may think that it would be misconduct if anyone employed by the defendants broke, without any justification, some regulation which was designed to ensure the safety of the aircraft and of its passengers; if the pilot departed from the generally accepted standards of safe aerial navigation; or if some official of the defendants failed to supply the

pilot of the machine with some map or other information which their rules required him to have, or which any responsible person would realise was part of the necessary equipment of the aircraft. All those things might amount to misconduct. Carriage by air can be fraught with the gravest danger to human life unless very high standards of care are maintained. For that reason, you may feel justified in coming to the conclusion that some relatively minor breach of a safety regulation amounts to misconduct, although it would not do so in places and on occasions where the consequences of such a breach would be much less serious. The breach of some safety precaution in a factory might give rise to some minor injury, and in all the circumstances the jury might think that it was not an act of misconduct. But with aircraft and the carriage of passengers by air, a minor lapse from the accepted standards of safety might be regarded as an act of misconduct.

If you find that any of the servants of the defendants—either the pilot, or any of the ground staff—committed any of the acts of misconduct which have been alleged in this case, you have next to consider the, perhaps, more difficult question of whether that act of misconduct was wilful. In order to establish wilful misconduct the plaintiff must satisfy you that the person who did the act knew at the time that he was doing something wrong and yet did it notwithstanding, or, alternatively, that he did it quite recklessly, not caring whether he was doing the right thing or the wrong thing, quite regardless of the effects of what he was doing on the safety of the aircraft and of the passengers for which and for whom he was responsible. That is something quite different from negligence or carelessness or error of judgment, or even incompetence, where the wrongful intention is absent. All these human failings—errors of judgment, carelessness, negligence, or incompetence—may give rise to acts which in the judgment of ordinary reasonable people may amount to misconduct, but the element of wilfulness is there missing. The element of wilfulness is essential in the present case if the plaintiff is to recover more than the £3,000 odd to which he is admittedly entitled.

You may think that what was actually done matters less than the intention or state of mind of the person who did it. The same act may amount on one occasion to mere negligence, and on another to wilful misconduct. Two men driving motor cars may both pass traffic lights after they have changed from yellow to red. In both cases there are the same act, the same traffic lights, the same cross-roads, and the same motor cars. In the first case the man may have been driving a little too fast. He may not have been keeping a proper look-out, and he may not have seen the lights (although he ought to have seen them) until he was too close to them and was unable to stop, and, therefore, crossed the roads when the lights were against him. He was not intending to do anything wrong, to disregard the provisions of the Road Traffic Act or to endanger the lives of anyone using the road, but he was careless in not keeping a proper look-out and in going too fast, and as a result, without intending to do anything wrong, he committed an act which was clearly an act of misconduct. The second driver is in a hurry. He knows all about the lights, and he sees in plenty of time that they are changing from yellow to red, but he says to himself: "Hardly any traffic comes out of this side road which I am about to cross. I will go on. I am not going to bother to stop." He does not expect an accident to happen, but he knows that he is doing something wrong. He knows that he should stop, and he is able to stop, but he does not, and he commits exactly the same act as the other driver. But in that frame of mind no jury would have very much difficulty in coming to the conclusion that he had committed an act of wilful misconduct. Of course, he did not intend to kill anyone or to injure anyone coming out of the side road. He thought that in all probability nobody would be coming out of the side road. None the less, he took a risk which he knew he ought not to take, and in those circumstances he could be rightly found to have committed an act of wilful misconduct.

A In the present case, there is no direct evidence of the state of mind or the intentions of the various persons said to have committed acts of wilful misconduct. The unfortunate pilot is dead. It may have been impossible—we do not know—to trace the person in the map dispatch department or the person from the staff of the line who was responsible for compiling the route book. But we have not seen them here, and there can be no direct evidence as to their state of mind. You are not, however, confined to direct evidence. You are entitled to look at the whole of the facts and to draw an inference from those facts as to the state of mind and the intentions of the person who does some particular act.

B In a criminal prosecution the knowledge of the accused that the goods were stolen must be proved beyond reasonable doubt. That is not the case in a civil action. The plaintiff is entitled to recover if he satisfies you that it is more probable that a certain act was an act of misconduct and that it involved wilful misconduct on the part of the person who did it than that it was an act of mere negligence or carelessness. It very often happens that two different inferences may be drawn from one set of facts. For example, a motor car may cross a controlled crossing after the lights have gone yellow owing to wilful misconduct on the part of the motorist, but it may equally well have been due C to a mere act of carelessness on his part in not keeping a proper look-out and not seeing the lights in time. If both those inferences are equally likely—if there is nothing to indicate that it was more likely that this was an act of wilful misconduct than that it was an act of negligence—then it is not established that wilful misconduct was the cause of the act. On the other hand, other facts D may enable you to balance the probabilities as between those two possible inferences, and to say: Looking at the matter as a whole, and taking *this* point and *that* point into account, we as reasonable people think it more likely that the true explanation of this car going across the cross-roads when the lights were against it was, for example, that the driver was committing an act of mere negligence. If on your consideration of the whole of the evidence you are E able to balance the probabilities in that way, you are entitled to say: On balance of probability, we think that a certain act was an act of wilful misconduct. In those circumstances in the present case if you think on balance that any one of these acts alleged against the servants of the defendants was an act of wilful misconduct, then, if that act caused the accident, the plaintiff will be entitled to recover the damages which he is seeking to recover.

F In *Lancaster v. Blackwell Colliery Co., Ltd.* (1) LORD BIRKENHEAD, L.C., said (89 L.J.K.B. 611):

“If the facts proved give rise to conflicting inferences of equal degrees of probability, so that the choice between them is a mere matter of conjecture, then, of course, the applicant fails to prove his case, because it is plain that the onus in these matters is upon him.”

G There LORD BIRKENHEAD is saying: Here certain facts give rise to conflicting and alternative inferences; you can infer *this* from them and you can infer *that* from them. If it is equally likely that the correct inference from the facts is *this* and equally likely that the correct inference is *that*, then you are left in a state of complete uncertainty as between the two, and nothing really has been proved. LORD BIRKENHEAD goes on (*ibid.*):

H “But where the known facts are not equally consistent, but there is ground for comparing and balancing probabilities, as to their respective value, and a reasonable man might hold that the conclusion for which the applicant contends is the more probable, then the arbitrator is justified in drawing an inference in his favour. That view of the law has been stated in this House repeatedly, and is not now open to challenge.”

For “the applicant” must be substituted in the present case “the plaintiff”, and for “the arbitrator” “the jury”. In that case the evidence was

that the plaintiff had suffered a strain, and the question was whether it could properly be inferred from the facts as a whole that the strain had taken place at the plaintiff's work or elsewhere, and LORD BIRKENHEAD there states the principles which may be applied when probabilities have to be balanced in this way. [HIS LORDSHIP added that the plaintiff, if he proved wilful misconduct, must establish that such misconduct caused the accident and dealt with the rules as to a break in the chain of causation.]

The jury retired.

On their return the foreman of the jury said: My Lord, the jury find themselves unable to answer any of the questions you have put to them, at the moment. They are in difficulty on a point of law—the application of the words “wilful” and “misconduct” to some of the facts in this case. The jury are agreed on one point which was not put to them as a question; there can be no question that either the defendants or the pilot intentionally endangered this aircraft. But things have been done and not done which we regard as evidence of carelessness, and these acts of omission and commission have been sufficiently repeated to suggest that they amount, we believe within your Lordship's direction, to misconduct. Many of these acts, or some of them, at any rate, were, to the knowledge of those who did them, either contrary to what is in accordance with plans, instructions, or documentary provision, or departed from standards of safe flying, and what we want to know is whether, if we have that view, that turns the carelessness into wilful misconduct; whether misconduct can arise out of a series of acts of carelessness; and whether, if that series of acts was done on many occasions and was contrary to instructions or departed from the standards of safe flying, and if that must have been known to those who did them, that was wilful misconduct.

After hearing further argument by counsel,

BARRY, J., gave the following further direction to the jury: The whole conception of wilful misconduct is not an easy one to apply to the facts of any particular case. What I think is the best and shortest and most complete definition in English law, not an original definition, but one which has been used more than once in these courts, is this: To be guilty of wilful misconduct the person concerned must appreciate that he is acting wrongfully, or is wrongfully omitting to act, and yet persists in so acting or omitting to act regardless of the consequences, or acts or omits to act with reckless indifference as to what the results may be. All the problems which you raise must be considered in the light of that definition. You have said:

“Things have been done and not done which we regard as evidence of carelessness, and these acts of omission and commission have been sufficiently repeated to suggest that they amount, we believe within your Lordship's direction, to misconduct.”

Before considering any question of wilfulness you have to be reasonably satisfied that an act of misconduct was committed by some individual employed by the defendants.

Counsel for the defendants is right when he says that you cannot look at this whole case and add up a number of acts or omissions each of which is of a minor character, and in itself does not in your view amount to misconduct, and say: The minor act of carelessness in the map department, the minor act of carelessness in the department responsible for selecting the crew of this aircraft, and a number of minor acts of carelessness on the part of the pilot, none of which in itself we think would amount to misconduct, taken together amount to misconduct on the part of the defendants as a whole. That would be a wrong way of looking at the matter. You must look at each act and judge it in the light of all the evidence about it and all that you know about the case, and then you must pronounce an individual judgment on it in the light

of your knowledge of the whole case. You cannot add up a number of acts and say that, although no one of them really amounts to misconduct, yet put together they show among the whole staff of the defendants, including the pilot, so many small acts of carelessness that in the aggregate they amount to misconduct on the part of the defendants as a corporation. That would be wrong. You must judge each act separately, and say whether or not misconduct was committed in relation to that particular act. Counsel for the plaintiff suggests that you should answer each of the nine questions in the light of the answers to the previous ones. Taken literally, I am bound to direct you that that is not the view which you should adopt. You must look at each alleged act of misconduct independently. In forming a judgment about it you are entitled to look at the evidence as a whole and to take into account all that you know as a result of that evidence, but there must be an individual judgment on each act, and that act must in itself, in your view, amount to misconduct before any question as to wilfulness arises.

Your foreman went on to say:

“Many of these acts, or some of them, at any rate, were, to the knowledge of those who did them either contrary to what is in accordance with plans, instructions, or documentary provision, or departed from standards of safe flying . . .”

You are entitled to draw inferences from the facts as you know them as to the state of mind of any person who is alleged to have committed acts of wilful misconduct. In order to satisfy you that wilful misconduct has, in fact, been committed, the plaintiff must be able to say to you as reasonable men: Looking at the evidence as a whole it is more likely that some act was an act of wilful misconduct than that it was an act of mere negligence or carelessness. If it might be one or the other, and there is nothing to show you what the true inference to be drawn from it is, then of course wilful misconduct has not been established. There mere fact that an act was done contrary to a flight plan or to some instructions, or even to the standards of safe flying, to the knowledge

of the person who did it, does not necessarily establish wilful misconduct on his part, because in the exigencies of the flight it is always possible that a pilot may consciously depart from instructions, taking the view that, in the best interests of the safety of his aircraft, it is wiser and safer for him to depart from them than to adhere to them. The pilot is solely responsible for the safety of the aircraft in its journey. A finding on your part that the pilot acted contrary to instructions, and knew that he was so acting, does not mean that he necessarily committed wilful misconduct merely because you now think that he was wrong. That is not the question that you have to consider. If a man departs from instructions, he may be committing a grave error of judgment in so doing, and you may think now (knowing all we now know about this flight) that the pilot was wrong in so doing. But that does not by any means conclude the matter.

You have also to be satisfied that at the time when the pilot knowingly departed from the instructions, he realised that he was doing something which amounted to misconduct, i.e., something which was contrary to the interests of the passengers or of the corporation which employed him and which owned the aircraft, or involved his passengers and the aircraft in a greater risk than would have been involved if he had adhered to his instructions. “A greater risk” means a greater risk looked at in the broad sense, i.e., a risk which it is less in the interests of his passengers to take than some other risk. Thus a pilot may say: “It may be a bit safer to land on the sea, where the risk of the aeroplane disintegrating and going on fire may be considerably less. On the other hand, I have to look to the safety of the whole complement of the aircraft, passengers and crew. If I land in the sea, I may possibly be able to bring the aircraft down in safety, but it is a foggy day, and, by the time any

ship comes within sight, all my passengers and all the crew may be dead of exposure, or may have drowned". If he thinks that, he may well be justified, without committing wilful misconduct, in taking what was physically a greater risk in landing blind on the dry land. That might involve the machine in a crash, but, on the other hand, the pilot might land the aircraft safely, or one or two passengers might be killed, but not all of them, whereas if he landed the machine in the sea, they might all be drowned. If the pilot genuinely thought: "In the interests of my passengers I had better come down on land", any jury or any court might very well afterwards take the view that that was a very foolish decision and a grave error of judgment, as it well have been. But it was not wilful misconduct unless the pilot knew that by landing where he did land he was acting contrary to the best interests of those for whose safety he was responsible.

Your foreman also said:

"And what we want to know is whether, if we have that view, that turns the carelessness into wilful misconduct; whether misconduct can arise out of a series of acts of carelessness; and whether, if that series of acts was done on many occasions and was contrary to instructions or departed from the standards of safe flying, and if that must have been known to those who did them, that was wilful misconduct."

I think that is almost wholly covered by what I have already said. A pilot may be guilty of a long series of errors of judgment. Each act in that series of acts may involve a departure from instructions or from the flight plan or from the accepted standards of safe flying. Each one of the acts may involve a departure from plans or instructions or standards of safe flying. But whether there be one act or a hundred acts, if each of them was done for the best—that is to say, if each of the acts was done in what the pilot thought was the best interests of the aircraft and passengers—then the mere fact that there is a large addition sum to be done and one act added to another does not give you a total which amounts to wilful misconduct. You have to look at each act and try to judge from the evidence whether it was an error of judgment done in the best interests of the aircraft or passengers, or whether it was a reckless act, an act which the pilot knew was contrary to instructions, which he knew was contrary to the standards of safe flying, and which he yet did knowing that it was against the interests of his passengers and of the aircraft, fully realising that by doing it he was involving them as a whole in a greater risk than they would be involved in if he took some different course and adhered strictly to the instructions which had been given to him.

The number of occasions on which acts are done is, of course, of some significance in considering the state of mind of the person who does those acts. To revert again to the old example of the motorist and the traffic lights, if a car passes the traffic lights when they are against him, that may show that the driver was careless, or was deliberately and knowingly acting contrary to the regulations in taking a risk which he was not justified in taking, and which could easily be avoided if he had taken the trouble to apply his brakes and stop his car. Both of those inferences might equally well be drawn from that one act. If, however, a motorist follows another down the Great West Road, and the first driver is passing every traffic light at red, although one inference might be that it is mere negligence, a mere error of judgment in approaching the lights and not stopping, you might in those circumstances be entitled to infer either that he looked at the traffic lights and deliberately said: "I will pass them", knowing he was taking a risk, and knowing that, if any traffic came out of a side road, he might endanger people's lives, or, on the other hand, that he was acting recklessly and with complete indifference as to the consequences of what he did. But that is just as bad. If you see a traffic light, and you say: "I am going to drive past it even though it is against me",

that is wilful misconduct. If you say: "I am going to drive down the Great West Road and I don't care whether the lights are against me or not. I am not even going to look at them or stop whatever happens", that of course would equally be wilful misconduct even though at any particular cross-roads you did not know that the lights were against you because you did not trouble to look.

A You have to find here either (i) a deliberate breach of regulations which the person who committed it *knew* that he ought not to commit in the particular circumstances or to commit which he knew was contrary to the interests of his passengers; or (ii) that whoever it was—the person in charge of the map department or the pilot in charge of the machine—was completely reckless as to the consequences of what he did and did not care whether the aircraft had maps or not or what he did when he was flying the aircraft and was quite indifferent to the results of his conduct on the safety of his passengers.

B The jury disagreed, and the action was settled on terms that the plaintiff accepted the £3,017 4s. 9d. for which liability was admitted by the defendants and which had been paid into court and withdrew the allegations of wilful misconduct against the pilot and other servants of the defendants, each side paying their own costs.

C *Order accordingly.*

Solicitors: *Barton & Hanning* (for the plaintiff); *Beaumont & Son* (for the defendants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

D

TURVEY v. DENTONS (1923), LTD.

[QUEEN'S BENCH DIVISION (Pilcher, J.), October 27, 28, 29, 30, November 14, 1952.]

E *Mistake of fact—Money paid under mistake of fact—Long lease—Rent paid without deduction of tax at standard rate—Recovery of overpayments—Income Tax Act, 1918 (c. 40), General Rules Applicable to All Schedules, r. 19 (2)—Finance Act, 1940 (c. 29), s. 17 (1) (a), (2).*

F *Income Tax—Deduction of tax—Insufficient deduction—Recovery of money overpaid—Payment under mistake of fact—Rent under long lease—Payment without deduction of tax at standard rate—Lessee's erroneous belief that lease for short term—Income Tax Act, 1918 (c. 40), General Rules Applicable to All Schedules, r. 19 (2)—Finance Act, 1940 (c. 29), s. 17 (1) (a), (2).*

G *Company—Payment of money under mistake of fact—Mistake, owing to ignorance, by assistant secretary and accountant—True facts known to secretary, but other officers of company not informed.*

H The secretary of a company negotiated for the company a ninety-nine years' lease of premises in London and informed the assistant secretary of the company who was responsible for paying rents on the company's premises. He omitted, however, to tell him the term of the lease, and the lease was kept in London by the company's solicitors. The assistant secretary erroneously assumed, and so informed the company's accountant, that the lease was for the same period as a ten-years' lease of a part of the same premises which the secretary had purchased previously. The accountant accordingly drew cheques, and the assistant secretary signed them, for the full rent due under the lease, deducting therefrom only tax under sched. A instead of tax at the standard rate as he was entitled to do under s. 17 (1) (2) of the Finance Act, 1940, the lease being a "long lease" within the meaning of s. 13 (1) of that Act. It was found as a fact that both the accountant and the assistant secretary had made these

over-payments on the mistaken assumption that the lease was one for ten years and that they would have deducted tax at the full rate if they had known that the lease was a long lease, and also that the secretary did not know the basis on which the rent was being paid and would have required the proper deductions to be made if he had done so. In an action by the lessor to recover rent withheld by the company to recoup the over-payments, and on a counterclaim by the defendants for the refund of the over-payments,

HELD: (i) the length of the term of a lease was a question of fact, and, therefore, the over-payments were made under a mistake of fact, and the company were entitled to recover the sums paid notwithstanding the secretary's knowledge of the length of the lease and the carelessness as a result of which neither the assistant secretary nor the accountant was precisely informed of that matter.

Anglo-Scottish Beet Sugar Corp., Ltd. v. Spalding Urban District Council ([1937] 3 All E.R. 335), applied.

(ii) the company were not debarred from recovering such over-payments on the ground that the lessor was legally entitled to receive the whole rent, subject only to the right of deduction of tax, or that the right of deduction at the appropriate time was the company's exclusive remedy.

Dicta of ABBOTT, J., in *Denby v. Moore* (1817) (1 B. & Ald. 130) and LUSH, J., in *Ord v. Ord* ([1923] 2 K.B. 445), applied.

AS TO RECOVERY OF MONEY PAID UNDER A MISTAKE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 162-169, paras. 234-249; and FOR CASES, see DIGEST, Vol. 35, pp. 147-163, Nos. 457-586.

Cases referred to:

- (1) *Anglo-Scottish Beet Sugar Corp., Ltd. v. Spalding Urban District Council*, [1937] 3 All E.R. 335; [1937] 2 K.B. 607; 106 L.J.K.B. 885; 157 L.T. 450; Digest Supp.
- (2) *Denby v. Moore*, (1817), 1 B. & Ald. 123; 106 E.R. 46; 31 Digest, Replacement, 317, 4538.
- (3) *Ord v. Ord*, [1923] 2 K.B. 432; 92 L.J.K.B. 859; 129 L.T. 605; 28 Digest 72, 386.
- (4) *Lamb v. Brewster*, (1879), 4 Q.B.D. 607; 48 L.J.Q.B. 421; 40 L.T. 537; 43 J.P. 461; 31 Digest, Replacement, 326, 4609.
- (5) *Re Hatch*, [1919] 1 Ch. 351; 88 L.J.Ch. 147; 120 L.T. 694; 28 Digest 68, 362.
- (6) *Kelly v. Solari*, (1841), 9 M. & W. 54; 11 L.J.Ex. 10; 152 E.R. 24; 29 Digest 391, 3128.
- (7) *Armstrong v. Strain*, [1952] 1 All E.R. 139; [1952] 1 K.B. 232.

ACTION for possession of premises, £1,687 10s. rent., and mesne profits. COUNTERCLAIM for money alleged to have been paid under a mistake of fact and for money alleged to be due under a contract.

The plaintiff was the ground lessee under a lease for two thousand years of a shop, basement, and upper floor at 96 New Bond Street, London. In 1946 the shop and basement were let to a Mrs. Nadel on a ten years' lease of which nine years remained unexpired and the upper part was let to a Mrs. Davey. In the autumn of 1946 Mr. Littman, the secretary of the defendant company, which carried on a business as ladies' outfitters at Gloucester and Cheltenham, purchased, on behalf of the defendants, the remainder of the lease of Mrs. Nadel for £2,750, and he so informed Mr. Baker, the assistant secretary of the defendant company, who was responsible for the day-to-day administration of the defendants' affairs. The purchase was completed on Nov. 22, 1946. Later, Mr. Littman arranged to rent the whole premises from the plaintiff for a term of ninety-nine years from Dec. 25, 1946 at a rent of £2,250 a year. Early in December he informed Mr. Baker by telephone of the transaction,

but he omitted to state that the term of the lease was ninety-nine years. The lease was executed and was dated Dec. 9, 1946, but it was not sent to Mr. Baker at Gloucester, it remaining in the offices of the defendants' solicitors in London until subsequently the premises were mortgaged. No one at the Gloucester office of the defendants was ever informed of the term of the lease of the whole premises. It was the duty of Mr. Baker at Gloucester to see to the paying of all rents due on the defendants' premises including the rent of the New Bond Street premises. On Feb. 7, 1947, a Mr. Shawe was appointed accountant of the company, and on Apr. 10, 1947, he took up his duties. At some time before Apr. 19, 1947, a demand was received for the gross amount of the first quarter's rent on the New Bond Street premises, £562 10s. Mr. Shawe inquired of Mr. Baker what the term of the lease in question was, and was informed that it was ten years, Mr. Baker having erroneously assumed that the lease of the whole premises was for the same period as that of the lease of the part acquired from Mrs. Nadel. Mr. Shawe wrote out a cheque for the full amount of £562 10s., which was signed on behalf of the defendants and sent to the plaintiff's solicitors. Thereafter for three and a half years from Mar. 25, 1947, to Sept. 29, 1950, Mr. Shawe drew cheques for the gross rent due during the period, less tax under sched. A to the Income Tax Act, 1918, but not less tax at the full standard rate, the cheques being signed by Mr. Baker and sent to the plaintiff's solicitors.

By the Finance Act, 1940, s. 17*:

"(1) This section applies to the following payments, that is to say—
(a) rents under long leases . . . (2) Rules 1 and 4 of No. VIII of sched. A shall not apply to any payment to which this section applies, but any such payment shall, so far as it does not fall under any other Case, be charged with tax under Case VI of sched. D and be treated for the purposes of such of the provisions of the Income Tax Acts as apply to royalties paid in respect of the user of a patent as if it were such a royalty."

By s. 13 (1) of the Act*:

"'long lease' means a lease granted for a term exceeding fifty years, other than a lease which is or takes effect as a lease for a term of years determinable after the death or marriage of any person."

By r. 19 (2) of the General Rules Applicable to All Schedules in sched. I to the Income Tax Act, 1918*:

"Where any royalty, or other sum, is paid in respect of the user of a patent, wholly out of profits or gains brought into charge to tax, the person paying the royalty or sum shall be entitled, on making the payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the royalty or sum was accruing due."

A member of the firm of the plaintiff's solicitors, who received the rent on behalf of the plaintiff, knew that under s. 17 (1) and (2) of the Finance Act, 1940, the defendants were entitled to deduct income tax at the full rate from the rent, the lease being a long lease within the meaning of s. 13 (1) of that Act. He did not inform the defendants of the error, but he warned the plaintiff to earmark the tax for the year ended Apr. 5, 1948, and onwards and to be prepared to return it to the defendants owing to the over-payment. In the autumn of 1950 the defendants' auditors drew Mr. Shawe's attention to the error, and Mr. Shawe wrote to the plaintiff's solicitors informing them of what had occurred and asking for their comments. The plaintiff's solicitors replied that the plaintiff was willing to pay the sum of £1,297 2s. 6d. which had not

* The corresponding provisions in the Income Tax Act, 1952, are: Income Tax Act, 1918, sched. I, General Rules, r. 19 (2)—s. 169 (3). Finance Act, 1940, s. 13 (1), s. 17 (1) (a), (2)—s. 172 (1), s. 177 (1) (a) (2).

been deducted, the figure being arrived at in accordance with a statement which the solicitors then enclosed. This figure was accepted by the defendants as correct, but the plaintiff subsequently took the point that the defendants were not entitled to the return of the sum in question since they had failed to deduct it. The defendants thereupon withheld further payments of rent to recoup themselves for the over-payments.

The defendants now conceded that they were not entitled to withhold future payments of rent to recoup themselves for the over-payments and that they had wrongly retained net sums of rent due amounting to £914 1s. 3d., but they claimed to be entitled to set off against the plaintiff's claim for rent either the sum of £1,572 2s. 6d. as money paid under a mistake of fact, this being admitted to be the correct total of the sums over-paid, or the sum of £1,297 2s. 6d. under an agreement to repay evidenced by the correspondence, and they counter-claimed for the balance due in either event. The plaintiff denied that there was any consideration for the alleged agreement or that the over-payments were made owing to a mistake of fact, and she contended that, even if the over-payments were so made, the defendants had no legal right to recover the sums paid, any right of recovery being confined according to the authorities to cases in which the recipient had no legal right to receive the payment whereas here the plaintiff was entitled to the whole rent subject to deduction of tax, the remedy of deduction being exclusive and no other legal process being available if it were not exercised at the appropriate time. The plaintiff conceded that, if the defendants were held to be entitled to recover either of the sums claimed, they would also be entitled to relief from an order for possession and a formal order would, therefore, not be asked for.

P. M. B. Rowland for the plaintiff.

Avgherinos for the defendants.

Cur. adv. vult.

Nov. 14. **PILCHER, J.**, read a judgment in which he stated the facts and continued: I am satisfied that all the over-payments in question were made by Mr. Baker and Mr. Shawe on the mistaken assumption of fact that the lease in question was one of ten years. I am satisfied that neither Mr. Baker nor Mr. Shawe, who alone were concerned with making the payments of rent, had any idea that the lease was, in fact, a long lease until Mr. Shawe's attention was drawn to this fact by the defendants' auditors. The latter only became aware of the fact because the inspector of taxes happened to mention the matter in a letter dated Aug. 30, 1950. I am also satisfied that, if Mr. Baker and Mr. Shawe, or either of them, had known that the lease was in fact for a term of ninety-nine years, income tax at the standard rate would throughout the period have been appropriately deducted. The length of the term of a lease is a question of fact, and I, accordingly, find that the defendants made the over-payments of rent amounting in total to £1,572 2s. 6d. under a mistake of fact.

I should add this. Mr. Littman who was, as I have said, in sole charge of the defendants' property deals, knew the length of the lease, knew that it was a long lease, and knew his rights under such a lease. I find that he did not know the basis on which rent was being paid. I am fully satisfied that, if he had known of it, he would have intervened at once and seen that the appropriate deductions were made. There is no doubt that Mr. Baker was not justified on the facts in assuming that the lease was not a long lease. It is also remarkable that neither he nor Mr. Shawe were ever precisely informed as to the term of the lease. There was clearly a lack of liaison between Mr. Littman, the defendants' solicitors, and the Gloucester administration. It seems probable, moreover, that there was some degree of carelessness.

It is, however, clear on authority that where, as in the present case, a limited liability company is concerned and payments are made under a bona fide mistake of fact by an authorised agent of the company, the fact that some

other agent of the company may have had full knowledge of all the facts does not disentitle the company to recover the money so paid, provided that the agent with the full knowledge does not know that the payments are being made on an erroneous basis. For this proposition I need only refer to *Anglo-Scottish Beet Sugar Corpn., Ltd. v. Spalding Urban District Council* (1) where the facts were curiously similar to those which I have had to consider in the present case. In that case over-payments in respect of water supplied by the defendants were made over a period by the manager of one of the plaintiffs' factories, who had not been informed, as he should have been, that the managing director of the company had negotiated a new agreement with the defendants whereby the sum payable by the plaintiffs to the defendants for water had been substantially reduced. In that case the carelessness of the various officials of the company was more pronounced than any carelessness which can properly be attributed to Mr. Littman, Mr. Baker, Mr. Shawe, the defendants' auditors, or any other agent of the defendants.

Unless, therefore, it could properly be said that there is some feature in the present case which disables the defendants from recovering as money paid under a mistake of fact the over-payments they have made to the plaintiff, I should hold that they are entitled to succeed on this particular issue. Counsel for the plaintiff made the following submission. He argued that, even if these over-payments were, in truth, made under a mistake of fact, they are none the less irrecoverable because under the lease the plaintiff was entitled, or had a legal right, to be paid the full rent. The defendants, according to counsel, were bound to pay the full rent, subject only to their statutory right to deduct income tax at the standard rate at the time of making the payment. Counsel contended that in every case where money paid under a mistake of fact has been held to be recoverable, the money has not, in fact, been legally due to the payee. He submitted that it was on this basis that a claim for money paid under a mistake of fact was always laid as for money had and received to the use of the payer, namely, that it was money paid by the payer to the payee, to which the latter had no legal right.

I was not impressed with this argument. As I understand it, the scheme of the relevant statutory provisions of the Income Tax Acts is that, when the rent payable on a long lease is in fact paid wholly out of the profits or gains brought into charge for any accounting year, i.e., in the case of a trading company in the position of the defendants, where the company are trading at a profit, after debiting the rent in question in the account, the tenant, in this case the company, is entitled to deduct from the gross rent due to the landlord under the lease tax at the standard rate, because the rent shown in the accounts has been paid out of profits or gains of the company brought into charge and the Revenue will receive tax on the general profits of the company, which would naturally have been less if no deduction of tax had been made when paying the rent. While the tax position is complicated and was not very fully argued before me, it was not in dispute and was conceded by counsel for the plaintiff that, as a result of the defendants' failure to deduct income tax at the standard rate at the proper time, they had indirectly borne the proportion of the tax which was represented by the difference between income tax at the standard rate on the gross rent and tax under sched. A. It follows, therefore, that the defendants, in addition to discharging all their tax obligations to the Inland Revenue, have paid to the plaintiff a substantial sum for which, as far as I am aware, she will not have to account to the Inland Revenue. The plaintiff was warned by her solicitors at an early stage that the defendants were paying her more rent than they need and that she would do well to earmark the over-payments as they might have to be reimbursed. It is clear that morally there are very few merits in the plaintiff's case. The old count for money had and received has sometimes been said to be based

on the view that the payee ought not to be unjustifiably enriched. If my broad view of the tax position is correct, there seems little doubt that the plaintiff in this case has been unjustifiably enriched by accepting and retaining money paid to her by the defendants under a mistake of fact. All that she could have legally required the defendants to do was to pay her rent after deduction of tax at the standard rate. In the result, she has received and retained a sum in excess of what she was legally entitled to, and I, accordingly, reject this branch of her counsel's argument. A

The next point taken by counsel for the plaintiff was that the tenant's right to deduct income tax at the standard rate on making a payment of rent was an exclusive remedy, and, if he failed to exercise his right to deduct at the appropriate time, no other legal process was available to him to recover from his landlord over-payments of rent made under a mistake of fact. I think this argument is also misconceived. It is clear that, if the tenant wants to make the permissible deduction from his gross rent, he must make it, by way of deduction from rent, at the appropriate time, but on general principles, I can see no ground for saying that because a tenant has paid more rent than he legally need under a mistake of fact and is unable to recover such over-payment by deduction because he has not made the permissible deduction at the time provided by the legislature, he should be debarred from invoking the general remedy available to all persons who have inadvertently paid money under a bona fide mistake of fact. B

In *Denby v. Moore* (2) a tenant had for many years voluntarily paid the gross rent of a farm to his landlord and also the sched. A tax which he was, of course, entitled to deduct from the gross rent to the Inland Revenue. He then sued his landlord in assumpsit for money had and received for the sum representing the sched. A tax so over-paid over the years. He was held not entitled to recover on the ground that he had voluntarily paid both full rent and tax. *ABBOTT, J.*, having so held, says (1 B. & Ald. 130): C

"I do not say, however, that the clause giving the power of deduction takes away all other remedies." D

This passage, while not necessary for the decision of the case, seems to support the view that, where a fiscal Act gives the tenant a right to make a deduction of rent, of which he does not avail himself, his general right to recover the sum over-paid by appropriate action is not necessarily extinguished. E

In *Ord v. Ord* (3) a husband had paid the gross sum due under an annuity to his wife without any deduction of tax. The payments were made voluntarily with full knowledge of the facts, but under what was pretty clearly a mistake of law. *LUSH, J.*, said ([1923] 2 K.B. 445): F

"The rule does not in terms say that if the person paying is to deduct tax, he must deduct it from the next instalment of the annuity, as is provided in the case of a tenant paying property tax, but the language of the rule, in my opinion, shows that that is intended. Whether the rule means that the only remedy of the payer of the annuity is to deduct the tax is a difficult question, as to which I think the authorities differ. If the defendant had not voluntarily paid to his wife the sum that he paid on her behalf by way of tax, it may be (it is not necessary to decide it) that he could maintain an action against her for money paid to her use." G

Lamb v. Brewster (4) is also an authority for the proposition that a tenant who has not deducted sched. A tax at the appropriate time can recover the tax not deducted by appropriate action. I, therefore, hold that the right to deduct granted by the section with which I am dealing is not an exclusive remedy and that this branch of counsel's argument also fails. H

The next argument presented on behalf of the plaintiff was based on the fact that there appears to be no decided case in which a plaintiff suing for

money had and received has been held entitled to recover money due to the Inland Revenue which he could have deducted, but has failed to deduct, at the appropriate time. The short answer to this point is, in my view, that the reported cases to which I was referred were all clearly cases in which the payer had either voluntarily paid the larger sum with full knowledge of the facts or had made the payment under a mistake of law. The very fact that in these cases unsuccessful attempts were made to recover by action sums not deducted on making a payment of rent rather tends to show that the remedy by deduction is not exclusive, and that, if a tenant, who has failed to deduct at the appropriate time, can show that his failure was due solely to a mistake of fact, he can recover as for money had and received. In this connection I refer to the case of *Re Hatch* (5). I, accordingly, find that the defendants are entitled to recover from the plaintiff the sum of £1,572 2s. 6d. under the claim for money had and received. The plaintiff's net claim for rent, namely, £914 1s. 3d., is not disputed. Against this sum the defendants are, however, entitled to set off an aliquot sum and to recover the balance, namely, £658 1s. 3d. on their counterclaim. In view of the above finding, it is not necessary for me to deal with the defendants' alternative point that they are entitled to the sum of £1,297 2s. 6d. on the alleged agreement to which I have referred in the course of this judgment. [His LORDSHIP reviewed the facts and said that he did not think that the offer and acceptance on the correspondence were made by way of settlement of a disputed claim and that he would have held, therefore, that the defendants' alternative claim failed because the agreement to pay was unsupported by consideration].

Judgment for the defendants on claim and counterclaim.

Solicitors: *Last, Sons & Fitton* (for the plaintiff); *L. T. S. Littman & Co.* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

DICKINSON v. MINISTER OF PENSIONS.

[QUEEN'S BENCH DIVISION (Ormerod, J.), October 3, 1952.]

War Pension—Burden of proof—Death more than seven years after termination of war service—Royal Warrant Concerning Retired Pay, Pensions, etc., 1949 (Cmd. 1949, No. 7699), art. 5 (2).

In 1940 the claimant's husband was invalided out of the army on account of neurasthenia and was awarded a pension on the ground that his illness had been aggravated by war service. In 1950 he died as the result of a coronary thrombosis. A pensions appeal tribunal, being satisfied that the claimant had not shown that her husband's death was substantially hastened by his war service, dismissed her claim to a pension.

HELD: on the true construction of art. 5 (2) of the Royal Warrant Concerning Retired Pay, Pensions, etc., 1949, in the case of a death occurring more than seven years after the termination of war service, the onus was on the claimant to prove that the death was due to or substantially hastened by an injury attributable to such service; the claimant had failed to prove this to the satisfaction of the tribunal; and, therefore, her claim should be disallowed.

AS TO WAR PENSIONS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 779, 780, paras. 1098, 1099; and FOR CASES, see DIGEST Supps., Royal Forces. Cases referred to:

(1) *Irving v. Minister of Pensions*, 1945 S.C. 21; 2nd Digest Supp.

(2) *Mitchell v. Minister of Pensions*, 1945 S.C. 131; 2nd Digest Supp.

APPEAL by the claimant from an order of a pensions appeal tribunal rejecting her claim to a pension in respect of the death of her husband which occurred

ten years after the termination of his war service. The claimant contended that in the absence of any provision to the contrary in art. 5 of the Royal Warrant Concerning Retired Pay, Pensions, etc., 1949, the onus was on the Minister to show that she was not entitled to a pension.

F. R. McQuown for the claimant.

J. P. Ashworth for the Minister.

ORMEROD, J.: This is an appeal by Mrs. Gladys Eleanor Dickinson **A** against a decision of a pensions appeal tribunal on Dec. 3, 1951, that the death of her husband, Major George Colleton Dickinson, was not attributable to war service.

Major Dickinson was an army officer who rejoined the army from the reserve of officers at the age of fifty on Sept. 18, 1939. He served in the army until Aug. 7, 1940, when he was invalided out on account of neurasthenia. Later, **B** he was awarded a pension on the ground that his neurasthenia had been aggravated by his war service. He died on Sept. 22, 1950, as a result of a coronary thrombosis. His death was thus more than ten years after the termination of his service, and his widow claimed that it was substantially hastened by his service, the stress and strain of worry caused by the neurasthenia (which in turn had been aggravated by service) having had a **C** serious effect on the condition of the arteries which finally resulted in his death from a coronary thrombosis. The matter came before a pensions appeal tribunal who, having heard the whole of the evidence and the arguments of counsel for the claimant, dismissed the appeal, using these words:

"These and other points raised in connection with this matter have **D** been fully dealt with in the two opinions of the Medical Services Division, and the tribunal regard those opinions as medically sound. They are satisfied that it has not been shown that Major Dickinson's death from a coronary thrombosis ten years after his war service ended was in any way connected with that service."

In other words, the tribunal decided this matter on the basis that, as the death of the deceased took place more than seven years after the termination of his war service, the onus of proof was on the claimant to satisfy the tribunal that his death was "due to or substantially hastened by" service and that it was not on the Minister as would have been the case if he had died within seven **E** years of the termination of his service.

Counsel for the claimant has argued with force that the tribunal misdirected itself on the question of onus of proof, and that, even though the death of Major Dickinson occurred more than seven years after the termination of his service, the burden of proof was still on the Minister, and, therefore, the appeal should be allowed. This argument is based on the provisions of art. 4 and art. 5 of the Royal Warrant Concerning Retired Pay, Pensions, etc., 1949. **F** Article 4 (1) provides:

"Where, not later than seven years after the termination of the service of a member of the military forces . . . the death occurs of that member and a claim is made (at any time) in respect of that death, such . . . death . . . shall be accepted as due to service for the purposes of this **G** Our Warrant provided it is certified that . . . (b) the death was due to or hastened by (i) an injury which was attributable to service; or (ii) **H** the aggravation by service of an injury which existed before or arose during service."

Article 4 (2) provides:

"Subject to the following provisions of this article, in no case shall there be an onus on any claimant under this article to prove the fulfilment of the conditions set out in para. (1) of this article and the benefit of any reasonable doubt shall be given to the claimant."

It is clear that the onus of proof is not on the claimant to establish his claim in a case which comes under art. 4 of the warrant, and, indeed, it has been held in Scotland in *Irving v. Minister of Pensions* (1) that the effect of art. 4 (2) must be that the onus of proof is on the Ministry to show that in the circumstances in which the pension is claimed the claimant is not entitled to a pension. Article 5 (1) of the warrant deals with claims which are made when a longer period than seven years has elapsed between the death of the person in respect of whom the claim is made and the termination of the service. The article provides for entitlement to pension in almost the same words as art. 4 (1) with the exception that, in the case of a claim in respect of death, whereas art. 4 (1) says when "the death was due to or hastened by an injury which was attributable to service" art. 5 (1) requires certification that

"(b) the death was due to or substantially hastened by an injury which was attributable to service."

It is to be assumed that the word "substantially" has been put in for a purpose and that a greater effect of the conditions, so far as hastening death is concerned, must be proved before an award can be made in those circumstances, but that is a matter which probably does not affect the question in issue here.

There is no paragraph in art. 5 similar to art. 4 (2) providing that in no case shall there be an onus on the claimant, and it is, I think, proper to assume that that has been expressly omitted. Article 5 (2) provides:

"A disablement or death shall be certified in accordance with para. (1) of this article if it is shown that the conditions set out in this article and applicable thereto are fulfilled."

By art. 5 (4):

"Where, upon reliable evidence, a reasonable doubt exists whether the conditions set out in para. (1) of this article are fulfilled, the benefit of that reasonable doubt shall be given to the claimant."

Counsel for the claimant argues that art. 5 is ambiguous, that the position as it existed in 1939 was that the onus of proof was not on the claimant whether the death occurred within or after seven years of the termination of the service, and that, although the warrant as it at present exists is a complete repeal of the warrant as it existed previously, the provisions of the warrant which was in use previously must be taken into consideration, that it must be accepted that there was an alteration (or an attempted alteration) of the position, that such alteration, if it is valid, must be in terms which admit of no ambiguity or doubt, and that, as it is not stated specifically in art. 5 of the warrant of 1949 that the onus of proof shall be on the claimant, by the ordinary rules of interpretation, the position must be as it was before this warrant came into force, and, as it is in art. 4 (2) of the warrant, the onus of proof must still be on the Minister and not on the claimant. He says further that, in view of art. 5 (4), it is impossible to say that the onus of proof must be on the claimant and at the same time, if there is a reasonable doubt, he must have the benefit of that doubt, and that the words of this paragraph, if they do not go so far as to say in specific terms that the onus of proof is on the Minister, can be consistent only with that proposition.

After considering the terms of art. 5 I find that I cannot accept these contentions. Counsel for the claimant submits that the warrant does not so much establish rights to be decided in a court of law as to set out, as it were, the administrative rules by which pensions should or should not be granted. That, I think, cannot be accepted as a proper statement of the position. The effect of the warrant is, of course, in a proper case to entitle a man to a pension, and the relevant articles of the warrant set out the circumstances in which he shall be entitled and the way in which that entitlement shall be established. It is axiomatic in the administration of our law that, if a person thinks that

he has a claim against another person or against a Minister, the duty is on him to establish that claim. The mere fact that an Act of Parliament which establishes a right does not state that that duty is on him, must automatically establish the duty on him to prove what he thinks is his right before he can succeed in his claim. That, I think, was recognised by those who framed this warrant because art. 4, having set out the conditions under which a man may be entitled to a pension, provides specifically that the onus of proof shall in no case be on the claimant. In other words, the onus of proof shall be on the Minister or the respondent to the claim. That has been done to provide an exception to what is clearly an accepted rule. In art. 5 no such exception is made, and, therefore, I think, it must follow that, to succeed, the claimant must satisfy the court or the tribunal that the conditions which entitle him to an award have been satisfied. But art. 5 goes further than that because it provides in para. (2) that a disablement or death shall be certified if it is shown that the conditions set out in that article and applicable thereto are fulfilled. A

Counsel for the claimant argues that there is nothing in art. 5 (2) to say who shall show that the conditions of the article are fulfilled, and that duty might be on the claimant or on the Minister, or on some other unspecified person. That, I think again, is an argument which cannot be accepted. It appears to me clear that, where it is provided that a pension shall be awarded if it is shown that the conditions set out in the article are fulfilled, it must mean if it is shown by the person making the claim that the conditions applicable thereto are fulfilled. In those circumstances I am satisfied that there is no ambiguity in the wording of art. 5 and that the rules of construction which counsel for the claimant has prayed in aid of his case do not fall for consideration. I am satisfied that the article in itself leaves it quite clear that after seven years a claimant may still be entitled, under the proper conditions, to a pension provided that it is shown by him that the conditions of entitlement have been fulfilled. B

A further difficulty is the wording of art. 5 (4) which provides that, if a reasonable doubt exists, the benefit of that reasonable doubt shall be given to the claimant. Counsel for the claimant argues on the authority of the Lord Justice-Clerk (LORD COOPER) in *Mitchell v. Minister of Pensions* (2) that, if the claimant is to be given the benefit of the doubt in the case of a reasonable doubt, it must mean that the onus of proof is on the Minister, because, if the onus is put on the claimant to begin with and he is to be given the benefit of the doubt, the burden of proof must shift at some stage of the case. I agree with counsel that the wording of that paragraph is probably unfortunate. I am, however, satisfied that its intention and meaning is that it is the duty of the claimant to produce reliable evidence to establish his claim, but if (after considering that evidence and comparing it with the evidence which is called on behalf of the Minister to controvert it) the tribunal has a reasonable doubt, then the benefit of that doubt shall be given to the claimant. Therefore, as I see it, in the present case the tribunal have directed themselves properly on this question of onus. They state in their judgment that they are satisfied that it is not shown that the death of Major Dickinson from a coronary thrombosis was connected with war service. That means that they were not in any doubt, reasonable or otherwise, and there was no reasonable doubt the benefit of which could be given to the claimant. It follows that the appeal fails and must be dismissed. C D E F G H

Appeal dismissed.

Solicitors: *Fowler, Legg & Co.* (for the claimant); *Treasury Solicitor* (for the Minister of Pensions).

[Reported by J. D. PENNINGTON, Esq., *Barrister-at-Law.*]

BARTHOLOMEW v. BARTHOLOMEW.

[COURT OF APPEAL (Singleton, Denning and Hodson, L.J.J.), November 17, 1952.]

Divorce—Desertion—Constructive desertion—Wife dirty in her person and the matrimonial home—No inference of intention to drive husband away.

A In December, 1945, the husband returned from war service and complained of the dirty condition in which the wife was keeping herself, the matrimonial home, and the children, and in March, 1946, he left, telling the wife that, if she failed to effect an improvement, he would not return. He complained that she failed to improve the conditions, and he refused to return to her. On a petition by him for divorce on the ground of constructive desertion,

B HELD: the fact that a wife was dirty in her person and her home was not of necessity evidence which showed that she wished to bring the matrimonial consortium to an end; she might be dirty because she was lazy or lacked energy; the conduct of the wife in the present case was not of such a grave and convincing character as to justify an interference of an intention by her to drive the husband away from the matrimonial home; and, therefore, she was not guilty of constructive desertion.

C Dictum of LORD GREENE, M.R., in *Buchler v. Buchler* ([1947] 1 All E.R. 320), applied.

Winnan v. Winnan ([1948] 2 All E.R. 862), explained and distinguished.

D AS TO CONSTRUCTIVE DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, p. 654, para. 964, and 1952 Supp.; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 350-352, Nos. 2897-2913.

Cases referred to:

- E (1) *Buchler v. Buchler*, [1947] 1 All E.R. 319; [1947] P. 25; [1947] L.J.R. 820; 176 L.T. 341; 111 J.P. 179; 27 Digest, Replacement, 350, 2899.
(2) *Boyd v. Boyd*, [1938] 4 All E.R. 181; 108 L.J.P. 25; 159 L.T. 522; 102 J.P. 525; 27 Digest, Replacement, 351, 2908.
(3) *Hosegood v. Hosegood*, (1950), 66 (pt. 1) T.L.R. 735; 27 Digest, Replacement, 336, 2798.
(4) *Winnan v. Winnan*, [1948] 2 All E.R. 862; [1949] P. 174; [1949] L.J.R. 345; 27 Digest, Replacement, 375, 3098.

F APPEAL by the wife from an order of Mr. Commissioner GRAZEBROOK, Q.C., dated July 10, 1952, granting a decree nisi of divorce to the husband on the ground of desertion by the wife.

The husband alleged that he was forced to leave the matrimonial home owing to the dirty condition of the house, which, in spite of complaints by him, the wife failed to remedy. The commissioner held that the wife's conduct amounted to expulsion of the husband in circumstances amounting to desertion by her.

G J. C. Mortimer for the wife.
R. B. Willis for the husband.

SINGLETON, L.J.: I am of opinion that this appeal should be allowed and that the decree granted to the husband by the learned commissioner should be set aside.

H On Mar. 18, 1946, the husband left the matrimonial home because of the dirty condition of the house and children. He told his wife that he would be away for a fortnight, that she should see if she could clean up the house, and that if she did not do so he would stay away. He told the commissioner that he went back to the house on several occasions to take money, and found that she had not improved the condition of the house, and so he ceased to go back to it and had not lived with his wife since Mar. 18, 1946. On Aug. 17, 1951, he petitioned for a decree of dissolution of his marriage alleging that his wife

had deserted him without cause for a period of at least three years immediately preceding the presentation of the petition, and the particulars which he gave were:

"The petitioner discovered on his return on leave from H.M. Forces at Christmas, 1945, that the respondent had allowed the three younger children, the matrimonial home, and herself to get into a deplorable and filthy condition. When asked for an explanation the respondent said she could not bother. The house was insanitary, there were piles of dirty clothes about. The respondent smelt and could not remember when last she had had a bath. She prepared only a minimum of food and that out of tins. The petitioner himself did his best to clean up the house, but the respondent refused to make any effort. The petitioner further warned the respondent that, if she did not mend her ways, he could no longer live with her as conditions such as that were intolerable. The respondent did not mend her ways, so that the petitioner, unable any longer to endure the filth, squalor, and stench at the said matrimonial home, left the same on or about Mar. 18, 1946, since when the parties have lived separate and apart."

The wife put in an answer denying desertion on her part, and asking that she might be granted a decree on the ground of desertion by the husband.

To establish a right to a decree on the ground of constructive desertion it is necessary, it has been said time and again, to prove an actual intention to bring the matrimonial consortium to an end. Although the intention can be inferred from the circumstances, no such inference can be drawn unless the conduct relied on is of a grave and convincing character, equivalent to driving the other spouse away.

In *Buchler v. Buchler* (1) LORD GREENE, M.R. said ([1947] 1 All E.R. 320):

"In constructive desertion the spouse charged must be shown to have been guilty of conduct equivalent to 'driving the other spouse away': per BUCKNILL, J., in *Boyd v. Boyd* (2) ([1938] 4 All E.R. 181 at p. 183); from the matrimonial home and to have done so with the intention of bringing the matrimonial consortium to an end. In each case the intention may, of course, be inferred if the circumstances are such as to justify the inference."

Later (*ibid.*, 322), the Master of the Rolls said:

"But, as I have already said, in cases of alleged constructive desertion it is essential to examine the actual facts to see whether the conduct of the spouse who is to blame can fairly and clearly be said to have crossed the borderline which divides blameworthy conduct causing unhappiness to the other spouse from conduct equivalent to expulsion from the matrimonial home."

Counsel for the husband submitted that in the present case there was conduct which ought to be regarded as equivalent to expulsion from the matrimonial home, and that the wife ought to be presumed to intend the natural consequences of her acts. If she kept the house in this filthy condition and would not clean it up after her husband's requests, it must be presumed that she intended to get rid of the husband.

In *Buchler v. Buchler* (1) LORD GREENE, M.R., further said (*ibid.*, 325):

"On a careful consideration of the case and a study of the whole of the evidence I am forced to the conclusion that the facts relied on were not of sufficient gravity to justify a finding that the husband deserted his wife. That they caused her intense unhappiness I have no doubt, but they were not, in my opinion, such as to justify her in treating them as a dismissal

from the consortium although the husband, I agree, behaved to his wife in a manner in which no decent man ought to have behaved. If I am right in this, she could not concert them into such a justification by announcing her intention of leaving her husband if he did not change his conduct. If conduct is not a justification for one spouse to leave another, it cannot be made so by threats of this kind. Moreover, if the conduct in question is in its nature insufficient, a statement that, if she did not like it she could go, even if taken at its face value, could not, in my opinion, give to that conduct the character of desertion in fact."

In *Buchler v. Buchler* (1) this court approved what BUCKNILL, J., had said in *Boyd v. Boyd* (2), and, if further authority be needed, it is found in the judgment of DENNING, L.J., in *Hosegood v. Hosegood* (3), a judgment to which BUCKNILL, L.J., was a party, though BUCKNILL, L.J., did not repeat what he had said in *Boyd v. Boyd* (2).

We are asked to say that on the facts a case of constructive desertion is made out. I cannot see it. I do not agree with the conclusion drawn by the commissioner that the conduct of the wife amounted to expulsion of her husband in such circumstances as to amount to desertion of her husband by her. The evidence showed that she had a filthy house, and let it be said she might have done a good deal more to clean it up. I think the husband might have done something more to help her, and I cannot help thinking that he would not have left the children there if it had been as bad as he said. The fact that a wife is lazy and is dirty is not of necessity something which shows she is determined to get rid of her husband. She may be dirty because she is lazy or lacks energy. In my view, on the facts there is nothing on which it can be said that the husband has proved a case of constructive desertion. For that reason I consider that the appeal of the wife ought to be allowed, and the decree granted to the husband should be set aside, and I gather it follows from what has been said by the learned counsel, that, if that be so, the wife herself is entitled to a decree on the ground of desertion.

DENNING, L.J.: I agree. On the findings of the commissioner the wife was a lazy and dirty woman who did not keep the house or the children in a clean and proper state, so much so that on that account the husband left the house. That is not sufficient to make the wife guilty of constructive desertion. The essential element of intention is wanting. The wife had no wish that the husband should leave. There is no evidence that the wife intended to bring the matrimonial consortium to an end, and there is no ground for inferring any such intention. Without such intention constructive desertion cannot be found.

The law about constructive desertion was laid down by BUCKNILL, J., in 1938 in *Boyd v. Boyd* (2), in terms which were quoted with approval by LORD GREENE, M.R., in *Buchler v. Buchler* (1), in the passage my Lord has read, and the judgment of BUCKNILL, J., was explicitly approved by this court in *Hosegood v. Hosegood* (3). The judgments in *Hosegood v. Hosegood* (3) were considered judgments, and I know that BUCKNILL, L.J., agreed with what I said about the nature of constructive desertion. *Winnan v. Winnan* (4), in which the wife kept a large number of cats in the matrimonial home, must have depended on special evidence available to show that she intended to bring the matrimonial consortium to an end in that she preferred the cats to her husband. In the present case I see no evidence, and no ground for inferring, that the wife intended to bring the matrimonial consortium to an end. The real thing for the husband to have done would have been to buckle to himself and seen that the house and the children were kept in proper order. Instead of doing that, he left the house and his children, and was himself the deserter. Accordingly, I agree that the appeal should be allowed.

HODSON, L.J.: I also agree. In my judgment, the wife's conduct did not speak for itself in such a way that it followed therefrom that she must have intended to drive the husband out. So far as express evidence of intention is concerned, the evidence is all the other way. So far as evidence of intention is concerned, the wife's intention would appear to be the opposite of that of a person who was meaning to drive her husband away, or to keep him away after he had gone.

I think the learned commissioner was impressed by *Winnan v. Winnan* (4), in which it was held that the wife's conduct in preferring cats to her husband amounted to constructive desertion by her. That, on the face of it, does not look as if it was a very impressive case of constructive desertion. The facts in that case are very sparsely reported, and the report is directed in the main to another subject altogether. It appears, however, that the decision as to constructive desertion was essential to the determination of that case, and to that extent, of course, the report is of relevant authority. The facts appear to show that the wife had been guilty of cruelty to her husband in the past (concessions seem to have been made by counsel for the wife in that connection), and, so far as the cats were concerned, the animals seem to have been extraordinarily numerous and to have turned the house into a sort of "zoo", the wife having expressed her preference for the cats as against her husband. There was, therefore, some evidence of an intention to drive him away. I think that that case can be distinguished from the present case, and that the facts here could not properly be held to be such as to constitute what may be described as acts of expulsion which might be said to speak for themselves so that the intention could readily be inferred from them. I agree, therefore, that the appeal should be allowed.

Appeal allowed.

Solicitors: *H. H. H. Wiggett* (for the wife); *Gush, Phillips, Walters & Williams*, agents for *Knocker & Foskett*, Sevenoaks (for the husband).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

NOTE.

KENDALL v. KENDALL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Davies, J.), October 28, 29, 1952.]

Justices—Husband and wife—Maintenance order—Persistent cruelty—Subsequent inconsistent finding of High Court on same facts—Right of husband to discharge of order.

On Sept. 13, 1944, the wife obtained an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on the ground of the husband's persistent cruelty. On Aug. 2, 1951, she filed a petition for divorce, setting out substantially the same allegations of cruelty. On Mar. 24, 1952, this petition was dismissed by a divorce commissioner who found that the allegations of cruelty were not proved. On a summons by the husband to discharge the order of Sept. 13, 1944,

HELD: the decision of the justices was effective for the purpose for which it was applied, but the finding of the High Court on the same facts was conclusive, and, therefore, the order of the justices could not stand and must be discharged.

Pratt v. Pratt (1927) (96 L.J.P. 123), applied.

Cases referred to:

- (1) *Pratt v. Pratt*, (1927), 96 L.J.P. 123; 137 L.T. 491; 27 Digest, Replacement, 726, 6938.
- (2) *Sullivan v. Sullivan*, [1947] P. 50; 111 J.P. 27; 27 Digest, Replacement, 734, 7023.
- (3) *Ormsby v. Ormsby*, ante, p. 1005.

A APPEAL by the husband against the dismissal on May 21, 1952, by the justices for the petty sessional division of Bulmer West in the North Riding of Yorkshire, sitting at Easingwold, of his application to discharge an order made in favour of the wife by the justices on Sept. 13, 1944, on the ground that the husband had been guilty of persistent cruelty to her.

B *Parris* for the husband.
The wife did not appear.

LORD MERRIMAN, P., in the course of his judgment, said: We have looked at the notes of the evidence taken at the original hearing in 1944. It is quite clear from those notes, as we now know the wife herself admitted, that the cruelty then alleged coincided item by item, so far as was possible, with the cruelty alleged by her in her petition for divorce on the ground of cruelty, which was dated Aug. 2, 1951. I say "so far as was possible", because the last two paragraphs of her petition contained allegations of incidents which occurred after the original hearing and so could not have then been brought before the justices. In every other respect the charges are identical. On Mar. 24, 1952, the petition came before His Honour JUDGE STEWART, sitting as a commissioner in divorce at York, and was dismissed on the merits, the learned judge finding that the charges of cruelty in the petition were not proved. Thereupon the husband took out this summons, putting forward, as he was fully entitled to do, the dismissal of these identical charges as fresh evidence.

Counsel for the husband read the notes of the proceedings on this summons, and, on instructions, told us that the matter had been put before the justices by the solicitor on behalf of the husband as a case for the discharge of the original order on the ground that the same matters had been adjudicated on later by the High Court and the whole basis on which the order had been made had been destroyed by the subsequent finding. The solicitor cited to the justices *Pratt v. Pratt* (1). I will read one passage in the judgment of LORD MERRIVALE, P., in that case, which was a little more complicated than the present case, because it related to the revivor of an order in favour of a wife which had already been discharged by the justices on the ground that she had committed adultery, whereas on a subsequent trial in the High Court it had been held that she had not, but in substance the point is the same. LORD MERRIVALE, P., said (96 L.J.P. 124):

G "The husband, having obtained the discharge of the order, filed a petition in this court for dissolution of his marriage . . . on the ground of adultery, alleging the adultery which had been found in point of fact by the justices . . . The decision of the justices was effective for the purpose for which it was applied, but it had not concluded the matter. The difference as between that decision and the decision of the learned judge who heard the petition for divorce was that he could make a conclusive finding, and the learned judge, after hearing the evidence tendered by the husband, came to the conclusion that the wife had not committed the alleged adultery, and he so found."

H Everything there applies mutatis mutandis to the present case.

The astonishing thing is that from first to last on the notes of the proceedings on the husband's application there is not a hint that this was the issue in the case or that this point was taken. There is no reference to it in the finding,

and all that happened was that the justices took on themselves to reduce the wife's order from £1 to 10s., which nobody had suggested should be done. Before parting with the case I wish to call the attention of the justices and their clerks to *Sullivan v. Sullivan* (2) and to what was said recently in this court in *Ormsby v. Ormsby* (3).

DAVIES, J., agreed.

Appeal allowed. A

Solicitors: *Kenneth Brown, Baker, Baker*, agents for *H. E. Harrowell, Brown & Bloor*, York (for the husband).

A.T.H.

NORDISK INSULINLABORATORIUM v. C. L. BENCARD (1934), LTD.

 B

[CHANCERY DIVISION (Vaisey, J.), October 2, 3, 7, 8, 9, November 19, 1952.]

Agent—Profit acquired through knowledge obtained in course of agency—Agency terminated by war—Right to transfer property vested in Custodian of Enemy Property—Purchase by agent and re-sale—Duty to account for profit. C

For some years before 1939 the defendants acted as agents for the plaintiffs for a variety of purposes, including the importation and sale of insulin. In 1939 the plaintiffs, a Danish corporation, owned stocks of insulin which, to the knowledge and with the help of the defendants, had been deposited in banks in England. On Oct. 10, 1939, the defendants wrote to the plaintiffs advising them to keep the insulin so deposited, and the plaintiffs accepted that advice. On or about May 15, 1940, Denmark having been occupied by the enemy, the President of the Board of Trade, by order made under the Trading with the Enemy Act, 1939, s. 7 (1) (c), vested in the Custodian of Enemy Property the right to sell and transfer the stocks of insulin. On Sept. 4, 1940, the defendants, without fully disclosing their previous connection with the plaintiffs, purchased the insulin from the Custodian for £9,623 3s., and on Nov. 8, 1940, re-sold it for £13,169 8s. 6d. On a claim by the plaintiffs for the amount of the profit so realised by the defendants, the court found as a fact that, had it not been for the information acquired by the defendants from the plaintiffs in the course of their agency, they would not have had knowledge of the existence of the insulin and would not have had the opportunity of buying it. D

HELD: notwithstanding that at the time of the purchase and re-sale the defendants had ceased to be agents of the plaintiffs, in view of the fiduciary obligations arising out of their agency the defendants held the profit acquired from the re-sale on trust for the plaintiffs, or, alternatively, the plaintiffs were entitled to an equivalent sum by way of damages either for breach of duty or for breach of trust. E

AS TO RIGHTS OF PRINCIPAL AGAINST AGENT, see HALSBURY, *Hailsham Edn.*, Vol. 1, pp. 241-255, paras. 412-427; and FOR CASES, see DIGEST, Vol. 1, pp. 448-456, Nos. 1372-1446, and pp. 475-479, Nos. 1572-1600. F

Cases referred to:

- (1) *Keech v. Sandford*, (1726), Sel. Cas. Ch. 61; 25 E.R. 223; 43 Digest 633, 720. G
- (2) *Ex p. James*, (1803), 8 Ves. 337; 32 E.R. 385; 43 Digest 779, 2193. H
- (3) *Regal (Hastings), Ltd. v. Gulliver*, [1942] 1 All E.R. 378; 2nd Digest Supp.
- (4) *Lamb v. Evans*, [1893] 1 Ch. 218; 62 L.J.Ch. 404; 68 L.T. 131; 1 Digest 462, 1491.
- (5) *Carter v. Palmer*, (1842), 8 Cl. & Fin. 657; 8 E.R. 256; 1 I. Eq. R. 289; 1 Dr. & Wal. 22; 1 Digest 472, q.

(6) *Luddy's Trustee v. Peard*, (1886), 33 Ch.D. 500; 55 L.J.Ch. 884; 55 L.T. 137; 42 Digest 80, 722.

(7) *Allison v. Clayhills*, (1907), 97 L.T. 709; 42 Digest 85, 765.

(8) *Stevenson (Hugh) & Sons v. Akt. für Cartonnagen Industrie*, [1918] A.C. 239; 87 L.J.K.B. 416; 118 L.T. 126; 2 Digest 177, 416.

A ACTION for a declaration that £3,546 5s. 6d. received by the defendants in or about November, 1940, from Boots Pure Drug Co., Ltd., being profit realised on the sale of insulin, was received by the defendants and thereafter held by them as trustees for the plaintiffs, and for an account of the said sum and profits or interest thereon, and payment of the amount found due. Alternatively, the plaintiffs claimed damages for breach of duty or breach of trust.

B *Beney, Q.C.*, and *M. R. Hoare* for the plaintiffs.

J. G. Strangman, Q.C., and *D. S. Chetwood* for the defendants.

Cur. adv. vult.

Nov. 19. VAISEY, J., read the following judgment. The plaintiffs are a Danish corporation, and the defendants are an English limited company. Each of them at all material times carried on businesses which included dealings in insulin and its compounds, in Denmark and the United Kingdom respectively. C It is hardly necessary for me to say that insulin is a valuable specific for diabetes. This action is based on the proposition that the defendants had been or were, at material times and for relevant purposes, agents for the plaintiffs, and thereby precluded from receiving and retaining for their own use, or otherwise than as trustees for and on account of the plaintiffs, a sum of £3,546 5s. 6d. That D sum represents the profit realised on the re-sale by the defendants of a stock of insulin formerly belonging to the plaintiffs and acquired by the defendants in the circumstances hereinafter described. The defendants deny that any such fiduciary duty was owed by them to the plaintiffs as to prevent the defendants from making, and keeping, such profit for themselves. That, in brief, is the issue between the parties.

E In March, 1940, by reason of the invasion and occupation of Denmark by the Germans, the plaintiffs became and were "enemies" within the meaning of the Trading with the Enemy Act, 1939. At that time they were the owners of a valuable stock of crystallised insulin which had been deposited by them for safe custody at certain country branches in England of the National Provincial Bank, Ltd., such deposits having been made (prior to the outbreak of war F between the United Kingdom and Germany) with the assistance and active co-operation of the defendants as the plaintiffs' agents. Moreover, shortly after the outbreak of war, by a letter to the plaintiffs dated Oct. 10, 1939, the defendants advised and recommended the plaintiffs to keep the said stock of insulin so deposited, and the plaintiffs accepted such advice, and acted on it. On or about May 15, 1940, in exercise of the powers vested in him by the G Trading with the Enemy Act, 1939, and the Trading with the Enemy (Custodian) Order, 1939 (S.R. & O., 1939, No. 1198), the President of the Board of Trade made an order vesting in the Custodian of Enemy Property under the said Act the right to transfer the said stock of insulin, and empowered the said Custodian to sell it.

H What happened thereafter was as follows. The defendants, without disclosing (or at any rate without fully and frankly disclosing) to the Custodian their knowledge of and previous connection with the plaintiffs and with the said stock of insulin in particular, purchased the said stock from the Custodian for £9,623 3s. A binding agreement for such purchase was concluded between the defendants and the Custodian on or about Sept. 4, 1940, and on or about Nov. 8, 1940, the defendants, without taking delivery of the said stock, sold it to Boots Pure Drug Co., Ltd., for £13,169 8s. 6d. thereby making a remarkably quick turnover profit of £3,546 5s. 6d., which is the sum claimed from them

by the plaintiffs in this action. I am bound to say that, in addition to the non-disclosure to which I have referred, the defendants deliberately misled the Custodian by mis-representing their true position, particularly in a letter which they wrote to him on July 18, 1940, and by asserting what they described as their moral claim in several letters, particularly two dated respectively June 1, 1940, and June 12, 1940. On June 25, 1940, I find them referring to this insulin as "theirs", and in these and other questionable ways they put the strongest pressure on the Custodian to sell the insulin to them at the lowest possible price. A

I am satisfied on the evidence that the sum paid by the defendants to the Custodian, namely, £9,623 3s. was, both in fact and to the knowledge of the defendants, less than the true value of the said stock, and I am also satisfied that the Custodian accepted such sum from the defendants in preference to other offers because he was under the impression that the plaintiffs (whose previous association with the defendants was to some extent known to him) would have approved of the sale being made to the defendants rather than to any other purchaser. Writing in 1946 (in an undated letter) the Solicitor to the Board of Trade says: B

"In view of the fact that Mr. Bencard was the agent for the owners of the insulin, and that he had been instrumental in the creation of the stocks in this country, it was anticipated that the owners would be more likely to be satisfied with the sale to Mr. Bencard than with a sale to a competitor, and, after careful consideration, it was decided accordingly to accept Mr. Bencard's offer." C

Mr. Bencard was the managing director of the defendants. Of course, the Custodian cannot have supposed that he was selling to the defendants as trustees, in any sense, for the plaintiffs—for that would have been contrary to law—but, in my judgment, the Custodian was quite justified in paying regard to what he conjectured would have been the wishes of the plaintiffs, for the enemy status of the Danish people could not wholly destroy, or altogether conceal, their fundamental characteristic of being in truth our friends. The sale to the defendants was, therefore, in my judgment, perfectly valid, the property in the insulin vested in the defendants, and the only question is whether the profit which ensued from the deal is one which they were entitled to make, or, having made it, are entitled to keep. D

It is admitted that for several years before the outbreak of war and until the plaintiffs became "enemies" as before stated, the defendants had acted as the plaintiffs' agents for a variety of purposes. They were also the sole concessionaires for the sale throughout the British Empire of a preparation of insulin in solution, known as Leo insulin, manufactured by the plaintiffs. I need not describe in detail the association between the two companies, which was certainly both constant and close, and I need only refer to the admissions made by the defendants in a notice delivered by them in this action on July 27, 1951. The agency necessarily came to an end when the plaintiffs became technical "enemies", and it was sought to be argued for the defendants that all the present and future consequences of the past agency were finally and irrevocably destroyed by that event. I cannot accept that. The equitable obligations which flow from the relationship of principal and agent cannot be so easily got rid of, nor does it seem to me to make any difference that the property in this stock of insulin was no longer, at the time when it was sold, the property of the plaintiffs. I cannot accept the view that the Custodian either could or did deal with the insulin so as to destroy entirely the consequences of its previous history. Yet the defendants' view is that they were entitled to make this quick substantial profit exactly as if they had purchased this insulin from a vendor in the open market with no knowledge at all of any previous ownership. H

The fiduciary nature of an agency is, to my mind, far too deeply seated to be

shaken and destroyed as easily as the defendants would seem to have supposed.

I was referred to a number of authorities beginning with *Keech v. Sandford* (1) where LORD KING, L.C., pointed out that a trustee should refuse to allow a lease to be renewed at all rather than accept it for himself. I was referred to a passage in *Ex p. James* (2) (8 Ves. 352); I do not pause to read it. In *Regal (Hastings), Ltd. v. Gulliver* (3) there is a very relevant passage in the speech of LORD WRIGHT, where he poses the question ([1942] 1 All E.R. 392):

" . . . whether an agent, a director, a trustee or other person in an analogous fiduciary position, when a demand is made upon him by the person to whom he stands in the fiduciary relationship to account for profits acquired by him by reason of his fiduciary position, and by reason of the opportunity and the knowledge, or either, resulting from it, is entitled to defeat the claim upon any ground save that he made profits with the knowledge and assent of the other person."

LORD WRIGHT proceeds (ibid.):

"The most usual and typical case of this nature is that of principal and agent. The rule in such cases is compendiously expressed to be that an agent must account for net profits secretly (that is, without the knowledge of his principal) acquired by him in the course of his agency. The authorities show how manifold and various are the applications of the rule. It does not depend on fraud or corruption."

Another very useful and relevant case is *Lamb v. Evans* (4), in which it is pointed out, among other things material to the present case, that there is no distinction between law and equity as regards the law of principal and agent, and that any materials or information acquired by an agent in the course of his agency may not be used thereafter by the agent to secure an advantage to himself. There are many cases in the reports where disqualification arising from an agency continues after the agency has come to an end, notably *Carter v. Palmer* (5) (8 Cl. & Fin. 705, 706), and *Luddy's Trustee v. Peard* (6), which is also relevant because there a solicitor dealt with the trustee in bankruptcy of a person who had previously been the solicitor's client, the client having, accordingly, no longer any interest in the property in question. In that case, also, the solicitor gave the trustee to believe that the purchase was by and on behalf of the bankrupt's family, not on behalf of himself, which is analogous to the present case in so far as the Custodian here understood that the defendants were purchasing in some sense for the ultimate benefit of the plaintiffs. Reference may also be made to some relevant observations in the judgment of PARKER, J., in *Allison v. Clayhills* (7).

I do not, as I have said, overlook the fact that the plaintiffs' interest in the insulin at the time of its sale to the defendants was somewhat shadowy, if, indeed, it existed at all: see *Hugh Stevenson & Sons v. Akt. für Cartonnagen Industrie* (8) ([1918] A.C. 249, 250). There was here, of course, no actual vesting of the property in the Custodian, and, presumably, the proper view is is that the ownership was in suspense. The differences between the form of the Trading with the Enemy Act, 1939, and the Trading with the Enemy Act, 1914, are in some respects considerable, but not materially to the issues in the present case. I think that the proper conclusion is either that the £3,546 5s. 6d. was at the date of the issue of the writ (June 27, 1949) held by the defendants as trustees for the plaintiffs, or that the plaintiffs are entitled to that sum as damages either for breach of duty or for breach of trust. On any view of this matter, I hold that it would be unconscionable for the defendants to withhold this sum of money from the plaintiffs. It may well be that the object of the defendants in obtaining control of this valuable drug was in part philanthropic, that is to say, to secure a continuance of its supply to those who needed it. It is also, I think, right to say the defendants did

nothing wrong in selling the property to Boots Pure Drug Co., Ltd., and the only question is: Who should get the benefit of that very profitable deal? I hold as a fact that had it not been for the information acquired by the defendants, in the course of their agency, from the plaintiffs, they would probably never have heard of this stock of insulin, and would never have had the chance of first buying it and then re-selling it on such advantageous terms. Had it not been for their uncandid and, indeed, untruthful letters, I should have been glad to acquit the defendants of any fraudulent intention. It, perhaps, suffices to say that they have, in my view, failed to understand their obligations in law. I give judgment for the plaintiffs for £3,546 5s. 6d. with simple interest at four per cent. per annum from the issue of the writ until payment, and the costs of the action. I do not see my way to awarding interest from any date earlier than the one I have named.

Judgment for the plaintiffs.

Solicitors: *Roche, Son & Neale* (for the plaintiffs); *W. Wallace Harden* (for the defendants).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

MARSHALL v. GOTHAM CO., LTD.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.JJ.), November 7, 10, 21, 1952.]

Mine—Gypsum mine—Security of roof—Duty of mine owner—“So far as may be reasonably practicable”—Metalliferous Mines Regulation Act, 1872 (c. 77), s. 23—Metalliferous Mines General Regulations, 1938 (S.R. & O., 1938, No. 630), reg. 7 (3).

On Dec. 14, 1950, while working in a gypsum mine owned by the defendants, a miner was killed by a fall of marl from the roof of the working place. The fall was due to a condition known as “slickenside”, which was unusual anywhere and had not occurred in the defendants’ mine for at least twenty-five years. There was no reason to suspect its presence and the probabilities were all against its occurrence there. Before the accident the defendants did not provide artificial support for the roofs, as it was not the general practice in gypsum mines to do so. They followed the usual procedure for making the roofs secure, viz., inspecting them for visible flaws, sounding them with hammers, and bringing down any loosely-attached rock so detected, but slickenside was not detectable by this method. On the morning of the accident the roof of the working place in which it occurred was inspected, sounded, and found apparently secure before the deceased started working. Since the accident the defendants had used hydraulic props to support the roof where slickenside was suspected in places where men were working, but the cost of providing artificial support wherever men were working would have been prohibitive, and, also, such a course would not have been practical. In a claim against the defendants for damages the miner’s widow alleged, inter alia, a breach of the Metalliferous Mines Regulation Act, 1872, s. 23, and of reg. 7 (3) of the Metalliferous Mines General Regulations, 1938 (which regulations were substituted by the preamble thereto for the general rules originally contained in s. 23), in that the defendants had failed to make the roof of the working place secure.

HELD: the duty imposed on the defendants by s. 23 of the Act of 1872 and reg. 7 (3) of the regulations of 1938 was not an absolute and unqualified duty to make the roof secure, but a duty to make it secure so far as it was “reasonably practicable” to do so, or, in other words, to do everything which it was reasonably practicable to do to make the roof secure;

the words "reasonably practicable" in s. 23 of the Act had a narrower meaning than "physically possible", and if, according to the best assessment of the situation which could be made at a point of time immediately before an accident, certain measures were or appeared to be all that was necessary to make the roofs secure, and those measures had been taken, the mine owner would, for the purposes of s. 23 and reg. 7 (3), have done all that was "reasonably practicable" to make the roofs of working places secure, and the fact that a particular roof was, nevertheless, insecure and fell would not constitute a breach of his statutory duty; on the facts, the defendants had done all that was reasonably practicable to make the roof secure, and, therefore, although it was not in fact secure, they were not in breach of their statutory duty.

Edwards v. National Coal Board ([1949] 1 All E.R. 743), distinguished, and dicta of ASQUITH, L.J. (*ibid.*, 747), applied.

AS TO CIVIL LIABILITY OF OWNER OF MINE FOR BREACH OF STATUTORY DUTY, see HALSBURY, *Hailsham Edn.*, Vol. 22, p. 824, para. 1689; and FOR CASES, see DIGEST Supps., Mines.

Case referred to:

(1) *Edwards v. National Coal Board*, [1949] 1 All E.R. 743; [1949] 1 K.B. 704; 2nd Digest Supp.

APPEAL by the defendants from an order of JONES, J., dated May 28, 1952.

The plaintiff, the widow of a miner employed in the defendants' gypsum mine, claimed damages against the defendants under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the death of her husband which was caused by a fall of marl from the roof of his working place. The claim was based (a) on negligence at common law, and (b) on a breach of duty under the Metalliferous Mines Regulation Act, 1872, s. 23, and the Metalliferous Mines General Regulations, 1938, reg. 7 (3), these regulations, by the preamble thereto, having been substituted for the general rules originally contained in s. 23. The accident was due to a condition known as "slickenside", which had not occurred in the mine for at least eighteen years. Before the accident the defendants had carried out the normal routine of inspection and found the roof apparently secure, and, not anticipating the presence of slickenside which was an unusual condition, they had not used any props to support the roof while the men were working as they had done since the accident in places where slickenside was suspected. The learned judge found that there was no negligence, but held that the defendants were in breach of their statutory duty on the ground that they had not done all that was reasonably practicable to make the roof of the working place secure.

Marshall, Q.C., and *A. E. James* for the defendants.

Paget, Q.C., and *Mallison* for the plaintiff.

Cur. adv. vult.

Nov. 21. The following judgments were read.

SOMERVELL, L.J.: The plaintiff is a widow suing for herself and as administratrix of her husband's estate under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934. Her husband, unhappily, was killed while working for the defendants in a gypsum mine. The death was caused by a fall of marl from the roof above where the deceased was working. There were a number of allegations in the statement of claim with which we are not now concerned. The first claim was based on negligence at common law. The learned judge found that there was no negligence, and, in my opinion, he was plainly right. We are concerned with an alleged breach of statutory duty arising under words which are to be found in the Metalliferous Mines Regulation Act, 1872, s. 23, and the Metalliferous Mines General

Regulations, 1938 (S.R. & O., 1938, No. 630), reg. 7 (3). The relevant words of s. 23 are:

"The following general rules shall, so far as may be reasonably practicable, be observed in every mine to which this Act applies . . ."

Regulation 7 (3) of the regulations of 1938 provides:

"The roof and sides of every travelling road, outlet and working place shall be made secure, and no person, unless engaged in repairing or in investigating the safety of the workings shall travel on or work in any travelling road or working place which is not so made secure."

The learned judge found that there was a breach of statutory duty and from that decision the defendants appeal.

Broadly speaking, the gypsum is removed from the various areas of the mine as they come into working, supporting pillars being left in between what are described as faces. The normal formation is first a layer or stratum of gypsum, above this is a stratum of marl, above this again a stratum of what is called ball rock, which is gypsum, but contains a higher percentage of that mineral and is harder to work, and above that stratum again there is a further stratum of marl. It is common ground that the normal procedure for making the roof secure, which had been followed in this mine, is to tap the roof and, if the noise indicates that the rock is not sound, to bring down the unsound portion. Apart from the condition which I will mention later and which caused this accident, the result is a solid rock roof which is safe and secure. As the learned judge here found, the deceased man, the man who was working with him, and the foreman or chargehand, Mr. Gunn, all together tapped and inspected the roof. They carried out these duties properly and, applying the common law test, there were no grounds for suggesting that anything further should have been done. The learned judge found that the fall was due to a condition known as "slickenside". When this condition exists there is a quantity of marl which is liable to fall if disturbed, but, when tapped, gives out the noise of sound solid rock. The condition is admittedly unusual anywhere. Mr. Mitchell, a mining engineer, who gave evidence, was familiar with the whole mine and had never encountered it in this mine during the six years that he had been there. Mr. Bowley, who had been employed as a miner in the mine for some eighteen years, had never heard of slickenside in this mine and had never seen a fall such as that which caused the death of the deceased. Mr. Baxter, who had been there for twenty-five years, described it as something unique in his experience.

At the time of the accident work was being done by the deceased and the man working with him on the ball rock stratum. Counsel for the plaintiff asked us to draw the conclusion from the evidence that the defendants had only quite recently started to work on the ball rock stratum. He further submitted that they should have realised that the marl above the ball rock was more likely to have slickenside than that below, and that, therefore, one ought to dismiss as irrelevant the absence of any similar happening in the past. I am satisfied that the submission of counsel for the plaintiff fails. Although there has been more working of ball rock in the last six years, it is, to my mind, clear from the evidence that ball rock has been worked in this mine over the whole period to which the witnesses speak. This case, therefore, must be approached on the basis that in this extensive mine where ball rock had been mined certainly for eighteen years, there had been no slickenside and no fall such as that to which I have referred. The process which I have described had made the roof secure. With regard to the marl in the area in which work has been carried on since the accident, there have been found further slickenside or evidence which has been thought to indicate slickenside. The

A defendants have provided hydraulic props which can be used with or without wood as supports for the roof, and they have been used when slickenside has been suspected in places where men have been working. Some of the witnesses did not regard them as very satisfactory, but the learned judge came to the conclusion on the evidence that they were, or that, at any rate, they might afford some protection and might have protected the deceased if they had been there in the present case. I will read the paragraph of the judgment in which the learned judge comes to his final conclusion:

B “What I have really to decide is whether the defendants have discharged the onus which is undoubtedly on them to make the roof, or to have made this working place in this mine, secure so far as was reasonably practicable for them to do so. There was nothing that they did which was calculated to protect anyone in the mine against the fall that occurred. On the other hand, it was a fall that was not easy or, indeed, possible to expect and it is said that, if the workmen at that particular place could have been protected against this emergency, the workmen in the other parts of the mine should have been protected also, and the cost of doing that would be quite prohibitive. I agree that to timber the whole of this mine would probably involve such a cost that the mine would cease to be worked, but whether that would be sufficient reason for continuing to employ men in a place where there was danger of this kind it is not necessary for me to decide, because the conclusion I have come to, as I have probably indicated already, is that the evidence in this case shows that there was a precaution that the defendants might have taken. I think that they D might have made use of these pneumatic props. I was told they had been available for five years, and, therefore, they were available at the time this accident happened. In view of the fact that all the witnesses seemed to know about slickenside and that unexpected things might happen, it seems to me, as there was this duty on them to make the roof of this working place secure so far as was reasonably practicable, they ought to have taken this practicable step of equipping themselves with these pneumatic props as they have done since. The view I have formed, although it is not altogether supported by all the evidence that has been given, is that if such a pneumatic prop had been used at the time, although it is by no means sure that the death of [the deceased] would have been prevented, there is quite a possibility that it would have been prevented through the fall of roof having been broken in some way or F dissipated so that the amount that fell on the deceased man would have been smaller than was in fact the amount that actually fell on him.”

I feel a difficulty about this conclusion, and I will state my difficulty before considering the authority on which the plaintiff relies. The possibility of G slickenside was, as the learned judge said, one which no one expected or could have expected in this mine, having regard to past experience. Yet the suggestion is that the defendants have been in breach of their duty ever since the mine began to be worked, or, at least, since these props were invented, because they did not have available, and, presumably, did not compel or try to compel their men to use, some form of prop or support. One thing seems quite plain, and counsel for the plaintiff was, I think, inclined to agree, namely, H that the men would object very much to being asked day after day to put up props under roofs which had been tested and made secure in the way I have described and which everyone believed to be as safe as a roof could be. I would have said, therefore, that in this mine the tapping procedure was an observation of the rule so far as was reasonably practicable. It is not reasonably practicable to have elaborate precautions taken day after day against a risk which is believed to be non-existent.

The question, then, is whether *Edwards v. National Coal Board* (1), the authority relied on by the plaintiff, compels one to come to a different conclusion. The Coal Mines Act, 1911, s. 49, provides:

"The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working place which is not so made secure."

A

The provision as to reasonable practicability, instead of occurring as opening words, is to be found in s. 102 (8), which provides:

"The owner of a mine shall not be liable to an action for damages as for breach of statutory duty in respect of any contravention of or non-compliance with any of the provisions of this Act if it is shown that it was not reasonably practicable to avoid or prevent the breach."

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The different arrangement of the provisions might possibly, at certain stages of a case, lead to different conclusions as to the onus of proof, but for the purpose of the present case, where all the evidence is before the court, there is, in my opinion, no difference in the construction and application as between the two sets of statutory provisions. In *Edwards v. National Coal Board* (1) the death had been caused by a latent defect referred to as a "glassy slant", which would appear to have some similarity to slickenside in that it could not be discovered by ordinary processes. In the *Edwards* case (1), however, there was undisputed evidence that glassy slants had been previously seen in the roadway where the accident happened although they were rare. The learned judge decided, as I gather, without evidence that the accident could have been prevented only by propping and lining throughout the roads of the defendants' mines and that this was not reasonably practicable. His decision was reversed in this court. It was held that s. 49 of the Act of 1911 imposed an absolute duty to make secure and the onus rested on the defendants to satisfy the court that it was not practicable. Having called no evidence, they had failed to discharge that onus. It is suggested on behalf of the plaintiff in the present case that the unlikelihood of the "insecurity" to be guarded against is irrelevant. If the roof turns out to be insecure, then there is an offence, however impossible it was to foresee that insecurity, provided that some reasonably practicable measure is available once its possibility is realised. If this were right, there is a good deal in the judgment of TUCKER, L.J., which one would not have expected to find there. He said, for example ([1949] 1 All E.R. 746), that evidence to show that glassy slants were more common in some formations and areas than in others and that they were non-existent in some areas would be relevant. He also held (*ibid.*), and this, I think, is not disputed by the plaintiff in the present case, that cost in relation to risk to be guarded against could properly be considered. ASQUITH, L.J., adopted the same view, though he may have indicated (*ibid.*, 747) that, in his opinion, the onus would have been more easily discharged. SINGLETON, L.J., as I read his judgment (*ibid.*, 748), placed the onus on the owners somewhat higher, but as it seems to me, in so far as there is a difference, we are bound by the views expressed by the majority. The passages to which I have referred in the judgment of TUCKER, L.J., I think, support the conclusion to which I have come, and I would allow the appeal.

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JENKINS, L.J.: I agree. The claim based on negligence at common law having been rightly rejected by the learned judge, the appeal turns on the true construction and relation to the facts of this case of reg. 7 (3) of the Metalliferous Mines General Regulations, 1938, read in conjunction with the prefatory provision contained in the Metalliferous Mines Regulation Act, 1872, s. 23, which must now be taken as qualifying the regulations of 1938, by virtue

of their substitution for the general rules originally set out in the section itself. Section 23 of the Act of 1872 provides:

"The following general rules shall, so far as may be reasonably practicable, be observed in every mine to which this Act applies . . ."

Paragraph 7 (3) of the regulations of 1938 provides:

A "The roof and sides of every travelling road, outlet and working place shall be made secure . . ."

The defendants, accordingly, were at the time of the fatal accident to the plaintiff's husband under a statutory duty to make secure the roof and sides of every travelling road, outlet, and working place in their gypsum mine, and, in particular, the roof of the working place by the fall of which the plaintiff's husband was killed, so far as it might be reasonably practicable for them to do so. As the event proved, the roof in question was not, in fact, secure, for it fell and killed the plaintiff's husband. But that misfortune did not in itself constitute a breach of the statutory duty, inasmuch as it was not an absolute and unqualified duty to make the roof secure, but a duty to make the roof secure so far as it was reasonably practicable to do so, or, in other words, to do everything which it was reasonably practicable to do for the purpose of making the roof secure.

C In *Edwards v. National Coal Board* (1), with respect to the comparable provisions there in question of s. 49 and s. 102 (8) of the Coal Mines Act, 1911, ASQUITH, L.J., said ([1949] 1 All E.R. 747):

D " 'Reasonably practicable' is a narrower term than 'physically possible' and seems to me to imply that a computation must be made by the owner in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other, and that, if it be shown that there is a gross disproportion between them—the risk being insignificant in relation to the sacrifice—the defendants discharge the onus on them. Moreover, this computation falls to be made by the owner at a point of time anterior to the accident. The questions he has to answer are: (a) What measures are necessary and sufficient to prevent any breach of s. 49? (b) Are these measures reasonably practicable? "

E With these observations I respectfully agree, and would add by way of corollary F that if, according to the best assessment of the situation which could be made at a point of time immediately prior to an accident caused by a fall of roof in a working place, certain measures were, or appeared to be, all that was necessary to make the roofs of working places secure, and those measures had, in fact, been taken, then the owner concerned would, for the purposes of s. 23 of the Act of 1872 and reg. 7 (3) of the regulations of 1938, have done all that was G "reasonably practicable" to make the roofs of working places secure, and the insecurity of the particular roof, proved by the fall which did, in fact, occur, would not constitute a breach by him of the relevant statutory duty. In the present case the uniform experience of many years' working had shown the nature and consistency of the strata in this particular mine to be such that a roof would be secure provided that any loosely-attached rock adhering to H it was brought down, and, further, that the presence of any loosely-attached rock would be detected by inspecting the roof for visible flaws and by sounding it with hammers. This accorded with common experience in gypsum mines where it had been the general practice not to provide artificial support for roofs, the procedure of inspecting and sounding, and bringing down any loose rock detected, having been found to be all that was necessary to make them secure. It seems to me, therefore, that, according to the best assessment of the situation which could be made at a point of time immediately prior to

the accident, the measures necessary and sufficient to make the roofs of working places secure in this particular mine were or appeared to be (i) to inspect and sound them for the purpose of detecting any loosely-attached rock, and (ii) to bring down any loosely-attached rock so detected. The roof of the working place in which the accident occurred was duly inspected, sounded, and found to all appearance secure, before the deceased started work on the morning of the accident. It follows that, if I am right in the construction which I place on the words "so far as may be reasonably practicable" in s. 23 of the Act of 1872, the defendants were not in breach of the relevant statutory duty, for, although the roof fell, and, therefore, was demonstrably not in fact secure, the defendants had done all that was reasonably practicable to make it secure.

It is, of course, vital to the conclusion in favour of the defendants reached by the above process of reasoning to be able properly to hold that the best assessment of the situation which could be made at a point of time immediately prior to the accident would not have included as a contingency to be guarded against the possibility of slickenside, that rare condition of the strata not detectable by sounding, and only sometimes by inspection, and then only if suspected, which did in fact occasion the fall in the present case. So far as the evidence goes, slickenside is a known but unusual geological phenomenon, it had never been encountered before in these workings, there was no reason to suspect its presence, and the probabilities were all against its occurrence here. According to the argument for the plaintiff the mere fact that slickenside was a geological possibility was enough to make it a matter which the defendants' assessment of the situation should have included, and, if it was a matter which should have been included in such assessment, it was one against which it would have been reasonably practicable to provide by expedients such as the hydraulic props brought into use since the accident, which would or might have prevented the fall. I think this argument rates the defendants' duty too high, as it, in effect, requires them to take into account in their calculation every conceivable possibility, however remote. Slickenside was a danger the presence of which there was no ground for suspecting, and was, indeed, against all the probabilities of the case, and, in my view, it cannot fairly be said to be "reasonably practicable" to guard against a contingency that could not reasonably have been foreseen, inasmuch as its occurrence would be contrary to all previous experience.

An extreme form of the argument on the plaintiff's side is to the effect that, in considering what is reasonably practicable, regard should be had exclusively to what would have been possible as a matter of engineering in the way of providing support for roofs and sides without making the working of the mine physically or economically impossible, and that it is for this purpose irrelevant to inquire what measures were or appeared to be necessary and sufficient to make roofs and sides secure according to the best assessment of the situation which could have been made immediately prior to the accident. This means, in other words, that what is reasonably practicable to make roofs and sides secure must be judged without reference to what appears to be necessary for that purpose. On this view a mine owner might be advised by the best mining engineers in the country that a roof in his mine was perfectly secure without artificial support, which would be wholly superfluous and a mere waste of time, labour and money, but he would, nevertheless, be obliged to put in artificial support as otherwise he would not have done all that was reasonably practicable to make the roof secure, and would be liable if through some unforeseeable happening it fell and injured someone working under it. Again, if he did put in some form of artificial support of a certain design and strength, selected after careful consideration as adequate to support some particular roof, and owing to some unforeseeable happening a fall of quite exceptional size occurred, which the support provided did not suffice to prevent, it would avail him

A nothing in a suit by some workman injured by the fall to say with truth: "I went into the whole matter very carefully, and I was satisfied that support of this design and strength was sufficient to prevent any fall of which there was any foreseeable risk". He would, nevertheless, be in breach of his statutory duty on proof that support of greater strength or better design could have been provided as a matter of engineering without making the working of the mine physically or economically impossible, and would or might have prevented the fall in question. I reject this argument as stretching the mine owner's duty far beyond what is "reasonably practicable" according to any rational construction of that expression. To my mind, that which is "reasonably practicable" in this context is no more nor less than what is capable of being done to make roofs and sides secure within the limits of what it is reasonable to do, and it cannot be reasonable to do for this purpose anything more than that which it appears necessary and sufficient to do according to the best assessment of what is necessary and sufficient that can be made at the relevant time, that is, in the present instance a point of time immediately prior to the accident. I should add that on the evidence I reject, as does my Lord, the contention on the part of the plaintiff that the ball rock stratum which was being worked at the time of the accident and the strata overlying it constituted, so to speak, terra incognita, to the behaviour of which past experience was no guide.

B The conclusion to which I have come seems to me to be directly supported by the passage which I have quoted from the judgment of ASQUITH, L.J., in *Edwards v. National Coal Board* (1). I think it is also indirectly supported by the judgment of TUCKER, L.J., in the same case, for, in discussing what evidence might have been adduced by the National Coal Board to show that everything reasonably practicable had been done, he said ([1949] 1 All E.R. 746):

E "Again, they might prove that in some areas, no propping or lining was necessary for some particular reason or that different methods were required. Dealing with the particular latent defect which caused this accident—a glassy slant—it might have been possible to show that such a thing is more common in some formations and areas than it is in others or that it is non-existent in some places, but this is the kind of evidence which, in my opinion, would have been relevant."

F It is true that in *Edwards v. National Coal Board* (1) the actual decision was against the defendants, and that in his judgment SINGLETON, L.J., the third member of the court, expressed views which, if accepted in their entirety, might lead to a similar result in the present case. But the facts of that case were very different, inasmuch as other instances of the latent defect which caused the accident—"glassy slant"—had previously been found from time to time in the very roadway in which the accident occurred. Accordingly, the decision in *Edwards v. National Coal Board* (1) cannot be regarded as governing the present case, while the reasoning contained in the judgments of a majority of the court on the whole points to the conclusion that on facts such as those of the present case the claim based on breach of statutory duty should fail. That being my own opinion on the facts of this case and what I conceive to be the true construction of s. 23 of the Act of 1872 and reg. 7 (3) of the regulations of 1938, I agree that this appeal should be allowed.

H HODSON, L.J.: I agree. This is an appeal from a judgment of JONES, J., given on May 28, 1952, in favour of the widow of a Mr. Marshall who was killed in an accident while working in a gypsum mine on Dec. 14, 1950. The accident was caused by a fall of marl which formed the roof of the working place where the deceased was employed at the time he was killed. The claim is based on negligence which was negatived by the trial judge, and also on breach of statutory duty. The defendants, having been held to be in breach of such duty, are appealing against the learned judge's finding. The duty is

contained in the Metalliferous Mines General Regulations, 1938, which have to be read with s. 23 of the Metalliferous Mines Regulation Act, 1872. [His LORDSHIP read s. 23 of the Act and reg. 7 (3) of the regulations, and continued:] The duty imposed by the regulation itself is absolute. The question is whether the defendants are able to escape from the absolute duty by reason of the qualification contained in the words of s. 23 of the Act to the effect that the rules are to be observed "so far as may be reasonably practicable". The words "reasonably practicable" in their context have been considered by this court in *Edwards v. National Coal Board* (1). That case arose on the meaning of the Coal Mines Act, 1911, s. 49 and s. 102 (8). [His LORDSHIP read the sections, and continued:] It was held that, while s. 49 of the Act imposed an absolute duty on the owners, by s. 102 (8) the onus rested on them of proving that it was not reasonably practicable for them to perform that duty. In that case, the owners having called no evidence to assist the court to visualise the situation nationally from the viewpoint of the monopoly owner and never having considered the matter from the local angle, it was held that they had failed to establish their defence under s. 102 (8). Although the arrangement of the sections in the two cases is slightly different, I do not think that there is any material difference in their general effect. Accordingly, I think that this court should hold itself bound to treat the onus as falling on the defendants to prove that they can escape their civil liability only if they can prove that it was not reasonably practicable for them to prevent the insecurity.

The first question is: What is meant by "reasonably practicable"? Counsel for the plaintiff argues with force that the words of qualification are directed, not to the need for security, but to the means of providing the security. He says that the employer cannot say: "I should not have provided means of security"; he can only say "I cannot". This, I think, is making the words "reasonably practicable" approximate to "physically possible", but ASQUITH, L.J., pointed out ([1949] 1 All E.R. 747) in *Edwards v. National Coal Board* (1) that there is a distinction to be drawn between these expressions. Notwithstanding that the interpretation put forward by counsel for the plaintiff in the present case is given support by the language of SINGLETON, L.J., in the *Edwards* case (1), I do not think it accords with the ratio decidendi of the judgments of the majority of the court consisting of TUCKER, L.J., and ASQUITH, L.J. The argument of counsel for the plaintiff is substantially the same as that negatived by the majority of the court in the *Edwards* case (1) with the modification that he recognises that, since that case was decided, the question of relative cost must be considered in arriving at a conclusion on reasonable practicability. I do not think, however, that the qualification introduced into the absolute duty by the words "reasonably practicable" is limited to the question of cost. TUCKER, L.J., gave an indication of the kind of evidence which might be relevant on this matter where he said (*ibid.*, 746):

"Again, they might prove that in some areas, no propping or lining was necessary for some particular reason or that different methods were required. Dealing with the particular latent defect which caused this accident—a glassy slant—it might have been possible to show that such a thing is more common in some formations and areas than it is in others or that it is non-existent in some places . . ."

It seems to me that the decision of the court, certainly that of the majority, turned on the absence of any sufficient evidence that the mine owners in the *Edwards* case (1), that is, the National Coal Board, had discharged the burden cast on them.

It is, I think, therefore, for the court to inquire whether in the circumstances of this case the defendants have proved that they did all that it was reasonably practicable for them to do to make secure the working place where the accident occurred. The knowledge which they had, or ought to have had, of the risk

is, I think, relevant to the question of reasonableness. The defendants sought to discharge the burden by saying that they have followed the normal practice of gypsum mining, viz., to inspect and tap the roof with a hammer and, if the noise is hollow showing that the roof is "dummy", to bring the roof down. They said that this was the right way to make a secure roof and that the accident in this case was due to a geological phenomenon called "slickenside" against which it was not reasonably practicable for them to provide because they had no reason to suspect its presence. The mine had been worked for fifty years, and the evidence covered the last twenty-five years during which slickenside had never been suspected. Slickenside is not detectable by tapping, as the sound given out by rock so affected is the same as that emitted from sound rock. In this state of affairs, accepting the learned judge's finding that a system of propping might have been used to hold up a roof where slickenside, in fact, existed and to prevent it falling, or, at any rate, to break its fall, the evidence in this case shows that slickenside is a phenomenon familiar to mining engineers, but it does not show that it was something which was reasonably to be expected in this mine in the light of past experience. I think, therefore, that the right conclusion in the light of the knowledge and experience of the defendants in working this particular mine is that it was not reasonably practicable for them to secure the roof against the event which happened, namely, a fall due to slickenside. It is a significant distinction between this case and *Edwards v. National Coal Board* (1) that in the latter glassy slant had previously been observed in the actual roadway where the accident happened. [After reviewing the evidence in regard to the submission by counsel for the plaintiff that the past experience in the mine would not avail the defendants, as the accident occurred when the miners were working a new ball rock of stratum, His LORDSHIP decided the point in favour of the defendants, and concluded:] I would, accordingly, allow the appeal.

Appeal allowed.

Solicitors: *Smith & Hudson*, agents for *Eking, Manning, Morris & Foster*, Nottingham (for the defendants); *Amery-Parkes & Co.*, agents for *Hawley & Rodgers*, Loughborough (for the plaintiff).

[*Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.*]

Re WATERMAN'S WILL TRUSTS. LLOYDS BANK, LTD. *v.*
SUTTON AND OTHERS.

[CHANCERY DIVISION (Harman, J.), November 18, 1952.]

Trust and Trustee—Bank—Charging clause—Deposit by bank of trust moneys with itself—Liability to account for profit.

By her will a testatrix, who died on Mar. 16, 1948, appointed a bank to be her executor and provided in a charging clause that "the bank shall be entitled (free of duty) to remuneration such remuneration to be charged and borne in accordance with its published terms in force at the date hereof and may without accounting for any resultant profit act as attorney and perform any service on behalf of my estate on the same terms as would be made with a customer." On July 1, 1948, probate was obtained by the bank. By June, 1949, the bank had in hand some £10,000 in cash. The bank invested £5,000 in the purchase of Treasury bills (which produce one-half per cent. and which are purchasable in minimum units of £5,000). On July 31, 1951, £4,000 of the uninvested cash was placed by the bank on deposit with itself, and on Aug. 16, 1951, on redemption of the Treasury bills, it deposited a further £5,000 with itself.

Held: on the true construction of the charging clause the bank was under no duty to account for the profit gained by its employment of the money deposited with it.

Form of charging clause criticised.

AS TO TRUSTEE'S PROFIT FROM TRUST PROPERTY, see HALSBURY, Hails-
ham Edn., Vol. 33, pp. 140, 220, paras. 238, 402; and FOR CASES, see DIGEST,
Vol. 43, pp. 863-866, Nos. 3097-3117.

ADJOURNED SUMMONS (restored).

The summons was originally heard and determined on June 18, 1952, and concerned the construction of the will of the testatrix, Edith Hilda Waterman deceased. The amount of the estate was insufficient to satisfy all the bequests, and an order was made directing the manner in which an abatement was to be made. The matter was then adjourned back into chambers for investigation of the facts that the amount of income earned in the four years since the date of the death of the testatrix was very small, and that £9,000 in cash had been deposited by the executor, Lloyds Bank, Ltd., with itself in July and August, 1951, and remained so deposited.

Milner Holland, Q.C., and *R. W. Goff* for the plaintiff, Lloyds Bank, Ltd.
E. I. Goulding and *E. G. Wright* for the defendants, various beneficiaries.

HARMAN, J.: The question now before me arises out of certain directions which I made at the hearing of an originating summons on which I decided various questions of construction. When I came to consider the question of costs, it turned out that during the four years since the testatrix had died the amount of interest earned by this estate was ludicrously small. That state of things was brought about by the fact, which appeared from questions which I asked counsel, that Lloyds Bank, who are the trustees, had never invested any of the moneys of which the estate consisted except for a period when they invested part of it in the purchase of short term Treasury bonds which, I think, are bought at a discount and realise about one-half per cent. It also appeared that in 1951 the whole of the estate consisted of some £10,000 cash, and that the bank had then thought fit to place almost the whole of that sum, viz., £9,000, on deposit with itself. So that, during the year before the matter came before me, the estate as a whole had only earned one-half per cent. interest. This was a startling state of things, and it seemed to me to call for some further investigation. I, therefore, adjourned the matter back into chambers for that investigation to be made.

The most disquieting feature was that the testamentary wishes of the testatrix were just in excess of the means to satisfy them, with the result that awkward questions of abatement arose. It appeared to me at one time that, if the estate had been invested in 1948 in a security bringing in, say, four per cent., there would have been no such question of abatement. I was satisfied, however, before the end of the hearing that there was some slight deficiency to be anticipated even though the investment had been, as I think, more prudently managed. I made an order directing the manner in which the abatement was to occur, but, even though there would have to be an abatement, the want of this interest for over four years on £10,000 was not a negligible matter, and the abatement would be far less if a different course had been pursued.

In those circumstances the bank, through its manager at Brighton, who was in charge of this administration, filed an affidavit explaining, or seeking to explain, why, over this long period, no investment had been made. In the upshot no beneficiary before me desired to attack the bank on the basis that there was a breach of trust in failing so to invest, and it seemed to me impossible, on an administration suit started, not by writ, but by summons, to charge these trustees with wilful default as would have been necessary to raise the question of breach of trust. I must, therefore, assume, in spite of all appearance, that there was nothing more than such a want of judgment shown as the court would excuse. I say I must assume that, but I do not forget that a paid trustee is expected to exercise a higher standard of diligence and knowledge than an unpaid trustee, and that a bank which advertises itself largely in the public Press as taking charge of administrations is under a special duty. I am not altogether satisfied when I find that where a testator appoints Lloyds Bank, Ltd., as his executor the only wisdom he attracts in general is that of the local bank manager, here the manager at Brighton. No doubt, he is a very good banker, but whether he has experience in administering trusts I do not know. He says, as I understand him, that he has behind him some central organisation to which he can refer and to which he did refer in this case when he became, not unnaturally, anxious at the fact that the administration dragged on year after year and there was no interest coming in. However, I assume that there was no breach of trust, and, therefore, that in 1951 it was not a gross impropriety not to invest the £10,000 which represented the cash capital of the estate.

The bank placed that sum on deposit with itself. If any private trustee having £9,000 of his beneficiaries' money in his pocket chooses to place it on deposit in his own business, in other words, to lend it to himself, the court will without hesitation charge him interest at five per cent., whether or not he has made a profit, because he has employed trust money in his trade, and that the court will not allow. It is, therefore, conceded that this is not a thing which the bank could do unless the charging clause which it put before the testator to sign dispenses with the usual penalties. I want to make it clear that I am only dealing with a very narrow matter, and that is not whether this was a proper investment of trust money—it is conceded that it was not. I am not deciding that a bank can ever invest money, assuming that it is investment of money to put it on deposit, by depositing it with itself. I am merely dealing with moneys which I assume are moneys which would not have been invested by a prudent trustee.

Can this bank justify on this charging clause the lending of money to itself and thereby making a profit at the expense of its beneficiaries, because if it has paid one-half per cent. and the court would charge it with five per cent., it is clearly making, or may be making, a profit of $4\frac{1}{2}$ per cent. at the beneficiaries' expense, which is rather a shocking thing. However, the bank does not hesitate

to say that the form of the charging clause which it put before the testatrix enables it to make this profit. The words relied on are:

"I declare that the bank shall be entitled (free of duty) to remuneration such remuneration to be charged and borne in accordance with its published terms in force at the date hereof . . ."

The bank's published terms include an acceptance fee, an income fee, a discharge fee and various other things like brokerage on the transfer of investments, A money for collecting mortgage interest, and so forth. The clause continues:

"and may without accounting for any resultant profit act as attorney and perform any service on behalf of my estate on the same terms as would be made with a customer."

The words "act as attorney" are not common form. The common form is "act as banker", but I must take the words as I find them in this will. The words relied on are these: "perform any service on behalf of my estate on the same terms as would be made with a customer". The argument on behalf of the bank is that one of the bank's services to customers is that of accepting money on deposit, and this acceptance of money on deposit was, therefore, a service which the bank rendered to the estate and which it is entitled to perform on the same terms as would have applied to a deposit by a customer, viz., that it pays one-half per cent. and earns whatever it can. It is said that the words "without accounting for any resultant profit" justify that. Whether any testator asked to sign a charging clause in these terms would guess that this profit might be made at the expense of his estate I very much doubt. I also have great hesitation in saying, when I look at the words, on the very narrow view on which alone I am asked to consider them, that they do suffice to relieve the bank from accounting for the profit it has earned, but, assuming that deposit with another bank is proper, I think a deposit with itself, that being a service which a banker regularly renders to his customer, is one in respect of which the bank need not account for any resultant profit. Accordingly, I think that the form of words to that extent justifies what the bank did. As I have said, I have not decided here, but I have only assumed, having regard to the attitude of the beneficiaries, that this very sorry story was one which could be justified by whatever the extraneous circumstances were. That being so, I think that the bank cannot now be made accountable for the difference between the deposit interest and the interest which it must be supposed to have earned on this £9,000. D E F

Solicitors: *Burton, Yeates & Hart*, agents for *Nye & Donne*, Brighton (for the plaintiff); *Ranger, Burton & Frost*, and *Church, Adams, Tatham & Co.*, agents for *Barwell & Blakiston*, Seaford (for the defendants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

LEIBO v. D. BUCKMAN, LTD., AND ANOTHER.

[COURT OF APPEAL (Denning, Jenkins and Hodson, L.J.J.), October 21, 22, 23, November 21, 1952.]

Malicious Prosecution—Reasonable and probable cause for prosecution—Reasonable cause in respect of part of money alleged to have been stolen—Belief of defendant in truth of charge against plaintiff—When question for jury.

A In 1950 the plaintiff agreed with the second defendant, the managing director of the defendant company, that the company should finance a scheme for making and selling decorated articles of pottery, the company paying the plaintiff a salary of £15 a week. On July 14, 1950, the plaintiff B having represented to the second defendant that he would require a set of tools for the work, the second defendant gave him £20. On July 18, 1950, the plaintiff showed the second defendant the tools which he had bought and handed him two receipts, one for £9 for small tools and another for £7 15s. for precision tools. He told the second defendant that the balance of the money had been spent on petrol. On this occasion the C plaintiff was paid a further £15 for the purchase of paints, and later he produced two receipts for purchases amounting to £14 6s. and £1 2s. 6d. respectively. On July 21, 1950, the second defendant discovered that the receipt for £7 15s. was not genuine and that the precision tools shown to him by the plaintiff were the plaintiff's own property. When taxed, the plaintiff maintained that he had no intention of stealing, but that he D made out the false receipt to conceal the fact that he was selling his own property to the company. The second defendant, however, decided to terminate the agreement, took possession of some of the small tools and paint materials valued at £7 17s., and told the plaintiff to return the rest of the goods comprised in the receipts. The plaintiff failed to return any of the goods and claimed £30 wages. The second defendant there- E upon preferred a charge against him of stealing £35 (later reduced to £27 3s. by deduction of the £7 17s. for which the plaintiff was given credit), the property of the company, but the charge was dismissed. In an action by the plaintiff for damages for malicious prosecution, the judge put the following questions to the jury: (i) Did the second defendant honestly believe that the charge of larceny preferred against the plaintiff was true and F that the plaintiff was guilty of such charge? (ii) Was the second defendant acting maliciously in prosecuting the charge? The jury answered the first question "No", and the second "Yes". The judge then ruled that there was no evidence on which the jury could find that the second defendant did not bring the proceedings honestly and entered a verdict for the defendants.

G HELD (DENNING, L.J., dissentiente): assuming that the second defendant had reasonable and probable cause for preferring the charge in respect of the £7 15s., he had none in respect of the balance of the £27 3s., and, therefore, the charge was preferred without probable cause and the plaintiff was entitled to judgment.

Reed v. Taylor (1812) (4 Taunt. 616), applied.

H *Johnstone v. Sutton* (1786) (1 Term Rep. 510), distinguished and explained.

Per JENKINS, L.J.: The question may, perhaps, resolve itself into one of degree. Where there is a theft of 20s. and reasonable and probable cause is shown as regards 19s. of it, it may well be that the prosecutor, when sued for malicious prosecution, is entitled to succeed, because he was justified in making the charge, even though he did so maliciously. But the contrary must surely be the case if the figures are reversed and reasonable and probable cause is shown as to 1s. only out of the 20s.

Per DENNING, L.J.: A question in the form of question (i) relating to the belief of the defendant should only be left to the jury in a case where there is evidence that the prosecutor knew the charge put forward by him to be groundless, for the effect of the question is to take the decision of the issue of reasonable cause out of the hands of the judge and place it in those of the jury. The proper course in most cases is not to ask the jury any question about honest belief, but to pick out the salient facts on which reasonable cause depends, and, if they are in dispute, ask the jury to find specifically on them.

AS TO WANT OF REASONABLE AND PROBABLE CAUSE, see HALSBURY, *Hails-ham Edn.*, Vol. 22, pp. 14-16, paras. 18-21; and FOR CASES, see DIGEST, Vol. 33, pp. 492-506, Nos. 319-497.

Cases referred to:

- (1) *Pain v. Rochester & Whitfield*, (1602), Cro. Eliz. 871; 78 E.R. 1096; 33 Digest 498, 391.
- (2) *Abrath v. North Eastern Ry. Co.*, (1883), 11 Q.B.D. 440; 52 L.J.Q.B. 620; 49 L.T. 618; 47 J.P. 692; *affd.* H.L., (1886), 11 App. Cas. 247; 55 L.J.Q.B. 457; 55 L.T. 63; 50 J.P. 659; 33 Digest 500, 418.
- (3) *Sutton v. Johnstone*, (1785), 1 Term Rep. 493; 99 E.R. 1215; *on appeal*, *sub nom. Johnstone v. Sutton*, (1786), 1 Term Rep. 510; 99 E.R. 1225; 33 Digest 473, 60.
- (4) *Panton v. Williams*, (1841), 2 Q.B. 169; 10 L.J.Ex. 545; 114 E.R. 66; 33 Digest 502, 441.
- (5) *Herriman v. Smith*, [1936] 2 All E.R. 1377; *affd.* H.L., [1938] 1 All E.R. 1; [1938] A.C. 305; 107 L.J.K.B. 225; Digest Supp.
- (6) *Tempest v. Snowden*, [1952] 1 All E.R. 1; [1952] 1 K.B. 130; 116 J.P. 28.
- (7) *Broad v. Ham*, (1839), 5 Bing. N.C. 722; 8 Scott, 40; 8 L.J.C.P. 357; 132 E.R. 1278; 33 Digest 495, 362.
- (8) *Hicks v. Faulkner*, (1881), 8 Q.B.D. 167; 51 L.J.Q.B. 268; 46 L.T. 127; 46 J.P. 420; 33 Digest 467, 18.
- (9) *Bradshaw v. Waterlow & Sons, Ltd.*, [1915] 3 K.B. 527; 85 L.J.K.B. 318; 113 L.T. 1101; 33 Digest 506, 493.
- (10) *Turner v. Ambler*, (1847), 10 Q.B. 252; 16 L.J.Q.B. 158; 9 L.T.O.S. 36; 11 J.P. 631; 116 E.R. 98; 33 Digest 503, 444.
- (11) *Johns v. Slater*, (Feb. 17, 1948) unreported.
- (12) *Blachford v. Dod*, (1831), 2 B. & Ad. 179; 9 L.J.O.S.K.B. 196; 109 E.R. 1110; 33 Digest 505, 460.
- (13) *Hailes v. Marks*, (1861), 7 H. & N. 56; 30 L.J.Ex. 389; 4 L.T. 805; 25 J.P. 808; 158 E.R. 391; 43 Digest 455, 328.
- (14) *Tims v. John Lewis & Co., Ltd.*, [1951] 1 All E.R. 814; [1951] 2 K.B. 459; 115 J.P. 265; 2nd Digest Supp.
- (15) *Reed v. Taylor*, (1812), 4 Taunt. 616; 128 E.R. 472; 33 Digest 511, 561.
- (16) *Palmer v. Birmingham Manufacturing Co.*, (1902), 18 T.L.R. 552; 33 Digest 511, 564.
- (17) *Delisser v. Towne*, (1841), 1 Q.B. 333; 113 E.R. 1159; 33 Digest 517, 614.
- (18) *R. v. Prosser*, (circa 1770), cited 1 Term Rep. at p. 533; 99 E.R. 1237; 33 Digest 511, 560.

APPEAL by the plaintiff from an order of OLIVER, J., dated May 2, 1952, in an action for malicious prosecution. The following statement of the facts is taken from the judgment of JENKINS, L.J.:

This is an appeal by Israel Leibo, the unsuccessful plaintiff in an action for malicious prosecution brought by him against the defendants, D. Buckman, Ltd., and David Buckman (who for the present purpose can be considered as one) and tried by OLIVER, J., with a jury on Apr. 30, and May 1 and 2, 1952. The questions left to the jury with the approval of counsel on both sides were: (i) Did the defendant, David Buckman, honestly believe that the charge of

larceny preferred against the plaintiff was true and that the plaintiff was guilty of such charge? (ii) Was the defendant, David Buckman, acting maliciously in prosecuting the charge? (iii) The amount of damages awarded to the plaintiff. The jury answered the first question "No", and the second question "Yes", but the learned judge after argument ruled that there was "no evidence on which the jury could find that the prosecutor did not bring the proceedings honestly" and on that ground entered a verdict for the defendants with costs.

A This ruling clearly means that in the view of the learned judge there was no evidence on which the jury could answer the first question put to them otherwise than affirmatively, and the question in this appeal is whether he was right in so holding.

The prosecution to which the action relates was in respect of a charge preferred by the defendant company (acting by its managing director, the second defendant, whom I will call "Buckman") against the plaintiff of stealing on or about July 13, 1950, at 137, Regent Street, W.1, £35 cash, the property of the defendant company, contrary to s. 17 (1) (a) of the Larceny Act, 1916, or, in other words, a charge of larceny of money of the defendant company to that amount by the plaintiff when employed as a servant of the defendant company. The charge was, in the first instance, preferred at the West End Central Police Station at about 9 p.m. on July 24, 1950, when the charge sheet was signed by Buckman on behalf of the defendant company. The plaintiff had been arrested at about 6.50 p.m. the same day on a written statement made to the police by Buckman. The plaintiff remained under arrest until about 1 a.m. the next morning when he was released on bail. On account of this arrest and detention of the plaintiff the present action originally included a claim for damages for false imprisonment, which was not pursued, and is, therefore, not material for the purposes of the present appeal. The case was heard at Bow Street on Aug. 8, 1950, when the sum alleged in the charge to have been stolen by the plaintiff was reduced from £35 to £27 3s. The defendant company appeared as prosecutor, and the magistrate, after taking the depositions of Buckman and of two police officers for the prosecution, discharged the plaintiff. The evidence given by the plaintiff and Buckman at the trial of the present action was in direct conflict on certain highly material points.

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The plaintiff is a commercial artist of Belgian origin. It is not in dispute that on July 12 or 13, 1950, he called on Buckman at the defendant company's place of business, 137, Regent Street, London, and broached to Buckman a project for the design and manufacture of ornamental articles of pottery which he suggested would find a ready sale during the then impending Festival of Britain. The plaintiff produced some samples of his work in this line, and his proposal in substance was that he should produce a range of further samples, with the aid of which he would canvass orders; that, if his samples and the orders obtained proved satisfactory, production should be undertaken on a commercial scale; that the defendant company should finance the making of the samples, and later the commercial production of the articles; and that the defendant company in addition to the salary next mentioned should pay the plaintiff twenty-five per cent. of any profits of the venture and should employ him at a salary of £15 per week. There is no doubt that Buckman, on behalf of the defendant company, agreed to the plaintiff's proposal as above outlined, but there was a conflict of evidence as to the agreement reached in regard to the date from which payment of the plaintiff's salary was to begin. The plaintiff said it was to begin as from Friday, July 14, 1950. Buckman, on the other hand, said that the plaintiff's employment by the company was to begin as from the date of the plaintiff's first meeting with him, but that the plaintiff was not to be entitled to any salary until such time as Buckman was satisfied from the samples and orders that the project was sound. It was common ground that it would take the plaintiff a matter of twelve weeks to produce

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a satisfactory range of samples. For the purposes of the present appeal it is unnecessary to decide whether the plaintiff or Buckman was speaking the truth as to the date from which it was agreed that the plaintiff's salary of £15 per week was to commence. It is enough to say that there was certainly evidence on which the jury could hold (if they believed the plaintiff) that he was employed by the defendant company at a salary of £15 per week from July 14, 1950.

The plaintiff and Buckman appear to have met more than once during the first two or three days of their association, and there is no doubt that the plaintiff represented to Buckman that for the purpose of making the samples he would require certain tools and materials (which he described), that in order to obtain some of these things he would have to go to Stoke-on-Trent in the Potteries, and that he would need the use of a motor car for the purposes of the project, and, in particular, for the purpose of going to Stoke-on-Trent to collect the things to be obtained there, and for the purpose of canvassing for orders. In consequence of these representations, Buckman, on behalf of the company, bought a motor car for £245, and made it over to the plaintiff for use by him in furtherance of the project on Friday, July 14, 1950, and on the same date paid to the plaintiff out of the company's moneys the sum of £20 to be applied by the plaintiff in the purchase of the necessary tools and materials. The plaintiff did not, in fact, go to Stoke-on-Trent at all, but in the course of the following week he produced to Buckman a number of receipts purporting to show that he had expended various amounts in the purchase of tools and materials, and obtained from Buckman out of the company's moneys a further £15, making with the £20 previously paid the sum of £35 alleged to have been stolen by the plaintiff from the defendant company in the charge as originally framed.

There was some confusion as to the date or dates on which the receipts were produced and the date on which the further £15 was paid, but I think it can be accepted that this further payment was made on Tuesday, July 18, 1950, on the plaintiff producing (i) a receipt purporting to be from one T. Meares of 98, Cavendish Mansions, Clerkenwell Road, E.C.1, and dated July 14, 1950, for a sum of £9 in respect of the tools and materials therein described, and (ii) a receipt purporting to be from one Ray Cummings of 2, Parish Yard, Longton, Staffs., and dated July 15, 1950, for a sum of £7 15s. in respect of "a precision set of draughtsman's tools" not further itemised. These two receipts thus purported to account for a sum of £16 15s. out of the £20 entrusted to the plaintiff, leaving a sum of £3 5s. unaccounted for. The plaintiff on the same occasion represented that he required a further £15 for the purchase of paints, and the additional payment of that amount was accordingly made to him. Between the payment to the plaintiff of the further £15 and Buckman's discovery (hereinafter referred to) that the receipt for £7 15s. was not genuine, the plaintiff produced to Buckman two further receipts, namely, (iii) a receipt purporting to be from one D. P. Williams of 60, Morden Way, Sutton, Surrey, and dated July 18, 1950, for £14 6s. in respect of paints, thinners and lacquer; and (iv) a receipt purporting to be from W. H. Palmer & Co., Ltd., of 7, Waller Street, Luton, and dated July 19, 1950, for £1 2s. 6d. in respect of two gallons of thinning. The plaintiff said in evidence (though this was disputed) that he repaid to Buckman £1 of the £15 because the expenditure on paints for which he had asked and received that additional sum only came to the £14 6s. covered by D. P. Williams' receipt.

It appears that Buckman suspected the receipt for £7 15s. partly because it seemed improbable that the plaintiff should have gone so far afield as Longton, Staffs., for this one small purchase, and partly because of the absence of an invoice. Accordingly, on or about July 19, he wrote to R. Cummings at the address given asking for an invoice, and in the afternoon of Friday, July 21, he

received his letter back through the dead letter office marked "Not known". From this Buckman concluded, as it turned out quite rightly, that the receipt for £7 15s. was a fabrication. According to the plaintiff he had precision tools of his own of the kind required for the project, the fair value of these tools was at least £7 15s., and he took it on himself to sell them to the defendant company at that price, or, perhaps, one should say buy them from himself on behalf of the defendant company at that price, concocting the receipt from "R. Cummings" to make it appear that the tools had been purchased from a third party, because he was afraid that, if he openly attempted to sell his own tools to the defendant company, Buckman would have said (in effect): "No, you must throw in for nothing the use of any tools of your own". Apart from any criminal offence involved in the fabrication of the receipt, this was, of course, a gross fraud by the plaintiff on the defendant company as his employer.

The plaintiff gave evidence to the effect that on July 18 he showed Buckman all the tools he (the plaintiff) had bought out of the £20, that is to say, the tools bought from Meares for £9 and the tools provided by the plaintiff himself for £7 15s. and covered by the fabricated receipt. This evidence, if accepted, would not, of course, show that Buckman on that occasion confirmed the plaintiff's sale of his own tools to the defendant company, for Buckman did not then know that the receipt from R. Cummings was a fabrication, but it would, I think, be of some importance as indicating that the plaintiff did not fabricate the receipt with a view to stealing the £7 15s., but with a view to concealing the fact that in reality he himself was selling tools of his own to the defendant company at that price.

The evidence of what took place after Buckman found out on Friday, July 21, that the receipt for £7 15s. was a fabrication, is full of controversy. According to the plaintiff, Buckman came to see the plaintiff at his house in Palmers Green on Saturday, July 22, and raised the question of the fabricated receipt. The plaintiff gave his explanation, which, apparently, Buckman accepted without any great show of indignation. Buckman did, however, say that he had decided not to go on with the business, assigning his decision to advice he had received from friends in Birmingham to the effect that prospects were poor. On the same day (this is still the plaintiff's version) Buckman inspected all the tools and paints and other materials bought by the plaintiff for the sums shown in the receipts, that is (as numbered above) No. (i) for £9 tools and materials, No. (ii) (the fabricated one) for £7 15s. precision tools, No. (iii) for £14 6s. paints, thinners and lacquer, and No. (iv) for £1 2s. 6d. thinning. These totalled £32 3s. 6d., leaving £2 16s. 6d. unaccounted for. The plaintiff explained that this balance had been spent on petrol for the car, with the knowledge and approval of Buckman. In the course of this interview Buckman told the plaintiff that he, Buckman, would pay the plaintiff his wages on the following day (Sunday, July 23) the plaintiff having apparently inquired on the telephone about his wages a short time previously. According to the plaintiff, Buckman did call again on Sunday, July 23, and said he wanted the tools, and took some of them away in his car. The plaintiff asked about his (the plaintiff's) salary, and Buckman said that if the plaintiff brought the car and the remaining materials to the office the next day he would pay him. On this occasion Buckman also took away some of the paint. He did not take the models, which were wet, and he left the rest of the paint because it would not go in the boot and he did not want it in front for fear of spoiling his car. According to the plaintiff, Buckman called again at about 9 a.m. on Monday, July 24, and said that as the materials were no use to him he would like the plaintiff to sell them for him and deduct his wages from the money. He also required the car used by the plaintiff to be returned by mid-day. Later than morning, according to the plaintiff, he spoke to Buckman on the telephone and asked for a little more time to sell the materials. Buckman replied "that the insurance on the car expired at 2", and required

the car and the materials (if unsold) to be returned to the defendant company's office by that time. The plaintiff failed to return the car by 2 o'clock, and thereafter could not drive it because it was uninsured, so he left it in the street outside his house. There was a further telephone conversation about 2 p.m. when the plaintiff told Buckman that he had been unable to sell the materials, that he could not drive the car because it was not insured, and that he proposed to keep the materials till his salary was paid. Buckman replied by saying: "I will prosecute you", or "I will go to the police"—the plaintiff was not sure which, but he thought the former. That afternoon the plaintiff took the precision tools out and pawned them. He was arrested the same evening and the charge which is the subject of the present action ensued.

Buckman's evidence is entirely different. According to him, when he found out that the receipt for £7 15s. was fabricated he took no action till Sunday, July 23. Being an orthodox Jew he would do no business on Saturday. On July 23, the plaintiff rang Buckman up. Buckman told the plaintiff he had found out about the fictitious receipt, was disgusted about it, "withdrew from the proposition", and asked the plaintiff to return the car and the tools and the materials. The next day he called at the plaintiff's house about 9 a.m. and demanded the return of all these things. The plaintiff willingly gave him what he had, consisting of a few tools and two cans of thinners. There was nothing else there, and in particular he saw no paint and no precision tools. The things he recovered were worth in all only about £7 17s. He delivered an ultimatum for the return of the car and the rest of the goods comprised in the invoices to the office in Regent Street by 12 noon. Later the same day he arranged with his insurance agents to cancel the insurance of the car so far as it covered drivers other than himself and wired the plaintiff at 4.45 p.m.: "Car not insured Phone. Urgent". Before the telegram was sent, the plaintiff did telephone. Buckman taxed the plaintiff with not returning the car and the rest of the tools by 12 noon. The plaintiff "said he wanted some wages or something". Buckman asked him: "What wages"? and "he said something about £15 for a week's work". Buckman then (in his own words) "told him that he had given me a false invoice, and that unless my car was brought back I would have to ask the advice of the police how I could get it back". The plaintiff replied: "You can do what you like". Immediately after this conversation Buckman did telephone the police, with the result that the same evening the plaintiff was arrested and charged as already mentioned. The car, the recovery of which seems to have been Buckman's main preoccupation, was duly recovered and passed from the case.

Quass, Q.C., and *Wainstead* for the plaintiff.

Beresford, Q.C., and *Finer* for the defendants.

Cur. adv. vult.

Nov. 21. The following judgments were read.

DENNING, L.J. : According to our law a person who has been acquitted of a criminal charge can bring an action for damages if he can show that the prosecution was instituted maliciously and without reasonable and probable cause. The experience of judges, lasting now over some centuries, has shown that in this action juries must be kept on a tight rein. If they are allowed their heads, they will usually run in favour of the plaintiff, giving little heed to the public interest which this action involves. The judges noted this as early as 1599 when they said it was not safe to send the general issue to the "lay gents", as they described the jury: *Pain v. Rochester & Whitfield* (1). More recently the attitude of juries was well summed up by LORD BRAMWELL in *Abrath v. North Eastern Ry. Co.* (2) (11 App. Cas. 252):

"A man brings an action for a malicious prosecution; he gives evidence which shows or goes to show that he is innocent. You may tell the jury

over and over again that that is not the question, but they never or very rarely can be got to understand it. They think that it is not right that a man should be prosecuted when he is innocent, and in the end they pay him for it."

A I have experienced the same thing myself, and the reports for the last four hundred years abound with cases where other judges have likewise experienced it. In view of this experience it is most important to adhere to the rule that it is for the judge, and not for the jury, to determine whether or not there was reasonable and probable cause for the prosecution. Only by firm adherence to this rule can people be protected in their public duty of bringing offenders to justice. The jury have, of course, an important part to play. Where the facts are in dispute, they have to find what were the facts known to the prosecutor

B when he made the charge. But once those facts are ascertained, then the judge has to decide whether they afford reasonable and probable cause for the prosecution. This rule was laid down by LORD MANSFIELD, C.J., and LORD LOUGHBOROUGH, C.J., in 1786 in the celebrated case of *Johnstone v. Sutton* (3) (1786) (1 Term Rep. 545). It was re-affirmed in 1841 by a strong Court of Exchequer Chamber in *Panton v. Williams* (4), and it was re-stated quite recently in the

C House of Lords in *Herniman v. Smith* (5). It is, therefore, well settled.

In the present case the jury have, apparently, accepted the facts as told by the plaintiff. [HIS LORDSHIP stated the facts and continued:] I desire to say at once that I regret that the first question was put to the jury at all. The judge had good reason for putting it because it was agreed by both counsel, who were, no doubt, following the recent case of *Tempest v. Snowden* (6). Nevertheless,

D experience shows that this question causes a great deal of trouble. If it is to be asked in every case, the effect will be to take reasonable cause out of the hands of the judge and put it into the hands of the jury. I know of many cases where a judge has been of opinion that there was reasonable and probable cause for the prosecution, but, nevertheless, he has been precluded from giving effect to his opinion by the answer of the jury to this question. The question seems to

E have its origin in a dictum of ERSKINE, J., in 1839 in *Broad v. Ham* (7) when he is reported to have said (5 Bing. N.C. 727):

"It would be a monstrous proposition, that a party who did not believe the guilt of the accused, should be said to have reasonable and probable cause for making the charge."

F In accordance with this dictum, HAWKINS, J., in 1878 in *Hicks v. Faulkner* (8) (8 Q.B.D. 171) said that, in order that there should be reasonable cause, there must be "an honest belief in the guilt of the accused." This was followed in 1882 by CAVE, J., in the celebrated case of *Abrath v. North Eastern Ry. Co.* (2), when he put to the jury the specific question (11 Q.B.D. 443): "Did [the defendants] honestly believe in the case which they laid before the magistrates?"

G Since that time the question has been repeatedly asked of juries often with most unfortunate results. In 1915 this court tried to discourage judges from putting the question. In *Bradshaw v. Waterlow & Sons, Ltd.* (9), following *Turner v. Ambler* (10) (10 Q.B. 261), it was laid down that the question was not to be asked unless there was evidence of absence of an honest belief. This warning received added emphasis in 1938 in *Herniman v. Smith* (5), when LORD ATKIN

H said ([1938] 1 All E.R. 8):

"There is a danger lest the questions asked in this case, which are taken from the questions formulated by CAVE, J., in 1882, in the well-known case of *Abrath v. North Eastern Ry. Co.* (2), should be asked in every case. This, it seems to me, would be to take the decision of the issue out of the hands of the judge, to whom, in the interests of prosecutor and accused alike, it has been confided."

Nevertheless, the question continues to be asked. I asked it myself in *Johns v. Slater* (11). It was asked in *Tempest v. Snowden* (6), and in the present case. In each case it was answered in favour of the plaintiff, although in each case the judge, apart from this answer, was of opinion there was reasonable and probable cause. I hope it will not be asked in the future unless the case really warrants it.

There are, I think, comparatively few cases in which the question is warranted, for the simple reason that reasonable and probable cause always involves an inquiry into the facts known to the prosecutor, but not as a rule into his beliefs. In most cases his belief goes only to malice and not to reasonable and probable cause. This was laid down by that good judge, LITLEDALE, J., in *Blachford v. Dod* (12), when he said (2 B. & Ad. 186):

"It was not a question [for the jury] whether the defendants believed that they had good ground for indicting the plaintiff, but all the material facts being ascertained, it was for the judge to say whether the defendants had reasonable and probable cause for so doing."

That statement was quoted with approval in this court in *Bradshaw v. Waterlow & Sons, Ltd.* (9) ([1915] 3 K.B. 535), which was, in turn, approved by LORD ATKIN in *Herniman v. Smith* (5) ([1938] 1 All E.R. 9). A like proposition was enunciated by an equally high authority, POLLOCK, C.B., in *Hailes v. Marks* (13) (7 H. & N. 63), and it is supported by the observations of no less an authority than the present Lord Chief Justice, LORD GODDARD, in *Tims v. John Lewis & Co., Ltd.* (14), when he said:

"The question whether there was a reasonable or probable cause is not, I think, to be determined subjectively, as has been suggested. It is a question which objectively the court has to decide on the evidence before it."

The proper course in most cases is, therefore, not to ask the question about honest belief, but to pick out the salient facts on which reasonable cause depends, and, if they are in dispute, ask the jury to find specifically on them. That was laid down as long ago as 1841 by a strong Court of Exchequer Chamber in *Panton v. Williams* (4) (2 Q.B. 195) which had to correct a divergent tendency in those days, just as this court should, I think, correct a like tendency now.

There are, however, some cases where the question about honest belief can properly be put to the jury. What, then, are those cases? When does the subjective element enter in? If the facts, viewed objectively, do not afford reasonable cause, that is, of course, the end of the matter. There is no need for a subjective inquiry. But if the facts, viewed objectively, do afford reasonable cause, the subjective element may sometimes come in to destroy it. It must be rarely that it does so, for, if the proved and admitted facts, viewed objectively, are such that a reasonable man would have reasonable cause for prosecuting (which is a matter for the judge), it will require very exceptional evidence to prove that the prosecutor himself, viewed subjectively, had no such cause. Proof of malice or bad motive will not do. Positive proof will be required that the prosecutor had no belief in the plaintiff's guilt, or, in other words, that he believed him to be innocent. That was clearly laid down by the Court of Queen's Bench in *Turner v. Ambler* (10) (10 Q.B. 261), where the court wrote down that there must be *proof of the absence of belief* and underlined it. This means that the subjective element—the question of honest belief—should only be put to the jury when a charge, apparently well founded, is shown to have been groundless and there is evidence that the prosecutor knew it to be groundless. In short, when there is evidence that the prosecutor knowingly put forward a false case. This is the basis of all the cases on the point.

Take *Broad v. Ham* (7) itself. An apprentice left the service of his master and, after he had left, a missing cheque was found in his locker which was unlocked. The master threatened to prosecute the apprentice for stealing it unless his father

paid £30, and, it not being paid, the master did prosecute him. The charge was groundless. Someone else had, presumably, placed the cheque in the locker. If the master knew that to be the case, he would, of course, have no reasonable or probable cause for prosecuting the apprentice, and that is all that *ERSKINE, J.*, meant by his dictum about honest belief which I have quoted earlier. That clearly appears from the better report of the case in 8 Scott and 8 L.J.C.P. at p. 360. What *ERSKINE, J.*, actually said (8 Scott 50) was:

A "It would be monstrous to hold that one *satisfied of the innocence of the accused* should still be held to have reasonable or probable cause for preferring a *groundless charge*."

No one would doubt that proposition, but it clearly involves two things—a groundless charge and knowledge that it was groundless. Take next *Hicks v.*

B *Faulkner* (8). A tenant's son gave evidence on oath in the county court that he had handed up the key to the landlord. The landlord denied it and prosecuted the tenant's son for perjury. Assuming that the evidence of the tenant's son was correct and that he had, in fact, handed up the key, the charge was groundless, but, nevertheless, if the landlord, by a mistake of recollection, had forgotten it and honestly believed that the tenant had told a lie, the landlord would have

C reasonable cause for prosecuting him. That case, therefore, also involved the two things: Was the charge groundless, and, if so, did the prosecutor know it was groundless? Lastly, take *Abrath v. North Eastern Ry. Co.* (2). A man made a claim that he had been injured in a railway accident. The man's claim was supported by Dr. Abrath, who made a report on his injury. The claim was settled by paying £725. Later, the railway company had statements from

D several witnesses saying that the man had not been injured in the accident, but that his injury had been produced by the doctor in collaboration with the man. Thereupon, the company prosecuted the doctor for conspiracy to defraud them. At the trial it was shown that the man's injury was absolutely bona fide, and that the witnesses for the prosecution were men of bad character, false witnesses who could not be relied on. The charge was, therefore, groundless, and the liability of the railway company clearly depended on whether they knew it to be groundless. *CAVE, J.*, put the question of honest belief to the jury, but explained it in this way (11 Q.B.D. 443):

"If I go before magistrates with a case which appears to be good on the face of it . . . *while all the time I know that the charge is groundless*, then I should not have reasonable and probable cause for the prosecution."

F When the question is thus explained it is obvious that it only applies when the prosecutor knowingly puts forward a false case. That is how *GREER, L.J.*, regarded it in *Herniman v. Smith* (5) ([1936] 2 All E.R. 1381), for he said it was

"... an act so seriously dishonourable that . . . it required the very strongest evidence to support an affirmative answer to the question."

G When the question of honest belief is explained as *CAVE, J.*, explained it, and tested as *GREER, L.J.*, tested it, I ask myself whether it could properly be put to the jury in the present case, and, in any event, whether there was any evidence on which they could answer it, as they did, adversely to the defendant. I say, with the judge who tried the case, emphatically No. There was no evidence that the charge was groundless, let alone that the defendant knew it was groundless.

H It was, indeed, most well and truly laid. On the facts admitted by the plaintiff, there was ample ground for charging him with stealing £7 15s. by a trick—or as a servant—and of covering it up by a forgery, and yet he has the impudence to bring this action for malicious prosecution. I use the word "impudence" advisedly because it was the word used by the judge who tried the case and I fully agree with the epithet. The only excuse put forward by the plaintiff was that he put his own tools into the business, instead of buying them. That may excuse him, but it does not exculpate him. No evidence was given of the value of

his own tools except his own word. He had pawned them when the police came. Even if they were worth £7 15s., nevertheless, it is clear law that a thief cannot wash away his guilt by paying back the money or giving its equivalent in kind. The common law of larceny does not require the money to be taken *lucri causa*, but only to be taken with intent to deprive the owner of it permanently: see the matter well and fully discussed in *RUSSELL ON CRIME*, 10th edn., pp. 1166-1175, and *KENNY'S OUTLINES OF CRIMINAL LAW BY TURNER*, p. 243, art. 282.

Counsel for the plaintiff said that, even if there was reasonable and probable cause for prosecuting the plaintiff for £7 15s., there was none for stealing £27 3s. I do not agree with this. Buckman said, quite truly, that he had handed the plaintiff £35 in cash and had only got back goods worth £7 17s. Why should Buckman give credit to the plaintiff for anything more than the goods he had actually got back? If the plaintiff had been guilty of theft and forgery in regard to the £7 15s., was there not a reasonable suspicion as regards the rest of the £27 3s.? What about the money for petrol? The plaintiff had got £2 or £3 for petrol to go to Stoke and had not gone. That brings the misappropriation from £7 15s. up to £10. Then what about the £15 for paint? The plaintiff only got that £15 out of Buckman by producing receipts for the first £20. If Buckman had known that the receipt for £7 15s. was a fake, would he ever have handed the extra £15 to the plaintiff? Clearly not. In those circumstances I do not see why Buckman should be called on to give credit to the plaintiff for that £15 as if it had been rightfully obtained and rightfully applied. After all, the plaintiff had not handed over the paint. He claimed to have a lien on it for £30 salary. This so-called lien was as impudent a claim as can be conceived. He had not earned any salary. In the course of the very first week he had been guilty of such gross misconduct in regard to the fictitious receipt that Buckman was entitled to dismiss him at a moment's notice without a penny salary. The plaintiff had not the slightest justification for not handing over the paint. That £15 brings the total to £25. In these circumstances I should have thought, therefore, that there was reasonable and probable cause for the charge for £27 3s. as it stood. Even if the charge was in fact groundless, however, I see not the slightest evidence that Buckman knew it was groundless, and that would be necessary before an answer could be given adverse to him. Thus far I have asked myself the same question as the judge asked himself: Was there any evidence on which the jury could answer the question as they did? This question tends, however, to merge into the all-embracing question: Was there any evidence of the want of reasonable and probable cause? For if the proved and admitted facts afforded reasonable and probable cause for prosecuting the plaintiff, no one could say that Buckman did not believe in it. That is how the court approached the problem both in *Turner v. Ambler* (10) (10 Q.B. 261), and in *Herniman v. Smith* (5). Indeed, when LORD ATKIN was faced with the same problem as we have here, he put the crucial question to himself in this way ([1938] All E.R. 9):

" . . . was there any evidence of the want of reasonable and probable cause? "

Asking myself that question, I say that, for the reasons I have given, there was no such evidence.

I recognise, however, that there is something to be said for the view that, although there was reasonable and probable cause for prosecuting for the £7 15s., or £10, there was none for the full £27 3s. I think that the jury must have taken that view, for I do not see otherwise how they could have answered the first question as they did. I think it is a wrong view, but I proceed to approach the case on that footing. Accepting that there was no reasonable cause for prosecuting for the full £27 3s., but only for the £7 15s. or £10, what is the result? Does that mean that in point of law the plaintiff must succeed in this action? I think not. A similar point was decided in the great case of *Sutton v. Johnstone*

(3). The circumstances of that case are so striking that they deserve recall. On April 16, 1781, an English squadron under the command of Admiral Johnstone was lying off the island of St. Jago in the West Indies when it was attacked in great force by a French squadron. The English beat it off and the French sailed away. Admiral Johnstone ordered his ships to slip their cables and follow them. They formed in line of battle and bore down on the French at sunset, but, darkness coming on, the French got away. One of the English ships was the *Isis*, commanded by Captain Sutton. She had been much damaged in the battle. Her foretopmast had been wrecked. On that account Captain Sutton did not obey the order to slip cable immediately it was given and did not keep up with the line of battle. The admiral then charged Captain Sutton before a court-martial with two charges: (i) disobedience to orders in not slipping his cable; (ii) for delaying and obstructing the public service in that he fell astern and did not keep up with the line of battle. At the court-martial Captain Sutton was honourably acquitted of both charges. He then brought an action against Admiral Johnstone for malicious prosecution. The jury at Guildhall found in his favour and awarded him £6,000 and their verdict was upheld in the Exchequer. The Court of Exchequer held that there was probable cause for prosecuting him on the first charge of disobedience to orders, but not on the second charge of delaying the public service. They held that on that account, because the whole charge was not justified, Captain Sutton was entitled to keep his verdict. If that was the correct view of the law it would help the plaintiff here, but the decision was reversed by the Exchequer Chamber and the House of Lords. The reasons are contained in the celebrated opinion of LORD MANSFIELD, C.J., and LORD LOUGHBOROUGH, C.J. They were of opinion that there was probable cause for both charges, both the disobedience and the obstructing the public service. But they went on to say (1 Term Rep. 547) that, if there was probable cause only for the charge of disobedience, and not for the other charge,

“it would equally avail the defendant in this cause . . . the adding [of a charge for] delay, and obstructing the public service, were only two or three superfluous words, which created no additional trouble, vexation, or expense; and this action is not adapted to so trifling a complaint.”

Every word of that opinion is applicable here. If there was reasonable and probable cause for a charge of stealing £7 15s. or £10 (as there clearly was) the charge of stealing £27 3s. created no additional trouble, vexation or expense and this action is not adapted to so trifling a complaint.

Counsel for the plaintiff relied on *Reed v. Taylor* (15) and some observations of JELF, J., based thereon in *Palmer v. Birmingham Manufacturing Co.* (16). I must say that I think *Reed v. Taylor* (15) is a most unsatisfactory decision. It is most unsatisfactorily reported. I agree with what LORD DENMAN, C.J., said about it in *Delisser v. Towne* (17) (1 Q.B. 339n). He said it was inconsistent with *Sutton v. Johnstone* (3). Of the two there is no doubt that *Sutton v. Johnstone* (3) is by far the higher authority and I think we should follow it. There may, of course, be some cases where the additional charge was so gross and unjustifiable that it destroyed the reasonableness of the whole charge, but that was not the case in *Sutton v. Johnstone* (3), nor is it so here. Test it this way: if the plaintiff had been charged with stealing £27 3s. but convicted only of stealing £7 15s. or £10 (as he might well have been), could he have brought an action for malicious prosecution? Clearly not. Why should it be any different now? Buckman was not concerned with whether the plaintiff was convicted or acquitted, but only with whether there was reasonable cause for the prosecution.

This brings me to the end. I have dealt with the case at some length because of the importance of its repercussions on the administration of the criminal law. It would be a bad thing if every person who was acquitted by a criminal court could turn round and sue the prosecutor for damages, but it looks as if that is what it is coming to if this action is allowed to succeed. Here is a man who

admits that his employer handed him £7 15s. to be used for a specific purpose, he admits that he used it, not for that purpose, but for his own purposes, and that he concocted a false receipt to cover up his transgression, and yet he says that there was no reasonable or probable cause for prosecuting him. OLIVER, J., who has great experience of criminal matters, was clearly of opinion that there was reasonable and probable cause. So am I.

My brethren take a different view of the facts, though not, I think, of the law on the main part of the case. They recognise that the conduct of the plaintiff in regard to the £7 15s. was a "gross fraud", "reprehensible" and "disreputable", but are much influenced by the evidence that the plaintiff subsequently showed Buckman some tools and gave a rational explanation. It seems to me, however, that it is wrong to pay too much attention to his explanation. The prosecutor is not bound to accept every plausible explanation which an accused puts forward. His explanation may suffice to acquit him in a criminal court, but it does not make the prosecution actionable. As LORD ATKIN said in *Herniman v. Smith* (5) ([1938] 1 All E.R. 10), the duty of the prosecutor

"is not to ascertain whether there is a defence, but to ascertain whether there is reasonable and probable cause for a prosecution."

I would, therefore, dismiss the appeal.

JENKINS, L.J., stated the facts as set out in the introduction and continued: The question is not whether there was evidence on which the jury might rationally have concluded, or on which the learned judge or this court might have been disposed to conclude, that Buckman honestly believed the plaintiff guilty of the offence charged, but whether there was no evidence on which the jury could rationally conclude, as they did, that Buckman did not honestly believe that the plaintiff was guilty. With the greatest respect to the learned judge, I am at a loss to see how it can possibly be said that there was no such evidence. If the jury accepted the plaintiff's evidence—and for the present purpose it must be assumed that they did—then Buckman, when the prosecution was launched, charging the plaintiff, in the first instance, with the theft of the whole £35, and later with the theft of the reduced sum of £27 3s., had seen in the plaintiff's possession goods corresponding to those comprised in receipts Nos. (i), (iii) and (iv). That being so, how could it be said that he honestly believed that the plaintiff had stolen from the defendant company the sums to which those receipts related, amounting together (after allowing for the goods Buckman had admittedly collected) to all but £7 15s. of the sum of £27 3s. comprised in the reduced charge? A fortiori, how could it be said that there was no evidence on which he could be held not to have honestly so believed? There remains the sum of £7 15s. to which the fabricated receipt related. The plaintiff's conduct in that respect is, of course, indefensible. He concocted the receipt, and Buckman became aware on July 21 that he had concocted it. If that was all Buckman could on the evidence be held to have known on July 24 about the £7 15s. which the plaintiff fraudulently pretended to have paid to R. Cummings for precision tools, it might no doubt be said with force that the only inference which the jury could rationally have drawn as to Buckman's state of mind in regard to the £7 15s. when he launched the prosecution would have been to the effect that Buckman honestly believed that the plaintiff had stolen this particular sum. But if the jury accepted the plaintiff's evidence to the effect that he, in fact, applied the £7 15s. in paying himself for his own precision tools which he thenceforth treated as sold by him to the defendant company, that on July 18 he had shown these tools to Buckman as part of the equipment purchased by him for the defendant company, and that on July 22 he had, when confronted by Buckman with the fabricated receipt, given him this explanation and again shown him the precision tools which he had provided for the £7 15s., then it seems to me that, even as regards this item, reprehensible as the plaintiff's conduct no doubt had been, there

was evidence on which the jury could hold that Buckman did not honestly believe that the plaintiff had stolen the sum in question. The plaintiff's conduct in retaining the tools and materials not actually removed by Buckman, and, in particular, his conduct in pawning the precision tools, was rationally capable of an innocent explanation, and an explanation by no means inconsistent with the absence of honest belief on Buckman's part in the truth of the charge, on the assumption that the jury accepted the plaintiff's evidence that the defendant company owed him remuneration at the rate of £15 per week from July 14, 1950, and that he conceived himself entitled to some sort of charge or lien on these articles in respect of the remuneration due to him.

If there was evidence on which the jury could hold that Buckman did not honestly believe in the truth of the charge or in the plaintiff's guilt of it as regards any part of the sum alleged to have been stolen, as, in my opinion, there clearly was, then the learned judge ought, in view of the jury's answers to the two questions put to them, to have entered judgment for the plaintiff. There may be cases of alleged malicious prosecution in which reasonable and probable cause for a prosecution can be held to have existed even though the defendant's state of mind is found to have fallen short of honest belief in the truth of the charge and the plaintiff's guilt of it. But this is not such a case. It must surely be implicit in the jury's answers here that they accepted the plaintiff's evidence in preference to that of Buckman, and on that footing the facts as known to Buckman were plainly inconsistent with the plaintiff's guilt, for the plaintiff had to the knowledge of Buckman laid out the whole of the £35 entrusted to him in the provision of tools and materials for the pottery project, apart from a small balance which, with the knowledge and approval of Buckman, he had spent on petrol for the car.

The view above expressed regarding the £7 15s. to which the fabricated receipt related makes it unnecessary for me to consider what the position might have been if, contrary to that view, the only conclusion rationally open to the jury as regards this sum was that Buckman honestly believed the plaintiff to have stolen it. On that footing the question would have arisen whether, the plaintiff having been, maliciously as the jury found, prosecuted for an alleged theft of £35 later reduced to £27 3s., the fact that Buckman honestly believed the plaintiff to have stolen £7 15s., while having no honest belief in his guilt as regards the balance, would have afforded a good defence to the action. The authorities on this point are not wholly in accord. In *Johnstone v. Sutton* (3), which came before the Exchequer Chamber on a writ of error in 1785, the malicious prosecution alleged related to two charges preferred against the plaintiff at a court-martial, the first being a charge of disobedience to orders and the second a charge of obstructing the public service. In their reasons for holding that the judgment given in favour of the plaintiff in the Court of Exchequer should be reversed LORD MANSFIELD, C.J., and LORD LOUGHBOROUGH, C.J., after saying (1 Term Rep. 546) that

"The charges against the plaintiff before the court-martial were formally two ; but in reality and effect, one ; to wit, the disobedience of the defendant's verbal orders, public signals, &c.",

and discussing the circumstances bearing on the question of reasonable and probable cause, continued (*ibid.*, 547):

"This probable cause goes to both parts of the charge ; the disobedience, and obstructing the public service. But if it went to the disobedience only, it would equally avail the defendant in this cause. For it is not like the case put of a plaintiff recovering, where he lays, in the same sentence, words actionable, and words not actionable. Here the defendant alleges a justification of the arrest, suspension, and trial. If his justification be allowed, there is an end of the action. If the defendant were right in trying the plaintiff for disobedience, the adding delay, and obstructing the public

service, were only two or three superfluous words, which created no additional trouble, vexation, or expense ; and this action is not adapted to so trifling a complaint."

It is to be observed that, as the probable cause was held to go to both parts of the charge, the view expressed to the effect that there would have been a good defence if the probable cause had gone to the disobedience only was obiter, and it is further to be observed that this view was founded, in part at all events, on the superfluous character of the allegations of delay and obstructing the public service if the trial of the plaintiff for disobedience was justified. In the course of the argument in *Johnstone v. Sutton* (3) counsel for the defendant cited and sought to distinguish LORD MANSFIELD's direction to the jury in *R. v. Prosser* (18), which was an action for malicious prosecution in respect of an indictment containing thirty-three assignments of perjury, one of which the defendant demonstrably knew to be false, though he could show reasonable and probable cause for many of the others. According to the report of the argument (1 Term Rep. 533) LORD MANSFIELD told the jury

"that the instructions in the handwriting of the defendant . . . left him defenceless against that charge of perjury, whatever probable cause he had for others",

and the jury found a verdict for the plaintiff with £100 damages. The ground on which it was sought to distinguish *R. v. Prosser* (18) was that "the malicious charge in the present case" (that is, *Johnstone v. Sutton* (3)) "was one act, though it contained independent members". As the probable cause in *Johnstone v. Sutton* (3) was held to go to both charges, it was unnecessary for the court to express any view as to the validity of the ground suggested in argument for distinguishing *R. v. Prosser* (18), though the obiter expression of opinion to which I have referred implies that they would have accepted it. At all events, nothing was said in their reasons to cast doubt on the correctness of the direction to the jury in *R. v. Prosser* (18).

In *Reed v. Taylor* (15), tried before MANSFIELD, C.J., and GIBBS, J., in 1812, which, like *R. v. Prosser* (18), was an action for malicious prosecution based on an indictment containing a number of assignments of perjury, for some only of which probable cause could be shown, the judgments delivered were in these terms. MANSFIELD, C.J. (4 Taunt. 617), said:

"The question is, whether, if a man prefers an indictment containing several charges, whereof for some there is, and for others there is not probable cause, this does not support a count for preferring that indictment without probable cause, I am of opinion that it does. You mention no precedent for this ground of your motion, and therefore I do not know how we can grant it."

Then GIBBS, J. (*ibid.*, 618):

"To support this action there must be a want of probable cause and malice. The charge here is not that the defendant imputed perjury without probable cause, but that he preferred that indictment without probable cause. There is no probable cause for some of the charges in the indictment, therefore this indictment is preferred without probable cause."

Delisser v. Towne (17), tried in 1841, was a similar action which was compromised, but which raised the point now under discussion on a question of costs. Delivering the judgment of the court LORD DENMAN, C.J., said (1 Q.B. 343):

"Though the indictment contained assignments of perjury upon several parts of the plaintiff's examination upon that occasion, yet it was but one charge: and the preferring that charge without probable cause constitutes but one cause of action. The plea of Not Guilty denies that one cause of action, and amounts to an assertion that the defendant had probable cause for the whole of the indictment. That is one entire issue: and, if

there was no probable cause for any part of the charge, the plaintiff was entitled to a verdict. Whether there was or was not probable cause for other parts of the charge, would affect the damages, but could not affect the verdict, or show that the defendant had properly preferred the indictment, that is, with probable cause for every part of it."

A Lastly, there is *Palmer v. Birmingham Manufacturing Co.* (16), tried by JELF, J., in 1902. That was an action for malicious prosecution based on an indictment containing a count of theft by the plaintiff of a number of specified articles. In answer to questions put to them the jury found, in effect, that the defendants' manager had honestly believed the plaintiff to have stolen some of the articles, but had not honestly believed him to have stolen others of them. The learned judge, in giving judgment for the plaintiff, intimated that, but for B *Reed v. Taylor* (15), he would have been inclined to take the opposite view. After discussing the effect of the jury's answers he said (18 T.L.R. 553) that:

"He was in the difficulty of having to find that with regard to some of the articles there was reasonable and probable cause, and an absence of reasonable and probable cause as to others. What was the effect of that in law? He felt bound by the case of *Reed v. Taylor* (15). There was in C that case one charge of perjury—namely, one oath—and in this case one charge of larceny, including different things. As to the doubts thrown upon that case by the arguments in *Delisser v. Towne* (17), if there was to be another view taken of the case, he left that for the decision of a higher court. If there were good grounds for charging a man with stealing half-a-crown, and he was without reasonable and probable cause charged with stealing D a much larger sum, that would be actionable. By the case of *Reed v. Taylor* (15) he must stand, and say that this was a malicious prosecution of the plaintiff by the defendants."

Notwithstanding the contrary opinion expressed obiter in *Johnstone v. Sutton* (3), I think the other cases to which I have referred point to the conclusion that in the present case, even if the only finding open to the jury on the evidence in regard E to the £7 15s. had been that Buckman honestly believed the plaintiff to have stolen that sum, the plaintiff would, nevertheless, have been entitled to judgment.

The question may, perhaps, resolve itself into one of degree. Where there is a charge of theft of 20s. and reasonable and probable cause is shown as regards 19s. of it, it may well be that the prosecutor, when sued for malicious prosecution, is F entitled to succeed, because he was in substance justified in making the charge, even though he did so maliciously. But the contrary must surely be the case if the figures are reversed and reasonable and probable cause is shown as to 1s. only out of the 20s. Here the charge of stealing £27 3s. was, as the jury found, maliciously preferred, and the hypothesis is that Buckman honestly believed that the plaintiff was guilty as to £7 15s. only, but, in effect, knew him not to be G guilty as regards the remaining £19 8s., and so far as the question is one of degree the case seems to me to fall well on the plaintiff's side of the line. But, as I have said, the question is one which in the view I take does not arise having regard to the evidence before the jury with respect to the £7 15s. For these reasons I would allow the appeal and direct judgment to be entered for the plaintiff for £50 damages as assessed by the jury and costs.

H HODSON, L.J. : Bearing in mind that the question whether the defendant had reasonable and probable cause for preferring the charge was a question for him, but that the defendant's honest belief in the charge was an essential ingredient of such cause, the learned judge was at first inclined to enter judgment for the plaintiff. He said:

"Upon the finding that the defendant did not honestly believe that the plaintiff was guilty, I will have to rule that there was no reasonable and probable cause."

After hearing argument from counsel, however, the learned judge finally came to the conclusion, as he was fully entitled to do if the arguments for the defendant were sound, that judgment should be entered for the defendant on the ground that there was no evidence on which the jury could find that the prosecutor did not bring the proceedings honestly. It is, therefore, necessary to examine the evidence given at the trial to see whether on the footing that the jury believed the plaintiff's evidence by itself or supported by any evidence given by the defendant or other witnesses it could fairly be said that there was no evidence on which they could properly find as they did.

Before considering the evidence I should first refer to the legal position as I understand it. The definition of reasonable and probable cause contained in the judgment of HAWKINS, J., in *Hicks v. Faulkner* (8) (8 Q.B.D. 171), approved by the House of Lords in *Herniman v. Smith* (5) ([1938] 1 All E.R. 8), is as follows:

"I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."

The distinction between the subjective and the objective elements in the definition is made clear by LORD DENMAN, C.J., in *Turner v. Ambler* (10) where he said (10 Q.B. 260):

"... the reasonable and probable cause [for instituting the prosecution] must appear, not only to be deducible in point of law from the facts, but to have existed in the defendant's mind at the time of his proceeding."

LORD ATKIN said ([1938] 1 All E.R. 8) in *Herniman's* case (5):

"If there is any evidence of a lack of honest belief in the guilt of the accused on the part of the prosecutor, the fact whether he honestly believed or not is a disputed but essential fact, on which the judge is to draw his conclusion, and is a question for the jury."

It thus appears that lack of honest belief destroys the defence of reasonable and probable cause.

[His LORDSHIP referred to the plaintiff's evidence and continued:] This account of the plaintiff was contradicted in many respects by the defendant, and at the trial the learned judge, in his clear and accurate summing-up, particularly directed the jury that it was for them to decide which of the two men had been telling the truth. He then put the questions stated. As in this case the facts were essentially within the knowledge of the parties it was to be expected that this course would be followed, but this did not, of course, disable the learned judge from ruling at the close of the case that there was no evidence on which the jury could find a verdict for the plaintiff. The question of honest belief having, however, been left to the jury after the defendant had given evidence, the position was different from what it would have been either if a submission had been made at the conclusion of the plaintiff's case that there was no evidence of want of honest belief or if the defendant had not given evidence, because the jury were entitled to come to the conclusion from the defendant's own evidence and demeanour that he was not a credible witness and had no honest belief in his charge. This remains true even though the plaintiff has made damaging admissions in his evidence.

The sum of £27 3s. mentioned in the charge was arrived at by adding together the two sums of £20 and £15 and deducting £7 17s., the value of the tools recovered. Not forgetting the disreputable business of the false receipt, the position with regard to £7 15s., part of the £27 3s., was that when he preferred his charge against the plaintiff, the defendant had seen the goods appropriated by the plaintiff to the defendant company and knew that the plaintiff was

refusing to return them because he claimed to be entitled to retain them until he was paid his wages. It was, therefore, even in respect of the £7 15s., I think, open to the jury to find that the defendant did not honestly believe that the plaintiff had stolen the money. Even if I am wrong about the £7 15s. and it would not be open to the jury so to find, the matter does not rest there because the plaintiff was charged with stealing £27 3s. In respect of this sum I think the defendant's difficulties are insurmountable. Although the law may seem to be remarkably favourable to a plaintiff in the situation of Mr. Leibo, I think it is clear from the authorities that, even if the defendant had reasonable and probable cause for preferring the charge in respect of the £7 15s., this does not necessarily apply to the whole amount.

The law is, I think, well settled since *Reed v. Taylor* (15), a decision of MANSFIELD, C.J., and GIBBS, J., in the year 1812. This is a strong case in which the plaintiff had been charged with perjury in an affidavit. The defendant produced evidence as to three of the transactions on which perjury had been assigned showing that the parts of the affidavit relating thereto were untruly given and that in matters which must have been within the plaintiff's knowledge. As to other matters it appeared that the plaintiff had truly sworn in the affidavit and that there was no probable cause for the assignment of perjury on those transactions. The jury found for the plaintiff and on a motion for a rule to set aside the verdict and have a new trial MANSFIELD, C.J., said (4 Taunt. 617):

"The question is, whether, if a man prefers an indictment containing several charges, whereof for some there is, and for others there is not probable cause, this does not support a count for preferring that indictment without probable cause. I am of opinion that it does. You mention no precedent for this ground of your motion, and therefore I do not know how we can grant it.

GIBBS, J., said (*ibid.*, 618):

"To support this action there must be a want of probable cause and malice. The charge here is not that the defendant imputed perjury without probable cause, but that he preferred that indictment without probable cause. There is no probable cause for some of the charges in the indictment, therefore this indictment is preferred without probable cause."

This case has been followed, so far as I am aware, without question: see, for example, *Palmer v. Birmingham Manufacturing Co.* (16) which was a case of larceny in which JELF, J., having had his attention drawn to the case of *Reed v. Taylor* (15), said at the conclusion of his judgment (18 T.L.R. 553):

"If there were good grounds for charging a man with stealing half-a-crown, and he was, without reasonable and probable cause, charged with stealing a much larger sum, that would be actionable."

JELF, J., had his attention drawn by counsel to the case of *Johnstone v. Sutton* (3), which was said to be at variance with the case of *Reed v. Taylor* (15). This case was reported on a writ of error in the Exchequer Chamber in 1785, and the argument of counsel (1 Term Rep. 533) includes a reference to an action for malicious prosecution brought by one Prosser and tried by LORD MANSFIELD in which the principle obtained which was afterwards applied in *Reed v. Taylor* (15). It is true that LORD MANSFIELD, C.J., and LORD LOUGHBOROUGH, C.J., in *Johnstone v. Sutton* (3) (*ibid.*, 547), speaking of probable cause, are reported to have said:

"This probable cause goes to both parts of the charge; the disobedience, and obstructing the public service. But if it went to the disobedience only, it would equally avail the defendant in this cause."

This dictum, if in fact it is inconsistent with the earlier decision of LORD MANSFIELD in *Prosser's* case (18), which is not fully reported, has not been followed so

far as the researches of counsel have been able to go, but it may be explained, I think, on the footing that the charge of obstructing the public service was superfluous.

First, as to the balance of the £20, the plaintiff's case was that £9 was expended on tools and that a receipt which the defendant has never impeached was given in respect of this transaction and that the balance was used for the expenses of the car. There is thus no obstacle to the jury's finding that the defendant had no honest belief that the balance was stolen, even if this balance be reduced by the £7 17s. credited to the plaintiff in respect of the goods returned.

The position with regard to the £15 is different in that it may be said that when the defendant made this payment he did so while still ignorant of the falsity of the receipt relating to the £7 15s., so that the false receipt was being used by the plaintiff in order to support his request for more money which would never have been paid had the defendant known of the fictitious nature of the receipt. Although there is force in this contention, I cannot regard the nexus between the two transactions as being sufficient to justify a reversal of the jury's finding that the defendant had no honest belief with regard to the £15 since this sum was proved to have been spent on paint and thinners and the transaction was supported by receipts neither of which has been challenged. I, therefore, agree with JENKINS, L.J., that the appeal should be allowed.

Appeal allowed.

Solicitors: *J. S. I. Rabin* (for the plaintiff); *Arnold A. Finer* (for the defendants).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

R. v. TUCKER.

[COURTS-MARTIAL APPEAL COURT (Hilbery, Streatfeild and McNair, JJ.), November 24, 25, 26, 1952.]

Court-Martial—Appeal—Unreasonable finding of court-martial—Finding not supported by evidence—Examination of evidence by court on appeal—Courts-Martial (Appeals) Act, 1951 (c. 46), s. 5 (1).

Although an appeal to the Courts-Martial Appeal Court is not a re-hearing, when the principal ground of appeal is that the finding of the court-martial involves a wrong decision which cannot be supported having regard to the evidence, it is the duty of the court to investigate the whole of the evidence that was before the court-martial in order to ascertain whether the finding of the court-martial was unreasonable within the meaning of s. 5 (1) of the Courts-Martial (Appeals) Act, 1951, and, if it was, to allow the appeal.

Military Law—Fraudulent misapplication of service property—Burden of proof—Deficiency in mess funds—No explanation given by accused person—Inference of guilt—Army Act, s. 17.

The appellant, a non-commissioned officer, was found Guilty by a district court-martial on a charge under s. 17 of the Army Act of fraudulently misapplying service property, to wit £650, part of the takings of a mess of which he was caterer. The judge advocate, in summing-up, stated that, as there was a proved deficiency which the appellant had not explained and as he had had opportunity to dispose of the money, the conclusion must be that he had fraudulently misapplied it and so was guilty under the section.

HELD: proof of a deficiency coupled with the absence of an explanation by the appellant did not amount to proof of misapplication within the meaning of s. 17 of the Army Act, and, therefore, the finding of the court-martial could not be supported having regard to the evidence and was unreasonable.

A Per curiam: There is a note numbered 7 (a) to s. 17 of the Army Act in the *MANUAL OF MILITARY LAW*, 1951, at p. 223, in which it is said: "If no evidence is forthcoming as to the particular mode of misapplication, the court may, in the absence of explanation from the accused, infer that the property was misapplied from the fact of its not having been properly applied and if . . . they think it was dishonestly misapplied they can convict the accused". The danger of this note is that it almost lends colour to the suggestion that the burden of proof shifts to an accused man where, by some process of accounting, there appears to be a deficiency . . . and we call attention to it because we think that, as it stands, it is unfortunately worded and should be the subject of revision.

B FOR THE COURTS-MARTIAL (APPEALS) ACT, 1951, s. 5 (1), see *HALSBURY'S STATUTES*, Second Edn., Vol. 30, p. 468; and FOR THE ARMY ACT, s. 17, see *ibid.*, Vol. 22, p. 270.

C **EDITORIAL NOTE.** On Dec. 2, 1952, the Secretary of State for War, answering a question in the House of Commons relating to the criticism by the court in this case of a passage in the *MANUAL OF MILITARY LAW*, said that an appropriate amendment to the Manual would be made as soon as possible.

APPEAL against conviction by district court-martial.

D The appellant, a sergeant in the Royal Army Service Corps, appealed against his conviction on June 21, 1952, by a district court-martial at Nairobi, Kenya, on a charge of misapplying £650 service property when acting as caterer for the sergeants' mess at Buller Camp, Nairobi. He was sentenced to be reduced to the ranks and to one year's detention.

C. Lawson for the appellant.

Hillard for the Crown.

E **HILBERY, J.**, delivered the following judgment of the court. The appellant was convicted by a district court-martial held at Nairobi of fraudulently misapplying service property, that is to say, money, when concerned in the care thereof, contrary to s. 17 of the Army Act. He was sentenced to be reduced to the ranks and to undergo one year's detention. He appeals by leave granted by the court. The charge against him was that on Apr. 1, 1952, when, as caterer of the warrant officers and sergeants' mess, Buller Camp, he was concerned in the care of cash takings in respect of the sale of bar stock of the said mess, service property, he fraudulently misapplied 13,000s., East F African, part of the said cash takings, to the value of £650.

G The charge was based on an allegation of a general deficiency in money for which the appellant was accountable at Apr. 1, 1952. That alleged deficiency is now admitted to be a general deficiency ascertained in such circumstances and in such a way that it might represent either money or goods, or partly H money and partly goods. The appellant puts forward as grounds of his appeal, first, that the finding was a travesty of justice, meaning that there was no evidence to substantiate the charge. Further, he says that it was not proper to charge him with a general deficiency in the circumstances, he having had to account for his cash receipts, and was accountable, every day, so that it was improper at the conclusion of a quarter, when he was to hand over his duties, to treat that day as his accounting day for the whole quarter. He alleged that as at that date there was a deficiency which might have arisen at any period in or during the whole quarter.

The appellant was a sergeant of the Royal Army Service Corps, and he was appointed mess caterer for the sergeants' mess at Buller Camp in October, 1951. His duties, as stated by the judge advocate in his summing-up, were to stand behind the bar, to sell stock, to receive money, and to hand that money over at the end of each day to the duty officer. Under the Queen's

Regulations there was a mess treasurer whose duties included a duty to maintain the wet and dry stock books. When the mess treasurer did his duty, the evidence was that this was done daily. During the period from October to Dec. 31, 1951, there was evidence that this course had been followed by the mess treasurer, but in December, notwithstanding, the appellant reported that there was, according to the books, a deficiency of some £70. A free audit was held, and that deficiency was confirmed. No action was taken in respect of it. No one appears to have suggested that it indicated any dishonest misapplication of the funds by the appellant as mess caterer. From Jan. 1 to Mar. 31, 1952, a Captain Jewson was the officer in charge of the sergeants' mess accounts. A new treasurer was appointed, one Sergeant Strange, and from Jan. 1 to Jan. 8 he maintained the wet and dry stock books. Thereafter, he never entered up either the wet or the dry stock book or did anything to discharge his duty to maintain those books. His explanation, given to the court-martial, was that on Jan. 8 he applied to be relieved and assumed thereafter that he was discharged from a further performance of his duties.

The appellant acted as mess caterer for the rest of the quarter, handing over daily what he asserted in his evidence were the daily takings, less the float of 150s. which was retained, and during this time the appellant reported to the mess president that the treasurer was not keeping up the books. He himself tried to keep some check on stocks and sales by making pencil jottings on pieces of paper, and sometimes putting pencil entries in the stock books. He complained more than once to Captain Jewson and to the president of the mess committee that he was getting no help and was unable to keep up the books by himself. Captain Jewson received the cash takings from the duty officer to whom the appellant, as was his duty, handed them. He thus received the cash takings and from the funds of the mess, we are told, he paid the bills. The goods were provided from the N.A.A.F.I. Captain Jewson did not check the wet or dry stock books, and he said in his evidence that he did not notice that the amounts which he had to pay out to the N.A.A.F.I. for the stocks supplied to the bar were out of proportion to the amounts which he was receiving daily. On Apr. 1, 1952, Captain Jewson had to hand over his duties to another officer, Captain Owen, and for this purpose he called a meeting consisting of the president of the mess committee, the treasurer, the appellant, and Captain Owen. The appellant failed to attend and was later found wandering in Nairobi. He said he was very worried over certain personal troubles connected with his family, but he returned to camp when asked to do so and produced the stock books. There were two stock books, one relating to beer and other liquors and the other one, the dry stock book, to cigarettes and other dry goods. Captain Jewson found that the beer stock book had not been made up for seven or eight days and the other book had not been made up for four or five weeks. Captain Jewson, in the absence of the appellant, took the value of the stock in hand by obtaining the prices from the African mess boy and he made up the total into a sum of shillings. Then Captain Jewson ordered Quartermaster-sergeant Davies and the appellant to endeavour to get out an account, and eventually these two, working together, reported that there remained unaccounted for 12,000 odd shillings. That supposed deficiency was arrived at by Davies and the appellant basing themselves, first of all on the figures for the value of the stock in hand which Captain Jewson had obtained by inquiry of the African mess boy. In his evidence explaining how he arrived at that result Davies made no mention of the stock figure which was taken as the value of the stock in hand at the beginning of the period, that is, at Jan. 1.

Captain Jewson then caused an account to be taken by Sergeant-major Swift of the Royal Army Pay Corps. Sergeant-major Swift, when he gave his evidence, produced no original figures taken out by him, and no original calculations

made by him, and he gave no evidence of what selling prices he worked on, but he made out finally a deficiency of 13,221s. On that, the appellant was interviewed by an officer who told him that he had reason to believe that he had inserted false figures in the stock book, and the appellant replied: "That is quite true as the books were never made up by the treasurer". He explained that by saying that it was not possible for him to enter the figures each day and sometimes he had to enter up as best he could six or seven days at a time. The evidence of the African bar boy who helped the appellant in the mess was—and so was the evidence of the appellant—that when the appellant had an evening off the bar boy would ordinarily be left in charge. There were, however, other occasions when the appellant was not on duty in the bar, but was relieved by other sergeants, and there was evidence that he was sometimes helped in the bar on busy occasions by other sergeants. The stock was said to be kept in a locked store. There was no till in the bar. A drawer or box, variously described, which had no lock or key, was the receptacle used for the takings. The appellant said that when he took over the duties of mess caterer no one explained to him what those duties were. He knew that the treasurer ought to check the books daily and fill in with ink the figures he himself had inserted in pencil, but the treasurer only did this three times early in January and did not do it all after Jan. 9. The appellant said, and it was not challenged, that he told the president of the mess committee and also Captain Jewson about this. Towards the end of March he reported to the president of the mess committee and to Captain Jewson that the accounts were in a mess, but no action was taken until Apr. 1 when he was due to hand over to another caterer.

Taking the view which we take of the whole of the evidence, it is not necessary for us to decide whether in this case it was proper to base this charge on an alleged general deficiency or to decide what was the proper accounting period. Nor, I think, need we decide the point that also arose on the argument of the appellant—the question what was the day on which it was the duty of the appellant to hand over money received by him as mess caterer, the point being taken that he had to do it daily and did it daily.

The Courts-Martial (Appeals) Act, 1951, s. 5 (1), provides as follows:

"Subject to the provisions of the next following section, on an appeal under this Part of this Act the court shall allow the appeal if they think that the finding of the court-martial is unreasonable or cannot be supported having regard to the evidence or involves a wrong decision of a question of law or that, on any ground, there was a miscarriage of justice, and in any other case shall dismiss the appeal."

It is right for us to emphasise that an appeal to this court is not a re-hearing. We do not try the case over again, but when, as here, it is the ground—perhaps the principal ground—of the appeal that the finding in question involved a wrong decision, a decision which was unreasonable and cannot be supported having regard to the evidence, it becomes essential for this court to investigate the whole of the evidence that was before the court-martial in order that the court may ascertain whether the evidence can be regarded as supporting the finding of the court-martial or whether that finding was not supported, that is to say, established by the evidence, or was unreasonable. It is for those reasons and because the assistance of the court is invoked under the terms of s. 5 that in this case we have gone through the whole of the evidence and investigated it.

In our view, the finding of the court-martial—that is, of the guilt of the appellant of a misapplication of this sum of money—cannot be supported having regard to the evidence, and it must be held to be an unreasonable finding. The appellant was proved to be a man of perfectly good character, reliable, but requiring guidance because not very intelligent. It is to be

observed that, notwithstanding that there was an apparent deficiency of about £70 in the accounting for the three months to Dec. 31, 1951, there was no suggestion that it pointed to dishonest misapplication of that money by the appellant. Indeed, the appellant was thereafter continued in his appointment as mess caterer from Jan. 1 to Mar. 31, 1952. There was no evidence that in that period he was indulging in any unusual expenditure or was under any financial stress or was gambling. His pay account was £12 odd in credit and he had no post office or other banking account. There was no evidence that he had ever used any money taken in the bar by him or disposed of any of the stock otherwise than by sale in the bar. It was argued that the proof of a deficiency ascertained in the way which I have indicated, coupled with the absence of any explanation by the accused, amounted to proof of misapplication within the meaning of s. 17 of the Army Act on which the charge was framed. When it is borne in mind that it was conceded that this deficiency so ascertained might represent a deficiency of money or goods or both, the fallacy in this argument is apparent. To misapply is to apply wrongly. There was no evidence that the appellant applied the alleged sum or any sum for a wrong purpose. Still less was there any evidence that he had done so dishonestly. Accordingly, this court, exercising its power under s. 5 of the Courts-Martial (Appeals) Act, 1951, allows the appeal.

There is one other matter which we feel it right to mention. There is a note numbered 7 (a) to s. 17 of the Army Act in the *MANUAL OF MILITARY LAW*, Part I, 1951, p. 223, particularly dealing with the offence of fraudulent misapplication, in which it is said:

"It is sufficient to allege in the particulars of the charge that the property was 'fraudulently misapplied' unlike the civil offence where the particulars must allege to whose benefit the property was converted. If no evidence is forthcoming as to the particular mode of misapplication, the court may, in the absence of explanation from the accused, infer that the property was misapplied from the fact of its not having been properly applied and if, in the circumstances, they think it was dishonestly misapplied they can convict the accused."

The judge advocate in this case in summing-up stated the case for the prosecution in the following terms:

"What the prosecution says here is that there was this deficiency, which is completely unexplained by the accused; that he had the money and the opportunity to dispose of it; and that his conduct throughout this time was such that you must be irresistibly drawn to the conclusion that he dishonestly took that money."

The judge advocate, no doubt having this note in mind, failed to warn the court that they were not entitled to draw the inference of guilt from the absence of innocent explanation. That was an unfortunate omission. This was a case where the deficiency might represent a deficiency of goods or money or both. In the way in which the accounts were taken it was obvious that it might not be a real deficiency at all, and, if that were the fact, no explanation of it could be found or given by the accused person. The danger of this note is that it almost lends colour to the suggestion that the burden of proof shifts to an accused man where, by some process of accounting, there appears to be a deficiency. The occasions on which an accused man is called on to give an innocent explanation about some matter with which he stands charged are extremely rare in our criminal law, and we call attention to this note because we think that, as it stands, it is unfortunately worded and should be the subject of revision.

Appeal allowed.

Solicitors: *Registrar, Courts-Martial Appeal Court* (for the appellant);
Director of Army Legal Services (for the Crown).

[Reported by T. J. KELLY, Esq., Barrister-at-Law.]

MURRAY, BULL & CO., LTD. v. MURRAY.

[QUEEN'S BENCH DIVISION (McNair, J.), November 20, 21, 1952.]

Licence—Licence to occupy premises—Employer and employee—Retention by employee of possession of flat by consent after termination of service—Work of confidential nature—Direct access of flat to offices.

Rent Restriction—Statutory tenant—Retention of possession after termination of contractual tenancy—Tenant employee of landlords—Work of confidential nature—Direct access of flat to offices—Continuance of contractual tenancy.

In 1929 a company of consulting and analytical chemists carrying on a business of a highly confidential nature appointed the defendant as managing director on a service agreement for seven years, at the end of which he continued in the employment without a fresh agreement. In 1939 the company acquired a lease of laboratories, offices, and board room, with a flat on the floor above them which had direct access to the offices by a staircase in addition to independent access to the street. They granted the defendant a lease of the flat for seven years "or until the termination of his managing directorship, whichever is shorter," with the right in the company to "terminate the lease in the event of selling or disposing of the premises". The rateable value of the flat rendered it subject to the Rent Restrictions Acts. In 1946, on the expiration of the seven years, the defendant remained in possession of the flat. In 1950 he gave notice of his intention to relinquish his appointment as managing director, which was accepted, subject, inter alia, to his vacating the flat by the end of the year. He, however, asked to be allowed to continue as a quarterly tenant of the flat "at an economic rental under conditions which do not establish me as a controlled tenant" and the company agreed to his remaining "a tenant on a quarterly basis" at his existing rent "in view of the fact that the [company] may require the premises in the not too distant future". Rent was invoiced to the defendant as three-monthly rent at so much per month. In an action by the company for possession,

HELD: (i) whether or not a tenant holding over after the expiration of a lease by effluxion of time became a statutory tenant under the Rent Restrictions Acts was a matter of inference from the circumstances; in the present case the relationship of the parties was fundamentally that of employer and employee; and it was to be inferred from that fact and the circumstances as a whole that in 1946 the defendant held over as a contractual, and not as a statutory, tenant of the flat.

Observations of SCOTT, L.J., and MACKINNON, L.J., in *Morrison v. Jacobs* ([1945] 2 All E.R. 430, 432), explained.

(ii) on a proper construction of the letters which passed between the parties in 1950 and having regard to the relationship of the parties, to the confidential nature of the landlords' business, and to the direct access of the flat to the landlords' premises where confidential work was being carried out, the common intention of the parties was that the defendant should be merely a licensee with no interest in the premises and not a tenant of them.

Tests laid down by DENNING, L.J., in *Errington v. Errington* ([1952] 1 All E.R. 155) and in *Marcroft Wagons, Ltd. v. Smith* ([1951] 2 All E.R. 277), applied.

Semble a statutory tenancy can be brought to an end only by an actual giving up of possession or an order for possession.

Dictum of LORD ASQUITH OF BISHOPSTONE in *Rogers v. Hyde* ([1951] 2 All E.R. 81) as to the effect of *Foster v. Robinson* ([1950] 2 All E.R. 342), doubted.

AS TO DISTINCTION BETWEEN LICENCE AND LEASE, see HALSBURY, *Hailsham Edn.*, Vol. 20, pp. 8-12, paras. 5, 6; and FOR CASES, see DIGEST, *Replacement Vol.* 30, pp. 527-536, Nos. 1649-1711.

Cases referred to:

- (1) *Morrison v. Jacobs*, [1945] 2 All E.R. 430; [1945] K.B. 577; 115 L.J.K.B. 81; 173 L.T. 170; 31 Digest, Replacement, 694, 7855.
- (2) *Errington v. Errington*, [1952] 1 All E.R. 149; [1952] 1 K.B. 290.
- (3) *Marcroft Wagons, Ltd. v. Smith*, [1951] 2 All E.R. 271; [1951] 2 K.B. 496; 2nd Digest Supp.
- (4) *Doe d. Cheney v. Batten*, (1775), 1 Cowp. 243; 98 E.R. 1066; 31 Digest, Replacement, 507, 6324.
- (5) *Foster v. Robinson*, [1950] 2 All E.R. 342; [1951] 1 K.B. 149; 31 Digest, Replacement, 697, 7888.
- (6) *Rogers v. Hyde*, [1951] 2 All E.R. 79; [1951] 2 K.B. 923; 2nd Digest Supp.

ACTION for possession of premises and for damages for trespass.

The landlords, the plaintiff company, carried on business as consulting research and analytical chemists, and on Apr. 11, 1929, the defendant became managing director of the company under the terms of a service agreement which provided for his employment for seven years. The agreement did not require the defendant to live in any particular place. On Apr. 11, 1936, it expired by effluxion of time, but the defendant continued in the employment without a fresh agreement. In 1939 the plaintiffs took a lease of premises at 20, Kinnerton Street, Knightsbridge, London, comprising laboratories on the ground floor, the board room, the company's offices, and another laboratory on the first floor, and on the second floor a flat with independent means of access to the street and direct access by a staircase to the offices on the first floor. They let the flat to the defendant on a tenancy, the terms of which were recorded (no formal lease being drawn up) in a minute of a meeting of the board of directors on May 25, 1939, signed by the defendant as managing director on June 26, 1939, as follows:

"Lease of flat at No. 20 Kinnerton Street. It was agreed that [the defendant] should be granted a lease of the flat for a period of seven years or until the termination of his managing directorship, whichever is shorter, at a yearly rental of £90 inclusive of rates, plus £20 per annum for hot water, provided that the company shall have the right to terminate the lease in the event of selling or disposing of the premises. It was agreed that [the defendant] should be liable to re-decorate every seven years."

In June, 1939, the defendant went into possession. In June, 1946, the tenancy agreement expired by effluxion of time, but he continued in possession. On July 10, 1950, he gave the plaintiffs notice of his intention to relinquish his post as managing director to take up full employment with another company, to which the chairman of the plaintiff company, on July 21, replied:

"The formal notice you have given to relinquish the post of managing director is accepted, to take effect as from Aug. 31, 1950. The following conditions will have to be complied with:—(1) Your resignation as a director of the company and its associates. (2) The position with regard to the Ozalid Company to be finalised. (3) Your flat to be vacated by Dec. 31, 1950."

The letter referred also to the surrendering of confidential data and the handing over of a motor car which the defendant had under the terms of his employment. On Aug. 25, 1950, the defendant wrote to the company:

"May I inquire whether I may continue as a quarterly tenant of the flat at 20A Kinnerton Street at the end of December at an economic rental under conditions which do not establish me as a controlled tenant. I am looking for a house, but I may not have had time to remove myself by the end of December."

On Sept. 5, 1950, the chairman replied:

"As regards the remaining a quarterly tenant at 20A Kinnerton Street, as after the end of December, this is a matter in which I am only too pleased to meet you as I do know the difficulty you will be having in finding a suitable house. No doubt you will appreciate that the company may need the flat in the course of the coming months and naturally I know I can rely on you to vacate the premises when they are required."

A On Sept. 28, the defendant answered:

"I am glad to know that I may remain as quarterly tenant in the flat at Kinnerton Street until I find a house or until the flat is required by the company. I do not wish for any preferential treatment and I would suggest that, as from December, I should pay a rental assessed by a local agent as reasonable. At present I pay £120 a year and I should think that a fair rental today would be nearer £250."

B On Oct. 4 the chairman wrote:

"I have considered your offer to pay an increased rent for your flat, but, as it has been agreed that you remain a tenant on a quarterly basis and in view of the fact that the company may require the premises in the not too distant future, I wish the rent now paid by you to stand."

C The defendant continued in possession of the flat at his existing rent until Mar. 27, 1951, when the chairman wrote asking him to give up possession by June 30, 1951.

D The defendant claimed that, the rateable value of the flat being at all material times £64 per annum, he was protected against an order for possession being made against him by virtue of the Rent Restrictions Acts, notwithstanding the express term of his agreement that the continuation of his occupancy should be "under conditions which do not establish me as a controlled tenant". He contended that he was not a licensee, that he became a statutory tenant before the termination of his managing directorship, and that the statutory tenancy was never terminated by either of the two modes known to the law, i.e., by his giving up possession or by his having an order for possession made against him. Alternatively, he contended that, if his tenancy up to the termination of his managing directorship was a contractual tenancy, that contractual tenancy continued subject to the protection of the Rent Restrictions Acts and had never been replaced by a mere licence.

F A. R. Campbell (with him P. A. Bruce) for the plaintiffs.
Stranders for the defendant.

G McNAIR, J., stated the facts and continued: The first question is whether when the defendant held over in June, 1946, he became a statutory tenant or remained a contractual tenant. It is argued by counsel for the defendant on the basis of the decision in *Morrison v. Jacobs* (1) that whenever there is a holding over at the end of a contractual tenancy of premises which by reason of their low rateable value are within the Rent Restrictions Acts, a statutory tenancy is created, and certain passages in the judgments of SCOTT, L.J. ([1945] 2 All E.R. 430) and MACKINNON, L.J. (ibid., 432), are relied on in support of that proposition. I do not so read those judgments. It seems to me that what the H Court of Appeal there said was that the legal position is a matter of inference from the surrounding facts. The court has to make up its mind what is the correct inference in the circumstances. When the relationship of the parties is merely that of landlord and tenant, the inference is easy to draw (and in most cases would be inevitable) that on a holding over after the expiration of a lease by effluxion of time a statutory tenancy is created. But here all the facts point the other way. The relationship of the parties fundamentally was that of employer and employee under a service agreement. It is plain, to my mind, that

the defendant continued in possession on the terms of the minute, for I do not think that the company would ever have contemplated letting the flat with its access to the offices below except to a person who had a right to have access to those offices. Furthermore, if the true inference is that, on the expiration of his written service agreement, the defendant continued in office on the terms of that service agreement, it seems to me that the correct inference also is that, when his written tenancy agreement ran out by effluxion of time, he held over on the same terms as a contractual tenant, and I so find. A

The contention was raised by the plaintiffs, but was not strongly relied on, that the defendant's occupancy was a service occupancy. I do not accept that contention. As I have already indicated, it appears to me to be plain that the defendant was never required by the terms of his service agreement to live in this flat, although, no doubt, it was convenient for both parties that he should do so. B

On the question of the nature of the arrangements regarding the defendant's continued occupancy after Dec. 31, 1950, the defendant relies strongly on the use in the four letters of the phrases "quarterly tenancy" and "quarterly tenant" and on the fact that when rent was paid—at any rate until this dispute arose—it was invoiced to the defendant as three-monthly rent of the flat at so much per month and a receipt was given him in similar terms. I propose to apply a test laid down by DENNING, L.J., in *Errington v. Errington* (2) in which, after considering the line of cases dealing with the difficult and vexed question of licensee or tenant, he says ([1952] 1 All E.R. 155): C

"The result of all these cases is that, although a person who is let into exclusive possession is, prima facie, to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege with no interest in the land, he will be held only to be a licensee." D

I was also referred to *Marcroft Wagons, Ltd. v. Smith* (3) and, in particular, to the judgment of DENNING, L.J., where he says ([1951] 2 All E.R. 277): E

"In these circumstances it is no longer proper for the courts to infer a tenancy at will, or a weekly tenancy, as they would previously have done from the mere acceptance of rent. They should only infer a new tenancy when the facts truly warrant it. The test to be applied in Rent Act cases is the same test as that laid down in *Doe d. Cherry v. Batten* (4) by LORD MANSFIELD in cases of holding over (1 Cowp. 245): 'The question therefore is, quo animo the rent was received, and what the real intention of both parties was?'" F

On the proper construction of the documents and drawing the proper inference from all the material circumstances—including, in particular, the relationship of the parties, i.e., a former employee of the company and departing managing director and including also the nature of the plaintiff company's business, clearly of a highly confidential nature, and the fact that the flat in question had direct access to the plaintiffs' premises where this confidential work was being carried out—I think it is plain that both parties intended that the relationship should be that of licensee and no more, though they may not have used that precise term or even had that precise term in mind. The primary consideration on both sides was that the defendant, as occupant of that flat, should not be a controlled tenant. I think it is clear that their common intention was that the defendant, as the occupier, should, to use the language of DENNING, L.J., be granted a mere personal privilege with no interest in the premises. In reaching that conclusion I rely particularly on the letter of Aug. 25, 1950, from G H

the defendant which I have read, and the reply of the chairman of the plaintiff company of Sept. 5, 1950. There was, in my judgment, nothing more than a friendly arrangement between the company and their former managing director that he should have the use of these premises under conditions which did not establish him as a controlled tenant so long as the company did not need them.

A On that conclusion of fact it is not necessary for me to express any final view on the validity of the submission by counsel for the defendant that *Foster v. Robinson* (5) is no authority for the proposition which was advanced by counsel for the plaintiffs that, even if the tenancy existing before Dec. 31, 1950, was a statutory tenancy, it would still be open for this court to treat the subsequent arrangement as that of a mere licence. But as the matter has been argued it is right that I should express the provisional opinion that there is a great deal to be said for the view that the true statutory tenancy can be brought to an end only by the actual giving up of possession or its equivalent or by an order for possession. For my part—though I express the view with great hesitation and diffidence—I find great difficulty in agreeing with the view which LORD ASQUITH OF BISHOPSTONE expressed of *Foster v. Robinson* (5). I think as obiter, in *Rogers v. Hyde* (6) when he said ([1951] 2 All E.R. 81):

C “If it was a statutory tenancy, there is recent and binding authority for the proposition that a contractual (and non-protected) tenancy can replace a statutory tenancy by a notional surrender and re-grant or by other means: see, for instance, *Foster v. Robinson* (5) . . .”

D For my part, in view of the Master of the Rolls’ judgment in *Foster v. Robinson* (5), I find it difficult to accept that *Foster v. Robinson* (5) supports the proposition for which it is cited. However that may be, my conclusion is, first, that the tenancy up to Dec. 31, 1950, was a contractual tenancy, and, secondly, that thereafter the occupation was under a licence which had been validly terminated as at June 30, 1951, after which the defendant was a mere trespasser. Accordingly, in my judgment, there should be an order for possession within twenty-one days, and an award in favour of the plaintiffs of damages for trespass which, on the undisputed evidence before me, I assess at the sum of £364.

Judgment for the plaintiffs.

Solicitors: *Barnett, Tuson & Co.* (for the plaintiffs); *Peachey & Co.* (for the defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

PRACTICE NOTE.

NANA OSEI ASSIBEY III, KOKOFUHEHE *v.* NANA KWASI
AGYEMAN, BOAGYAAHENE.

[PRIVY COUNCIL (Lord Simonds, L.C., Lord Morton of Henryton and Sir Lionel Leach), October 6, 7, November 18, 1952.]

Privy Council—Practice—Need for court from which appeal arises to state reasons for decision—Judicial Committee Rules, 1925 (S.R. & O., 1925, No. 440), r. 16.

APPEAL from an order of the West African Court of Appeal dismissing an appeal by the appellant from an order of the Chief Commissioner's Court, Ashanti, upholding a decision of the Asantehene's Court in favour of the respondent in a dispute over the ownership of lands situated within the Bekwai district of Ashanti.

The appellant contended that the decision of the trial court was against the weight of the evidence, and that the West African Court of Appeal erred in having dismissed the appeal made to it without giving any reasons for doing so.

Case referred to:

Abakah Nthah v. Anguah Bennieh, [1931] A.C. 72; 100 L.J.P.C. 47; 144 L.T. 161; Digest Supp.

T. B. W. Ramsay for the appellant.

Quass, Q.C., and *Dold* for the respondent.

Nov. 18. **SIR LIONEL LEACH:** The appellant's contention that the judgment of the West African Court of Appeal should be set aside because it has expressed no reasons for dismissing the appeal to it must be rejected. The suggestion is that the court disregarded r. 16 of the Judicial Committee Rules, 1925, which reads as follows:

"The reasons given by the judge, or any of the judges, for or against any judgment pronounced in the course of the proceedings out of which the appeal arises, shall by such judge or judges be communicated in writing to the registrar and shall be included in the record."

The contention shows misconception of the rule. It does not say that the tribunal from whose decision the appeal to Her Majesty in Council arises shall give reasons. It merely enjoins that where reasons are given they shall be communicated to the registrar. No reasons were given here, and, therefore, there was nothing to communicate.

Solicitors: *Burchells* (for the appellant); *A. L. Bryden & Williams* (for the respondent).

J.D.P.

SEXTON v. SCAFFOLDING (GREAT BRITAIN), LTD.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.JJ.), November 25, 26, 1952.]

Building—Building regulations—Dismantling of scaffolding—Provision of guard-rail—Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), reg. 24 (1).

A When the lowest "lift" or level of scaffolding used in building operations was about to be dismantled a charge-hand of the employers ordered the removal of a guard-rail which had been erected for the protection of workmen on a ledge of the premises, twenty feet above the ground, on which the scaffolding rested. A workman walking along the ledge to assist in the dismantling fell into the street below and was injured.

B HELD: although, prima facie, the Building (Safety, Health and Welfare) Regulations, 1948, applied in general to the work of scaffolders, reg. 24 (1) did not apply to the work of dismantling a level of scaffolding, and, therefore, the workman's employers were not in breach of their statutory duty to provide a guard-rail at the time of the accident and were not liable to the workman in damages.

C Decision of DONOVAN, J. (ante, p. 278), reversed.

FOR THE BUILDING (SAFETY, HEALTH AND WELFARE) REGULATIONS, 1948, reg. 24 (1), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 8, p. 220.

D APPEAL by the defendants from an order of DONOVAN, J., dated June 13, 1952, and reported ante, p. 278, in an action for breach of statutory duty and negligence.

E The plaintiff was one of three employees of the defendants who, on Dec. 2, 1950, were engaged in dismantling some tubular scaffolding erected in connection with building operations consisting of maintenance and repair work to premises comprising a shop with living-rooms on three upper floors at Barnes. The living-rooms were set back from the building line of the shop so that there was a ledge above the shop from the back of which the upper part of the building rose. The ledge was five feet wide except where the bay window of one of the living-rooms on the first floor projected, it being there only two feet, one inch, wide. On its side nearest the street the ledge bore a coping stone one foot, one inch, wide and two inches above the level of the rest of the ledge, the remainder of the ledge being a shallow trough between the coping stone and the front of the building, which was thus about a foot wide at its narrowest point. The distance from the ledge to the street was just under twenty feet. The scaffolding consisted of uprights arranged in parallel rows with horizontal "ledgers" and transoms joining the two rows of upright crossways. The upright poles of the scaffolding rested on base plates on the coping stone about five inches from its outer edge, and so to a man passing outside the uprights only five inches of foothold was available. The scaffold was arranged so as to enable work to be done at a number of levels or "lifts", each "lift" being six feet above the one below. On the occasion in question the plaintiff and the two other men had dismantled the upper "lifts" and were about to dismantle the last "lift", which rose six feet above the ledge. They would do this by standing on the ledge, reaching up with their hands, and, with an instrument called a "podger", undoing the clips and bolts which held the scaffold tubes together. On starting to dismantle the last "lift", one Rocks, one of the employees, on the orders of one Palmer, the charge-hand, removed a hand-rail consisting of a scaffold tube which had been erected at a height of three feet above the coping stone along the ledge, it being fixed to uprights at the flanks of the scaffold and intended as a protection for anyone working on the scaffold against falling into the street below. While walking from one

end of the scaffolding towards the other to begin further dismantling and when at the narrowest part of the trough by the bay window, the plaintiff fell into the street and was injured.

The plaintiff alleged that Rocks had piled some boards about one foot high in the trough of the ledge at the spot where he fell, and that while he was walking with his right foot on the top of these boards and his left foot on the coping stone one of the boards struck his left leg knocking it off the coping stone. He said that as he fell into the street he made an instinctive grab for the hand-rail which was not there. The defendants denied that the boards were at that point and said that the plaintiff walked on the coping stone and outside the scaffold poles. The plaintiff contended that the defendants were in breach of their statutory duty to provide a guard-rail under reg. 24 (1) of the Building (Safety, Health and Welfare) Regulations, 1948, and that they were negligent in causing scaffold boards to be stacked on the ledge, in allowing the ledge to be slippery, in moving the boards while the plaintiff was walking on them, and in failing to provide a safe system of dismantling the scaffolding by removing the hand-rail before such time as the ledge was cleared of materials and there was no occasion for the plaintiff to walk along it. The defendants denied that the regulations were applicable to the work of dismantling the scaffolding or that they were in breach of such regulations if applicable. They denied negligence and alleged that the accident was caused or contributed to by the negligence of the plaintiff. Further, they set up a plea of *volenti non fit injuria*.

DONOVAN, J., held that the dismantling of the scaffolding was an operation on a building and the scaffolding was "plant" within reg. 2 (1) of the regulations of 1948, and, therefore, under reg. 24 (1), the defendants were in breach of their statutory duty to provide a guard-rail at the time of the accident and were liable to the plaintiff in damages. He held, further, that, if he were wrong in his finding that the defendants were guilty of a breach of the statutory regulations, he would hold them to have been guilty of negligence at common law in removing the protective hand-rail when they did and failing to take reasonable care for the safety of the plaintiff and so carry on their operations as not to subject him to unnecessary risk. He held, further, that the defence of *volenti non fit injuria* did not apply, but that the plaintiff had been guilty of contributory negligence, and he awarded him two-thirds of the damages, which he assessed at £2,128 11s.

Stephen Chapman for the defendants.

Marlowe, Q.C., and *Buckee* for the plaintiff.

SOMERVELL, L.J., stated the facts and continued: Regulation 24 (1), which deals with guard-rails, provides:

"Subject to paras. (3), (4) and (5) of this regulation, every side of a working platform or working place, being a side thereof from which a person is liable to fall a distance of more than six feet six inches, shall be provided with a suitable guard-rail or guard-rails of adequate strength, to a height of at least three feet above the platform or place and above any raised standing place on the platform, and with toe-boards up to a sufficient height being in no case less than eight inches and so placed as to prevent so far as possible the fall of persons, materials and tools from such platform or place."

The learned judge decided that there had been a breach of that regulation, and, if he was wrong about that, a breach of the defendants' duty at common law. From that decision the defendants appeal.

The first point made by counsel for the defendants was that on their true construction these regulations did not apply to men employed by a scaffolder, but that they were for the protection of men engaged on building as distinct

from scaffolders. I do not accept that submission, and I see nothing in the regulations to support it. Under reg. 2 (1) the regulations are to apply to operations which include the construction, structural alteration, repair, or maintenance of a building. Taking as an example the present case, namely, the operation of repair or maintenance of a building, I would have thought that, on the natural meaning of those words, any scaffolding which it was necessary to erect to do the repair or maintenance was part of the operation of repair or maintenance. It may not in the result, as I see the problem in this case, matter, because the regulation goes on to say that the regulations apply to plant used in such operations, and if there is any difficulty about the view which I have just indicated, then clearly scaffolding would be regarded as plant. Regulation 4 provides:

“It shall be the duty of every contractor and employer of workmen who is undertaking any of the operations to which these regulations apply (i) to comply with such of the requirements of regulations 5-30 . . . as affect any workman employed by him . . . (ii) to comply with [certain other regulations] as relate to any work, act or operation performed or about to be performed by such contractor or employer of workmen; and it shall be the duty of every contractor and employer of workmen who erects or alters any scaffold to comply with such of the requirements of regs. 5-30 as relate to the erection or alteration of scaffolds having regard to the purpose or purposes for which the scaffold is designed at the time of erection or alteration . . .”

In the view I take it is unnecessary to express any final and concluded opinion as to how reg. 4 (i) quoad scaffolding fits in with the words which follow, but, if one takes the case of a builder who puts up his own scaffolding for repair, maintenance, or whatever it may be, I would have thought he was within reg. 4 (i). On the view that the operation of repair and maintenance includes scaffolding, then, I think, an independent scaffolding contractor would *prima facie* be within reg. 4 (i), but I incline to think that, although that would be the *prima facie* view, an independent scaffolding contractor is dealt with expressly as a special class by the later words, and the purpose of taking him out of the general class and dealing with him specially is to limit his liability to the regulations there set out having regard to the purpose or purposes for which the scaffolding is designed at the time of erection or alteration. There seems to be nothing in either para. (i) or para. (ii) and nothing in the specific regulations which follow to support the proposition that none of those regulations was intended for the protection of men employed by an independent scaffolding contractor. On the other hand, it is, to my mind, clear that some of the regulations, owing to their language, are plainly inapplicable to the process of erecting at the initial stage and dismantling at the final stage scaffolding which is necessary for the building work in question. For example, reg. 9 (1), which deals with the proper maintenance of scaffolding, provides that every part shall be fixed, secured or placed in position, and that is, of course, inapplicable to the process of erecting the scaffolding and fixing those parts in position. Regulation 20 (1) provides that no scaffold shall be used unless it has been inspected by a competent person within the preceding seven days. That is a regulation which would only come into operation when the scaffolding, or, perhaps, some new lift of the scaffolding, had been completed. It would not apply when it was in course of construction. On the other hand, I can see no reason why some of these regulations are not to be construed as for the protection of scaffolders' men as much as builders' men. For example, reg. 11 (1), dealing with ladders as uprights of scaffolds, provides that they are to be of adequate strength. Suppose such ladders were at the base of the scaffolding structure and were necessary for the scaffold men to use in getting up to some higher stage where they had to work, it would seem to me that

this regulation was for their protection just as much as for the protection of any other employee who had to use those ladders to get to the place where he was working. Therefore, the problem in the present case is whether, having regard to its wording and its purpose to be gathered from its terms, reg. 24 (1) was applicable to the work which was being done at the time.

The evidence called for the defendants was that when dismantling a particular lift the normal practice was to remove the guard-rail first. The learned judge found that that was not always done as the first stage, but I would say that the weight of the evidence was strongly in favour of the view that that was the usual practice. The plaintiff said it was not always done, but he was not accepted as a wholly reliable witness. The reason why it is normally removed first, or, at any rate, at an early stage, is because, as here, the area between the uprights of the scaffold and the wall is not usually very big, and, while there may be plenty of room for a man to stand with his back against the rail, say to paint, once the men begin to take down the lengths of tubing and move them along they want the maximum room in which to manoeuvre. In the present case it was the labourer, Rocks, who asked the charge-hand to have the guard-rail removed because he found it in his way and inconvenient having regard to the boards and other objects which he had to handle. One also has to bear in mind that a great deal of the work done by scaffolders is, as the witnesses said, done at heights with no guard-rail to guard them. On this part of the case the learned judge quite rightly had in mind the fact that there cannot be a guard-rail to guard the men who ultimately have to remove it and there would be work to be done after it had been removed. But, while admitting that, he took the view that reg. 24 (1) applied so that either in the construction or demolition of a lift such as this the guard-rail must be put up as soon as it is physically possible and taken down at the last moment.

I have come to the conclusion (and the question is not an easy one) that reg. 24 (1) does not apply to this operation, which, I think, has to be regarded as a single operation in which the taking down of the guard-rail is an essential part which has to be done at some time or another. When one is dealing with a single operation which involves either the erection or the taking down of the safety device which is provided for, one cannot read into the regulations words which say that that must be done at the first or the last moment which is physically possible. I am dealing here with the facts of this case and with the operation which was being done at the time. I am not saying, because a scaffolding of six or eight lifts was being demolished, that, therefore, as soon as any work was done on the top lift the guard-rails should be taken out of all the other lifts through which, possibly, the men had to pass to get up to the top. That can be dealt with when it arises. I am dealing with what I have described as the single operation of dismantling this lift, and I have come to the conclusion that there was no breach of the statutory regulations.

[HIS LORDSHIP referred to the evidence, and held, further, that the defendants were not guilty of negligence at common law and concluded:] I would, therefore, allow the appeal.

JENKINS, L.J.: I agree. Regulation 24 provides, by para. (1), that, subject to certain other paragraphs of which I only propose to refer to para. (3):

“ . . . every side of a working platform or working place, being a side thereof from which a person is liable to fall a distance of more than six feet six inches, shall be provided with a suitable guard-rail or guard-rails of adequate strength . . . ”

Paragraph (3) provides:

“ Guard-rails . . . required by paras. (1) and (2) of this regulation may be removed or remain unerected for the time and to the extent necessary for the access of persons or the movement of materials.”

The plaintiff's case as regards statutory duty was that the space at first floor level on the premises in question from which point upwards the scaffolding had been erected was a working place, and that, as it was more than six feet six inches from the ground, the defendants were obliged under reg. 24 (1) to provide a suitable guard-rail or guard-rails. At the time when the accident took place the dismantling of the scaffolding had reached a point at which the guard-rail had been removed.

A The first question in the appeal is whether the Building (Safety, Health and Welfare) Regulations, 1948, apply to the operation which was going on at the time of the accident, that is to say, the dismantling of scaffolding. The defendants were only concerned in the work done on the premises as the providers of the necessary scaffolding, they being specialists in that matter, and their business consisting of contracting to provide the scaffolding required for building operations carried out by other people. This scaffolding having served its purpose and the work having been completed, nothing remained to be done except to dismantle it. As to the application of the regulations of 1948 in general, it is unnecessary for the purposes of this case to decide—and I am not prepared to hold—that none of those regulations in any circumstances applies to persons employed in the erection or dismantling of scaffolding, but it does not follow that all of the regulations necessarily do so. The scope of the regulations is defined in reg. 2, which provides by para. (1):

“These regulations shall apply to the following operations . . . namely, the construction, structural alteration, repair or maintenance of a building . . . and the preparation for, and laying the foundation of, an intended building . . . and to machinery or plant used in such operations . . .”

D “Scaffold” is defined in reg. 3 (2) as

“ . . . any temporary structure on or from which persons perform work in connection with an operation to which these regulations apply, and any temporary structure which enables persons to obtain access to or which enables materials to be taken to any place at which such work is performed, and includes any working platform . . . together with any guard-rail, toe-board or other safeguards and all fixings, but does not include a lifting appliance or a structure used merely to support such an appliance or to support other machinery or plant.”

F Speaking for myself, I am inclined to think that the erection or dismantling of scaffolding is not in itself an “operation to which these regulations apply”. I think that is borne out by the definition of “scaffold” to which I have just referred. But plainly the erection of scaffolding is a necessary incident to probably most of the operations to which the regulations do expressly apply and it is recognised as such throughout the regulations which make a considerable number of special provisions in regard to scaffolding. It is also, I think, “plant”, according to the natural meaning of that word as used in reg. 2 (1).

G Regulation 4 provides:

“It shall be the duty of every contractor and employer of workmen who is undertaking any of the operations to which these regulations apply (i) to comply with such of the requirements of regs. 5-30 . . . as affect any workman employed by him . . .”

H By para. (ii) persons similarly described have to comply with a further number of regulations so far as they

“ . . . relate to any work, act or operation performed or about to be performed by such contractor or employer of workmen . . .”

Then there is this provision:

“ . . . and it shall be the duty of every contractor and employer of workmen who erects or alters any scaffold to comply with such of the

requirements of regs. 5-30 as relate to the erection or alteration of scaffolds having regard to the purpose or purposes for which the scaffold is designed at the time of erection or alteration . . .”

As to that regulation, I am inclined to think, as I understand my Lord to do, that it refers to two classes of persons, the first being contractors and employers of workmen who are undertaking operations to which the regulations apply, that is to say, undertaking actual building, repairing, or maintenance operations of some sort within the range of operations described in reg. 2 (1). They have to comply with the regulations mentioned for the benefit of their own employees, including, among others, regs. 5-30, which deal with scaffolding. Whatever steps those persons take to provide the scaffolding necessary for the carrying out of the building operations on which they are engaged, whether they provide the scaffolding themselves or procure a specialist contractor such as the defendants in this case to supply it, it is their responsibility to see that the scaffolding for so long as it is used by their employees conforms with all the requirements of regs. 5-30. They also have to comply with the other regulations mentioned in para. (ii). Then a second class of persons is introduced by the words

“and it shall be the duty of every contractor and employer of workmen who erects or alters any scaffold to comply with such of the requirements of regs. 5-30 as relate to the erection or alteration of scaffolds having regard to the purpose or purposes for which the scaffold is designed at the time of erection or alteration.”

That provision appearing, as it does, immediately after the reference to “every contractor and employer of workmen” who is undertaking any of the operations to which the regulations apply and to the duties imposed on those persons, seems to me to point to the case of contractors in the position of the defendants who are providing scaffolding to be used in building operations by the employees of others. The duty primarily laid on them is to conform to regs. 5-30 as regards the method of construction, design and so forth of the scaffolding that they provide. They cannot excuse themselves from liability because the persons who actually use the scaffolding will be or may be people in the employment of some other contractor or employer of workmen.

It is unnecessary for the purposes of this case to go further than to consider whether reg. 24 (1) applied to the particular operation of dismantling scaffolding in the course of which the accident took place. These regulations are broadly of two kinds. There is one kind which deals with such matters as the suitability, strength, condition and mode of securing the components of the scaffolding, and another kind which relates to the safety devices and protective features to be included in the scaffolding when complete and ready for use. Regulations of the first type might well apply to a man engaged in erecting or in dismantling scaffolding. The example given by my Lord was that of a defective ladder which might break under a scaffolding erector while he was climbing the scaffolding in the course of erecting or dismantling it. On the other hand, regulations of the other sort, those relating to the safety devices and protective features which the completed scaffolding is to include, seem to me to be appropriate only to the completed scaffolding and to relate to features which, as a complete scaffolding, it must possess while it is being used by the persons for whose use it has been provided. In particular, the guard-rails required by reg. 24 (1) are part of the complete scaffold. They are recognised as being part of the scaffolding by the definition of scaffold to which I have referred. It seems to me reasonably plain that a regulation requiring a feature such as that, which itself forms a part of the scaffolding, can have no application where the work in question is the actual dismantling of the scaffolding itself, including any guard-rail or guard-rails there may be on it. If that were not so, so far as I can see it would be impossible ever to dismantle any scaffolding

without committing breaches of these regulations, and, therefore, being guilty of criminal offences. I think the regulations themselves, apart from the impossibility of applying them in their entirety to the dismantling of scaffolding, show that dismantling is an operation of a special kind. Regulation 6 provides:

A "No scaffold shall be erected or be substantially added to or altered or be dismantled except under the immediate supervision of a competent person and so far as possible by competent workmen possessing adequate experience of such work. All material for any scaffold shall be inspected by a competent person on each occasion before being taken into use."

B That suggests, to my mind, that the regulations are intended to leave the operation of dismantling scaffolding and the order in which the different parts of the scaffolding are to be taken down to the judgment of the people in charge of the work and that reg. 6 provides that the work is to be done under the immediate supervision of a competent person, and, so far as possible, by competent workmen with adequate experience of such work, as the best method of ensuring the safe execution of an operation for which no hard and fast rule can be laid down as to the precise order in which the component parts of the scaffolding are to be removed.

C There is another reference to dismantling in reg. 9. Paragraph (2) provides:

D "No scaffold or part of a scaffold shall be partly dismantled and remain in such a condition that it is capable of being used unless either—(a) the scaffold continues to comply and would, if used, comply with these regulations, or (b) if the scaffold or part thereof would, if used, not comply with these regulations, a prominent warning notice indicating that the scaffold or part thereof is not to be used is affixed near any point at which the scaffold or part, as the case may be, is liable to be approached for the purpose of use."

E That regulation contemplates a partly dismantled scaffold and is concerned, in cases where a partly dismantled scaffold does not comply with the regulations, to prevent people from using the scaffold. If one was to construe these regulations as applying in their entirety and without exception to the work of dismantling a scaffold, it would be difficult to resist the conclusion that the contractor or employer of workmen responsible for the original or any further dismantling in such cases as are envisaged by reg. 9 (2) (b) would be in breach of the regulations. That seems to me to add further support for my

F conclusion that dismantling is regarded by these regulations as an operation of a special character.

G It is said that reg. 24 is capable of being sensibly applied to scaffolding in the course of dismantling, and the learned judge seems to have held that the way to give it a sensible application is to regard it as meaning that, while at some stage in the dismantling operation the guard-rail must necessarily be removed, it is not to be removed at an earlier stage in the dismantling operation than is necessary. I think the learned judge founded himself to some extent on reg. 24 (3), which allows guard-rails to be "removed or remain unerected for the time and to the extent necessary for the access of persons or the movement of materials". I do not think that that paragraph throws any light on the matter. The removal of the guard-rails permanently as a step in the course

H of dismantling cannot, in my view, be fairly regarded, according to the ordinary use of language, as a removal of the guard-rail "for the time and to the extent necessary for . . . the movement of materials". I think para. (3) is directed to access of persons or movement of materials in the course of the building operations and not in the course of taking down the scaffolding itself, including the guard-rail. Apart from that paragraph, I see no justification for qualifying reg. 24 in the way the learned judge has done. The obligation is an absolute obligation and either it must apply or it must not. If it cannot apply in its

unqualified form, it cannot, in my view, apply at all, and it does not seem to me that it is right for the court to say that, although this statutory obligation cannot be complied with to its full extent and in its full rigour to dismantling operations, nevertheless the court will apply it to such extent as appears to the court on the evidence to be necessary. In my view, that is not the right way to treat a regulation of this kind. As I have said, I cannot see how this regulation can be applied to the operation of dismantling, because it seems to me inevitable that at some time in the course of dismantling, any guard-rail, being itself part of the scaffolding, must be taken down and removed, and there must be people on the scaffolding after the guard-rail has been removed. The precise point of time at which the guard-rail should be taken down, cannot, in my view, in the absence of any express provision, be regarded as a matter of statutory regulation. It is a matter which must be left to the good sense and practical experience of the person in charge of the operation. Accordingly, for substantially the same reasons as my Lord has given, I agree in thinking that the alleged breach of statutory duty in this case was not made out.

[HIS LORDSHIP then dealt with the claim in negligence, said that, in removing the guard-rail, the defendants were acting in accordance with usual practice, and after the guard-rail was removed it was possible for the plaintiff to walk in the trough with safety, and he continued:] In those circumstances, it does not seem to me that the charge of negligence at common law is made out. The plaintiff was not exposed to any unreasonable risk. He was left with a safe place to walk, he being an experienced scaffolder. Accordingly, I think the alternative ground of claim fails also and I would allow the appeal.

HODSON, L.J.: I also agree. On the question whether the regulations apply, I agree with my Lords and with the learned judge in rejecting the submission made by counsel for the defendants that they had no application to the scaffolders in this case. The way in which the matter was put was that the operations covered by the regulations were building operations and the erection of scaffolding and the dismantling of scaffolding before and after the building operations were outside its scope. The learned judge said (ante, 279):

“The defendants contend that the scaffold is not a building within the meaning of the regulations. But the regulations apply to specified *operations* being operations on a building, and the erection and dismantling of any necessary scaffold would certainly be part of such operations. I should also have thought that scaffolding was covered by the words ‘plant used in such operations’. If scaffolds were not within the regulation at all, then regs. 5 to 21 containing a number of directions to ensure that scaffolds are safe are either meaningless or are to be construed in such a way as to exclude scaffolders from their protection.”

I see no reason to dissent from that passage. It may be open to question whether scaffolding comes under the heading of construction, repair, or maintenance of a building, or whether it comes only under the heading of “plant used in such operations”, but, in any event, I think the result is the same. Treating the matter generally, I would agree that *prima facie* the regulations apply. Having come to that conclusion, the learned judge took the further step of saying that, if that was so, reg. 24, which has to do with the provision of guard-rails, must be applied to the work on which the plaintiff was employed when he was injured. Realising the difficulty, since the scaffolding was being dismantled, that there must come a point when the provision of guard-rails would be impossible, he drew the line at that point, and, in effect, held that the regulation applied until the time came when the contractor had to take down the safeguard for which the regulation provides. For myself, I do not think it is legitimate or possible to draw the line at that point. If it were right

to draw the line there, it would be fair to argue in connection with reg. 5, which has to do with the provision of scaffolds, that there must always be a scaffold erected to support any scaffold which already existed because it is physically possible to do so. The question is whether reg. 24 as a whole applies or not. The conclusion to which I have come with regard to that regulation is the same as that at which my Lords have arrived, namely, that it does not apply. Regulation 24 has to do with what I might describe as a scaffold in use.

A A scaffold in use has to have any working platform from which a person is liable to fall a distance of more than six feet six inches "provided with a suitable guard-rail or guard-rails of adequate strength". The process of dismantling scaffolds is not, in my view, within the purview of that regulation. Dismantling is mentioned in regs. 6 and 9, reg. 6 being the important regulation which provides that

B "No scaffold shall be erected or be substantially added to or altered or be dismantled except under the immediate supervision of a competent person and so far as possible by competent workmen possessing adequate experience of such work."

C I respectfully disagree with the learned judge's conclusion that there was any breach of the regulations.

[HIS LORDSHIP held that the defendants had not been guilty of negligence at common law and continued:] For these reasons and the reasons which have been given by my Lords, I agree that the appeal should be allowed.

D *Appeal allowed.*

Solicitors: *L. Bingham & Co.* (for the defendants); *Berry Tompkins & Co.* (for the plaintiff).

[*Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.*]

A. & J. MUCKLOW, LTD. (In Liquidation) v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Harman, J.), November 20, 21, 26, 1952.]

Surtax—Company—Voluntary liquidation—Undistributed profits—“Available for distribution”—Income for broken period before winding-up resolution—Finance Act, 1927 (c. 10), s. 31 (4)—Finance Act, 1922 (c. 17), s. 21 (1), proviso.

On Dec. 9, 1943, a company, which made its accounts up to Apr. 30 in each year, passed a resolution for voluntary winding-up for the purpose of re-construction. The liquidator sold the company's assets to a new company which had been formed for the purpose, but excluded a sum of £35,000 from the sale, which sum was paid to the shareholders in the old company, who put it on deposit to guarantee an overdraft of the new company. No dividend was declared by the old company for the period May 1 to Dec. 8, 1943, because the directors considered that all the money of the old company was required for financing the new company. The Special Commissioners made a direction under s. 21 (1) of the Finance Act, 1922, rendering the company liable to surtax in respect of the profits for the period May 1 to Dec. 8, 1943. The company appealed.

Held: section 31 (4) of the Finance Act, 1927, which laid down that a company's income for the period from the end of the last year for which accounts had been made up to the date of the resolution for winding-up should be deemed to be income “available for distribution”, did not mean that any income of that period not distributed must of necessity be deemed to have been unreasonably withheld from distribution, so that a surtax direction would automatically be made; the Special Commissioners had to consider the situation at the relevant time in the light of all the circumstances; and, unless they came to the conclusion that the directors had acted unreasonably in withholding the company's income from distribution, they must discharge the surtax direction.

Collier (H.) & Sons, Ltd. v. Inland Revenue Comrs. ([1933] 1 K.B. 488), distinguished.

Per HARMAN, J.: “I think that the needs of the new company for financial support must be irrelevant . . . I am . . . of the opinion that the proviso to s. 21 (1) of the Finance Act, 1922, though it directs the commissioners to have regard to two factors, does not preclude them from taking other factors into account.”

AS TO UNDISTRIBUTED PROFITS OF COMPANIES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 289-294, paras. 574-580; and FOR CASES, see DIGEST Supp., Income Tax.

Cases referred to:

- (1) *Collier (H.) & Sons, Ltd. v. Inland Revenue Comrs.*, [1933] 1 K.B. 488; 103 L.J.K.B. 33; 148 L.T. 199; 18 Tax Cas. 83; Digest Supp.
- (2) *Montague Burton, Ltd. v. Inland Revenue Comrs.*, (1934), 152 L.T. 8; *affd.*, H.L., (1936), 105 L.J.K.B. 236; 154 L.T. 355; 20 Tax Cas. 48; Digest Supp.
- (3) *Carlaw (David) & Sons, Ltd. v. Inland Revenue Comrs.*, 1926 S.C. 870; 11 Tax Cas. 96; Digest Supp.
- (4) *Thomas Fattorini (Lancashire), Ltd. v. Inland Revenue Comrs.*, [1942] 1 All E.R. 619; [1942] A.C. 643; 111 L.J.K.B. 546; 167 L.T. 45; 24 Tax Cas. 328; 2nd Digest Supp.

CASE STATED by the Special Commissioners of Income Tax.

The Special Commissioners made a surtax direction under s. 21 (1) of the Finance Act, 1922, in respect of the taxpayer company's accounting year ended Apr. 30, 1943, and of the period from May 1, 1943, to Dec. 8, 1943, the

A day before the passing of a resolution for the voluntary winding-up of the company. On the facts the Special Commissioners found that there had been no unreasonable withholding of the company's income from distribution for the year ended Apr. 30, 1943, but they held themselves bound by s. 31 (4) of the Finance Act, 1927, to find that the income for the period May 1 to Dec. 8, 1943, had been unreasonably withheld from distribution, and they confirmed the direction for that period accordingly. The company appealed. The Crown did not appeal against the discharge of the direction for the year ended Apr. 30, 1943.

Millard Tucker, Q.C., and J. W. P. Clements for the company.

Heyworth Talbot, Q.C., and Sir Reginald Hills for the Crown.

Cur. adv. vult.

B Nov. 26. **HARMAN, J.**, read the following judgment. This is an appeal by way of Case Stated from a decision of the Special Commissioners refusing to discharge a direction given under s. 21 of the Finance Act, 1922, whereby the income of the company (the taxpayers in this case) for the period from May till December, 1943, when the company was put into liquidation, was declared to be the income of the members.

C The company's history is set out in the Case and I need not review it here. It never paid a dividend during its life which extended from 1939 to 1943. It was a company to which s. 21 applied, being owned by two brothers named Mucklow. Its business was purchased from them, and the object of the liquidation was to re-construct it, the business being re-sold to a new company of the same name, a large sum in cash being excluded from the sale and passing to the two brothers who used it to finance the new company. The commissioners found that it was not part of the object of the re-construction to avoid surtax, and they discharged a direction under s. 21 in respect of the company's last complete financial year, which ended Apr. 30, 1943, holding that the company was not unreasonable in refraining from paying a dividend for that year. They, nevertheless, confirmed the direction in respect of the last seven or eight months of the company's existence, "having regard", as the Case states, "to the provisions of s. 31 (4) of the Finance Act, 1927". The appeal is concerned solely with this period, the Crown making no complaint of the decision in respect of the previous year.

Paragraph 27 of the Case is in the following terms:

F "We had been requested to express our opinion on the broad question of what was reasonable. Were it possible to view this question apart from the proviso to s. 21 (1) of the Finance Act, 1922, and s. 31 (4) of the Finance Act, 1927, with the relevant authorities, we should have formed the opinion that it was not unreasonable for the appellant company to pay no dividend in respect of the broken period up to the date of liquidation. G But the matter was not so at large, and we had to determine it by reference, first, to s. 31 (4) of the Act of 1927, under which the income of the appellant company for the period in question must be deemed available for distribution, and, secondly, to the proviso to s. 21 (1) of the Act of 1922, under which the test of what was reasonable had to be interpreted by reference to the current and future requirements of the appellant company's business. H The evidence as to such requirements of the business at October, 1943, before liquidation was contemplated, had much impressed us, and we had accepted it in discharging the first direction. But current and future requirements meant nothing in the case of a company which was being wound-up, and the company's appeal must fail. Moreover, the case was, in our opinion, clearly covered by *Collier (H.) & Sons, Ltd. v. Inland Revenue Comrs.* (1). We, accordingly, confirmed the direction."

It is on this paragraph that the controversy arises, each side claiming it as a

decision in its favour. The company claims that it shows that, if the commissioners had not felt themselves bound by the terms of s. 31 (4) of the Act of 1927 and the proviso to s. 21 (1) of the Act of 1922, as interpreted (as they wrongly supposed) in *Collier (H.) & Sons, Ltd. v. Inland Revenue Comrs.* (1), they would have discharged the direction, while the Crown argues, first, that the commissioners rightly felt themselves so bound, and, alternatively, that the view expressed that they would not have considered the company unreasonable is unrelated to any facts which they could legitimately take into account.

Section 21 of the Act of 1922 has been much discussed and I need not read it again. It was summarised by FINLAY, J., in these terms in *Montague Burton, Ltd. v. Inland Revenue Comrs.* (2) (152 L.T. 12):

“ I think an accurate general description of the nature of the section and of the effect of the proviso was given when it was said that it was the duty of the commissioners to see whether a reasonable part of the actual income had been distributed, and that, in doing that they were to see to it that proper development of the business should not be penalised. It seems to me to read as put by Mr. Greene. I think I have substantially reproduced what he said and it seems to me that what he said, put generally, correctly represented the meaning of the section; and the proviso, I think, makes it clear that they are to have regard not only to current requirements but also to such requirements as may be necessary or advisable for the maintenance and development of the business.”

It is settled law that, notwithstanding the preamble to the section, it is unnecessary to find a positive design to avoid tax (*David Carlaw & Sons, Ltd. v. Inland Revenue Comrs.* (3)). It is, moreover, now settled by *Thomas Fattorini (Lancashire), Ltd. v. Inland Revenue Comrs.* (4) that, the section being a penal one, the burden of showing that the company was unreasonable is on the Crown and not on the subject: see LORD ATKIN'S speech where he says ([1942] 1 All E.R. 625):

“ It seems clear that the discussion must proceed ab initio on the footing that the action of the directors must be judged by considering what their conduct would reasonably be if no question of surtax influenced their decision. Withholding of distribution for the purpose of ‘avoidance of the payment of surtax’ by shareholders would, if found, obviously negative the reasonableness of any part so withheld. The other general point to be observed is that, as it seems to me, what has to be found is that the company acted unreasonably in withholding some part of its income from distribution. It is not enough to show that a part could reasonably be distributed, if at the same time it could be said, as it well might, that it was equally reasonable to withhold distribution. The section is highly penal, and I feel no doubt that the onus is originally and remains on the Revenue to show that the company acted unreasonably in withholding part of its income from distribution. What is reasonable has consistently been held to depend upon the actual conditions known at the time for decision. In the application of this section it is what *these* directors recommend and *these* shareholders decide in *those* conditions of *that* company. There is no abstract conception of reasonableness, and the conclusion is not to be reached on a priori reasoning.”

This contradicted the view generally held before that case that the onus was on the taxpayer.

It seems to be clear that s. 31 (4) of the Act of 1927 was passed to close a gap in s. 21 of the Act of 1922. That section did not catch profits earned in the last period of a company's life, because the company, having *ex concessis* gone into liquidation, could not lawfully declare a dividend to distribute the profits of the period. Accordingly, s. 31 (4) was passed in these terms:

"Where an order has been made or a resolution passed for the winding-up of a company to which the said s. 21 applies, the income of the company for the period from the end of the last year or other period for which accounts of the company have been made up to the date of the order or resolution for winding-up shall, for the purposes of the said section, be deemed to be income of that period available for distribution to the members of the company . . ."

A

It was argued for the Crown that the words "available for distribution to the members" mean in the context that any income not distributed must be held to be unreasonably withheld, and that, in effect, these words are mandatory and a direction must be made as a matter of course. This is certainly not the natural meaning of the words. The Crown rely on the proviso to s. 21 (1) of

B

the Act of 1922 which is in these terms:

"Provided that, in determining whether any company has or has not distributed a reasonable part of its income as aforesaid, the commissioners shall have regard not only to the current requirements of the company's business but also to such other requirements as may be necessary or advisable for the maintenance and development of that business."

C

The terms of that proviso are said to show that the only matters which can be taken into consideration are those mentioned, and, therefore, it must follow that, as nothing can be required for current commitments or future needs of a company on the point of liquidation, the answer must necessarily be that everything available ought to be distributed. This view of the section is said

D

to be supported by *Collier's* case (1), and so the commissioners thought. It is, therefore, necessary to examine that decision. In that case the appellant company, on which a direction was made for the last period of its life, had made an agreement selling its assets, including all its income, to a new company, and the argument mainly was that, as the company was not the owner of the income, it could not be unreasonable in not distributing it. That argument did not find any favour. The Special Commissioners and the Board of Referees confirmed the direction, which then went before FINLAY, J. His decision was merely that there was evidence on which the commissioners could come to the conclusion which they reached, but he made an observation which is valuable. He said (148 L.T. 204):

F

" . . . but I think that [the argument of counsel for the company] is answered by looking at s. 31 (4). You get the winding-up resolution on Dec. 20, and thereupon the section says that the income of the company for the period from the end of the last year shall, for the purposes of the section, be deemed to be income available for distribution to the members of the company. That does not, of course, mean that you are, without any more examination, to say that it has become obnoxious to the section. What it means is that it is income which you are entitled to treat as income of the company, and, therefore, as income which, if the other conditions of the section are fulfilled (that is to say, if there has been what I may call the unreasonable withholding of it), is income as to which the appropriate machinery may be brought into operation."

G

H Therefore, he was manifestly of the opinion that "available" had its ordinary meaning of being there to be used if the company was minded so to do, and, if the company was unreasonable in not using it, then a direction would follow.

When that matter went to the Court of Appeal there was, I think, a division of opinion. The judgments are, to my mind, a little obscure, but I think it is true to say that the majority of the court, that is to say, LORD HANWORTH, M.R., and SLESSER, L.J., took the view (although it was not necessary for them to take it) that s. 31 (4) did not mean what FINLAY, J., thought it meant,

but did mean what the Crown now argue it to mean. For instance, LORD HANWORTH, M.R., says ([1933] 1 K.B. 501):

"I think the elasticity originally given by s. 21 (1) in regard to the part of the profits which was reasonably distributable, has also been eliminated."

That is to say, there is no question of considering what is a reasonable part. Then I find these words (*ibid.*):

"In my opinion, those words in sub-s. (4) are so direct that it excludes the possibility of the latitude asked for by the appellant company in this case."

I think SLESSER, L.J., was, undoubtedly, of the same opinion, but some doubt is thrown on his observations by reason of the fact that I feel he had certain misconceptions about s. 21 of the Act of 1922. He ends his judgment in these terms (*ibid.*, 504):

"I have given judgment in this case at some length, because I am conscious of the fact that the considerations by which I have arrived at my decision are not quite the same as those which moved the learned judge in the court below. He seemed to be of opinion that the commissioners must still consider what was a reasonable part of the income for distribution under the Act of 1927, and decided the case, as I understand him, as a question of fact. Because I have arrived at a different view of the law on that matter, and agree with the Master of the Rolls in thinking that the words of sub-s. (4) are to be read in the sense which I have indicated, I have thought it right in courtesy to the learned judge to give full expression to my opinion."

Therefore, he thought (and so thought the Master of the Rolls) that the words in s. 31 (4) did make it mandatory to treat the whole income for the broken period as income which was unreasonably withheld. ROMER, L.J., agreed with FINLAY, J., that, as a question of fact, the commissioners were right. He thought that that was the way to decide the case, and that it was a matter for them to consider. He says (*ibid.*, 505):

"... it is clear that the commissioners could find, as they did in fact find, that it was unreasonable not to have so distributed it; in other words, that a reasonable part of that income had not in fact been distributed amongst the members. That is sufficient to dispose of this case..."

It seems to me, therefore, that opinions were evenly divided on this subject. Moreover, as the commissioners had found as a fact that the company was unreasonable, those opinions were unnecessary to the conclusion, it being only necessary to find that the conclusion was open to the commissioners notwithstanding the situation in which the company had placed itself by selling its income to another company. Accordingly, I feel free to follow my own views on the matter. It is significant that FINLAY, J., did not feel that he was precluded from following his own view when he came to decide the *Montague Burton* case (2). This appears from what he says (152 L.T. 13):

"It is not necessary that I should refer in detail to the section in the Act of 1927 which has been recently the subject of construction in the Court of Appeal, in the case of *Collier* (1)."

Then he refers to the argument of Mr. Greene, which I need not go into, and he goes on in this way (*ibid.*):

"... but it does not say that the legislature by saying that, by fixing dates and by saying that within those dates after the date of the resolution, there would be no room for a development policy—para-

phrasing it shortly, it does not seem to me that the legislature by doing that has precluded the commissioners, or those charged with the duty of arriving at the facts, from considering all the facts and considering, among other facts, the circumstance that a winding-up, though not put through, is contemplated and something more than contemplated."

A It was pointed out to me that in the case of investment companies the legislature has laid it down that the income for the ultimate period shall be deemed to be the members' income, and that this result is indicated categorically in s. 20 (6) of the Finance Act, 1936, in these words:

B "Where, whether before or after the passing of this Act, an order has been made or a resolution passed for the winding-up of an investment company to which s. 21 of the Finance Act, 1922, applies, the following provisions shall have effect:—(a) the actual income of the company from all sources since the date of the order or resolution shall, for purposes of assessment to surtax, be deemed to be the income of the members; (b) the Special Commissioners shall from time to time by notice in writing to the liquidator direct that the amount of that income for the year or period C specified in the notice shall be deemed for those purposes to be the income of the members for that year or period . . ."

It would be odd if the quite different words "available for distribution" should have the same effect as these words. They certainly do not in sub-s. (2) of the same section where they appear in these terms:

D "For the purpose of sub-s. (1) of the said s. 21 the sums which are to be regarded as income available for distribution among the members of an investment company . . ."

E for it is clear that there the words have their ordinary meaning: see also s. 14 (2) (b) of the Finance Act, 1937, and contrast s. 14 (1) of the Finance Act, 1939, which is also dealing with investment companies, where the words

"the whole . . . income . . . shall . . . be deemed for the purposes of assessment to surtax to be the income of the members of the company"

F are again found. I am, moreover, of the opinion that the proviso to s. 21 (1) of the Finance Act, 1922, though it directs the commissioners to have regard to two factors, does not preclude them from taking other factors into account. This again receives support from FINLAY, J., in *Burton's* case (2) where in discussing s. 21 he describes the proviso in this way (152 L.T. 13):

G "... and there is the proviso with regard to what are the considerations, or some of the considerations, to which they should have regard in arriving at a conclusion as to the reasonable part."

Further, *Fattorini's* case (4) shows that the commissioners must conclude that the company did act unreasonably, and, having regard to the prelude to s. 21, the absence of a tax avoidance motive must have some weight on one side, just as the presence of such a motive will have, as LORD ATKIN pointed out, an influence on the other.

H I conclude, therefore, that the commissioners misdirected themselves in holding that s. 31 (4) of the Finance Act, 1927, and the *Collier* case (1) bound them to hold that the direction was mandatory and followed automatically in the circumstances. It may well be that it will usually follow, because it is hard to see what circumstances can make it reasonable to refrain when the company is on the point of expiring, having regard to the injunction to treat the profit as available for distribution and considering that the factors mentioned in the proviso to s. 21 can have little weight. None the less, in

my judgment, it is the duty of the commissioners to consider the matter as FINLAY, J., indicates in the *Collier* case (1).

Have they done this? I am unable to say. I cannot find from their statement about reasonableness in para. 27 of the Case what factors they have considered in expressing this hypothetical view. They describe it as a "broad question", and it looks as though they have considered reasonableness as divorced from the circumstances. Now, the reasonable company, like the reasonable man, is not chimaera bombinans in vacuo. Reason, or its reverse, can only be judged when considered in the framework of the facts on which the directors had to form their conclusion. I have already read the passage from LORD ATKIN's speech from which this conclusion gains its force. There are two limiting considerations imported—(i) that the income must be considered "available" and so forth, and (ii) that the proviso to s. 21 indicates two of the factors to be taken into account. Moreover, I think that the needs of the new company for financial support must be irrelevant. With these guides the commissioners must seat themselves in the board room and consider the whole situation facing the directors at the relevant time, remembering LORD ATKIN's warning about onus. Unless they conclude that the directors have acted unreasonably, they must discharge the direction. I cannot feel sure that they have gone through this process, and I must say I feel great sympathy with them, for it is a hard one. It would be much simpler if the Crown were right and the result automatic, but I feel constrained to hold that it is not. Therefore, I must remit the case for a new finding, hoping, though without much confidence, that what I have tried to indicate may help them to find a way through this dark legislative jungle.

Appeal allowed. Case remitted.

Solicitors: *Scott & Son* (for the company); *Solicitor of Inland Revenue* (for the Crown).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

MERRINGTON v. IRONBRIDGE METAL WORKS, LTD., AND OTHERS.

[SALOP ASSIZES (Hallett, J.), July 14, 15, 16, 17, 18, 21, 23, 24, 28, 1952.]

Negligence—Fire—Fireman injured by explosion—Liability of occupiers—Invitee—Exceptional and unnecessary dangers of fire and explosion created by occupiers—Volenti non fit injuria.

The defendants were the occupiers of a factory in which they carried on the business of extracting the aluminium in aluminium foil. As a result of the processes carried on at the factory large quantities of fine dust containing aluminium and carbon particles were created. This dust lay in thick deposits in numerous places all over the factory, and the defendants took no steps to prevent or lessen its creation or to remove it. While fighting a fire at the factory in the course of his duties as a part-time fireman, the plaintiff was injured by a dust explosion caused by the exceptional and unnecessary dangers of fire and explosion which the defendants had created and maintained on the premises. In an action by the plaintiff claiming damages for negligence, the defendants denied liability and pleaded, *inter alia*, that the plaintiff attended the fire with knowledge of the attendant risk of injury to himself and voluntarily incurred that risk.

HELD: (i) the maxim *volenti non fit injuria* applied only if the plaintiff was both (a) *sciens*, i.e., he fully appreciated the dangerous character of the physical condition brought about by the negligence of the defendants, and (b) *volens*, i.e., he had consented to assume the risk without compensation; a man could not be said to be *volens* unless he was in a position to choose freely, and if he was acting under the compulsion of a duty his consent should rarely, if ever, be inferred (*Bowater v. Rowley Regis Corpn.* ([1944] 1 All E.R. 465), applied); on the facts, the plaintiff was neither *sciens* nor *volens*, and he had not impliedly agreed to give up any rights which he would have had but for such agreement.

(ii) the fire brigade having been summoned by the defendants' servant who was in charge of the factory at the time, the plaintiff was an invitee, but he could not succeed on the basis of a breach by the defendants of their duty to an invitee as it was not shown that he would have avoided the danger if he had been informed of it, and the probabilities were that he would not have done so.

(iii) the rights of a fireman who properly attends a fire cannot depend on how he comes to be there, for the fire brigade can attend the fire in the exercise of the powers conferred on them by the Fire Services Act, 1947, s. 30 (1), or they can be summoned, for example, by a policeman or a passer-by.

(iv) there was a duty on the defendants not to have their factory in the dangerous condition in which it was, and they knew or ought to have known (a) that by lack of reasonable care they were creating and maintaining exceptional and serious risks of fire and explosion in the factory, (b) that by reason of such risks a fire was likely to occur, (c) that, if a fire did occur, members of the fire service were likely to enter the premises to deal with it in the course of their duty, and (d) that, if firemen entered the premises to deal with the fire, they would be exposed to an exceptional and serious risk of being injured by explosion, and, therefore, their duty not to have their factory in that dangerous condition was a duty which the defendants owed towards the firemen and they were liable to the plaintiff in damages.

Dictum of LORD ATKIN in *M'Alister (or Donoghue) v. Stevenson* ([1932] A.C. 580), applied.

AS TO STANDARD AND DEGREE OF CARE ORDINARILY REQUIRED, see HALSBURY, Halsham Edn., Vol. 23, pp. 571-576, paras. 825-827; and FOR CASES, see DIGEST, Vol. 36, pp. 12-17, Nos. 33-76.

Cases referred to:

- (1) *Dann v. Hamilton*, [1939] 1 All E.R. 59; [1939] 1 K.B. 509; 108 L.J.K.B. 255; 160 L.T. 433; Digest Supp.
- (2) *Bowater v. Rowley Regis Corpn.*, [1944] 1 All E.R. 465; [1944] K.B. 476; 113 L.J.K.B. 427; 170 L.T. 314; 108 J.P. 163; 2nd Digest Supp. A
- (3) *D'Urso v. Sanson*, [1939] 4 All E.R. 26; Digest Supp.
- (4) *Haynes v. Harwood*, [1935] 1 K.B. 146; 104 L.J.K.B. 63; 152 L.T. 121; Digest Supp.
- (5) *Steel v. Glasgow Iron & Steel Co., Ltd.*, 1944 S.C. 237; 2nd Digest Supp.
- (6) *Hyett v. Great Western Ry. Co.*, [1947] 2 All E.R. 264; [1948] 1 K.B. 345; [1947] L.J.R. 1243; 177 L.T. 178; 2nd Digest Supp. B
- (7) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.
- (8) *Hay (or Bourhill) v. Young*, [1942] 2 All E.R. 396; [1943] A.C. 92; 111 L.J.P.C. 97; 167 L.T. 261; 2nd Digest Supp.
- (9) *Wheeler v. New Merton Board Mills, Ltd.*, [1933] 2 K.B. 669; 103 L.J.K.B. 17; 149 L.T. 587; Digest Supp. C
- (10) *Whitby v. Burt, Boulton & Hayward, Ltd.*, [1947] 2 All E.R. 324; [1947] K.B. 918; [1947] L.J.R. 1280; 177 L.T. 556; 111 J.P. 481; 2nd Digest Supp.
- (11) *Lavender v. Diamints, Ltd.*, [1949] 1 All E.R. 532; [1949] 1 K.B. 585; [1949] L.J.R. 970; 2nd Digest Supp. D

ACTION for damages for personal injuries.

On May 12, 1950, during the course of his duties as a part-time fireman in the Salop County Council fire brigade, the plaintiff went to deal with a fire at a factory occupied by the first defendants, Ironbridge Metal Works, Ltd., and was injured by an explosion following on the fire. The factory was used by the first defendants for the extraction of the aluminium in aluminium foil, and, as a result of the processes carried on there, large quantities of fine dust which included aluminium and carbon particles were created. No steps were taken by the first defendants to prevent or lessen the creation of this dust or to dispose of it. The factory was of such construction as to afford a multitude of places where the dust could lie and those places had thick deposits of dust on them. The fire started in a large pile of debris at about 11.20 a.m. At 12.20 p.m. a servant of the first defendants, who was then in charge of the factory, summoned the fire service and told them that foam equipment would be required, but he did not warn them of the presence of aluminium. Until the arrival of the firemen, one of the first defendants' servants played water on the debris, but the firemen at no time applied water. Not knowing that the fire area contained aluminium, or that any danger of explosion would be created by the application of foam, the firemen played foam on the fire to the knowledge of the first defendants' managing director and without any objection on his part. There was no sand available at the factory. After the fire appeared to be out, the senior fire brigade officer was informed, for the first time, that "it was aluminium". Shortly afterwards a flame broke through the foam blanket, the officer had foam put on the fire again for a short time, and then had the foam branch withdrawn. Shortly afterwards an explosion occurred in which the plaintiff was injured. The factory and its contents were destroyed, the managing director was killed, and other persons were injured. E F G H

In an action for damages against the first defendants and the executors of the managing director, as the second defendants, the plaintiff alleged (a) negligence, and (b) a breach of duty under the Factories Act, 1937, s. 28 (1). The allegation of negligence was, in substance, that the first defendants and the

managing director conducted their business at the factory so carelessly as to create and maintain therein two kinds of serious, exceptional, and wholly unnecessary risks, viz., (i) fire risks, and (ii) risk of a dust explosion. In their defences the defendants denied the responsibility for the fire and blamed the fire brigade for the explosion. Accordingly, the plaintiff, by amendment, added the Salop County Council, the authority made responsible for the fire services of the county under the Fire Services Act, 1947, s. 4, as the third defendants.

A The third defendants accepted liability to compensate the plaintiff if the explosion could be shown to have been caused wholly or in part by negligence on the part of his fellow members of the fire service. The first and second defendants also instituted third party proceedings against the third defendants, alleging inter alia (a) that the fire brigade officers knew or ought to have known that the fire contained aluminium and that the danger of explosion would be created by the use and application of water and foam to and near the fire, B (b) that they caused or permitted such application, and (c) that they so caused or contributed to the explosion and consequent injury. Against the plaintiff, the first and second defendants pleaded (a) contributory negligence, but this plea was abandoned during the trial, and (b) that the plaintiff attended the fire with knowledge of the attendant risks of injury to himself and voluntarily C incurred the risk of injury.

Sir Frank Soskice, Q.C., Pain and A. C. Cole for the plaintiff.

Ryder Richardson, Q.C., and Fife for the first defendants, Ironbridge Metal Works, Ltd.

D *Fearnley-Whittingstall, Q.C., J. C. Lawrence and J. E. M. Irvine* for the second defendants, the executors of the first defendants' managing director.

Fox-Andrews, Q.C., N. A. Carr and A. S. Orr for the third defendants (and third party), Salop County Council.

Cur. adv. vult.

E July 28. HALLETT, J., stated the facts, and said: Having regard to the broad way in which leading counsel for the plaintiff put his case when opening, I desire to emphasise that I am deciding the rights of the plaintiff on the facts of this particular case, and I am not purporting to lay down the rights of members of the fire service generally when injured in the course of their fire-fighting duties.

[Dealing with the defences raised by the first and second defendants, HIS LORDSHIP said that there was no evidence to justify the plea of contributory F negligence, and continued:] The other defence, in which the first and second defendants are still persisting, is that the plaintiff

" . . . attended the said fire with knowledge of the attendant risks of injury to himself and voluntarily incurred the risk of injury."

G Many of the cases in which the doctrine of *volenti non fit injuria* has been considered have been cases of master and servant where special considerations apply: see SALMOND ON THE LAW OF TORTS, 10th ed., p. 34. The decision in *Dann v. Hamilton* (1) is not binding on me, but I am satisfied that the doctrine can have no application unless the plaintiff is at least *sciens*, that is to say, he fully appreciates the dangerous character of the physical condition which has been brought about by the negligence of the defendant. Accordingly, H in my judgment, the plea of *volenti* in this case breaks down at the outset because there is no evidence whatsoever that the plaintiff attended the fire with knowledge of the attendant risks of injury to himself. On the contrary, such little evidence as there is on the point supports the opposite conclusion.

Next, it is well settled that to be *sciens* is not enough. The plaintiff must also be *volens*, that is to say, a real consent to the assumption of the risk without compensation must be shown by the circumstances. It is a question of fact in each case and not of law. If, however, a man acts under the

compulsion of a duty, such a consent should rarely, if ever, be inferred, because a man cannot be said to be "willing" unless he is in a position to choose freely: see *Bowater v. Rowley Regis Corpn.* (2), and for illustrations of this principle, *D'Urso v. Sanson* (3), *Haynes v. Harwood* (4), and other cases cited in the text-books. The question of consent being one of fact, I unhesitatingly find that there was no consent on the part of the plaintiff. The argument for the first and second defendants is that, because every fireman knows that his work when attending fires may involve some risk, he impliedly agrees in advance to accept without recourse against a person negligently causing it every risk at every fire, however exceptional, unknown to him, and even unforeseeable by him the particular risk may be. No authority was cited to me for such a contention, although it was argued that support for it can be derived—I do not know why—from s. 30 of the Fire Services Act, 1947. I regard the contention as plainly unsound. I shall discuss later what duty, if any, the first and second defendants owed towards the plaintiff and on what ground or grounds, if any, he can recover compensation from them for injuries occasioned by their carelessly causing exceptional risks of fire and explosion at their factory. For the moment I am only holding as a matter of fact that he did not impliedly agree to give up any rights which he would have had but for such agreement. This may be a convenient moment to say emphatically that I do not accept the submission of leading counsel for the plaintiff that, if a fireman sustains injury as the result of performing his duty at a fire, he ipso facto becomes entitled to recover compensation from any person whose carelessness has caused the fire in question.

[HIS LORDSHIP reviewed the evidence and came to the conclusion that there was both a small visible and superficial fire which seemed to be, and, perhaps, was, mastered, and also a deep-seated and, at first, unperceived fire which was not mastered and could never have been mastered, except, possibly, by the application of large quantities of sand, which were not available. HIS LORDSHIP found that the fatal explosion was not a hydrogen explosion, as the first and second defendants sought to maintain, but a dust explosion which arose from the quantities of dust lying all over the factory and containing aluminium and carbon particles. He was not satisfied that what the fire brigade did contributed in any degree to causing the explosion and amounted to novus actus interveniens, he thought that the explosion would probably have occurred even if the fire brigade had done nothing, he exonerated its members from the charge of negligence which was brought against them, and he continued:] I have held (a) that none of the allegations of negligence made against the third defendants has been established, and (b) that the explosion which injured the plaintiff was not a hydrogen gas explosion. I think, however, that the application of foam to the fire would produce hydrogen gas in considerable quantities, and, accordingly, if I had held the opposite way on both points (a) and (b), I should have held the third defendants responsible to the plaintiff for contributing in some degree to the explosion. But, as between the defendants, I should even then have attributed only a very small share of the responsibility to the third defendants.

It remains to deal with the rights of the plaintiff as against the first and second defendants. I have held that the explosion which injured the plaintiff arose from the exceptional and unnecessary dangers of fire and explosion which those defendants created and maintained on their premises, but the plaintiff must further show that those defendants have committed some breach of a duty which they owed to him. Cases dealing with the liability for fire or explosion of an employer towards his employee, or of an occupier towards his neighbour, in the ordinary sense of neighbour, do not assist me. On the facts of this case I think that the plaintiff clearly was an invitee of those defendants, because their servant, who was then in charge of their factory, sent for the fire brigade.

I am, therefore, prepared to hold that they owed to him the well known duty of an invitor towards an invitee, and, if so, they certainly did not perform that duty. They did not use reasonable, or any, care to remove the danger of explosion, nor did they give to the invitee due or any warning of the existence of that danger although they both ought to have known, and, in my judgment, did know, of its existence. A difficulty, however, which I see in the way of the plaintiff succeeding on this basis is that there is no evidence to show that he would have avoided the danger if he had been informed of it. He might have told his superior officer and that officer might have withdrawn him out of the danger zone, but this is mere speculation, and I think that on the whole the probabilities are the other way. Furthermore, I can hardly think that the liability towards a fireman depends on his being an invitee. The fire brigade may be summoned to a fire by the occupier of the premises concerned, but they may equally well be called by a policeman or by a passer-by. In fact, a passer-by called the firemen to a fire on the defendants' premises on the previous evening. Moreover, they may attend in the exercise of the powers conferred on them by s. 30 (1) of the Fire Services Act, 1947, and absence of consent clearly negatives invitation. I can hardly think that the rights of a fireman who properly attends a fire can depend on how he came to be there.

It is agreed by counsel that the point here raised is novel and is not covered by any authority, but I have consulted the cases which were mentioned as likely to assist me—in particular, *Haynes v. Harwood* (4), *D'Urso v. Sanson* (3), *Steel v. Glasgow Iron & Steel Co., Ltd.* (5) and *Hyett v. Great Western Ry. Co.* (6). If I were trying this case with a jury I would ask them the following questions: (i) Did the first and second defendants know, or (ii) ought they to have known, (a) that by lack of reasonable care they were creating and maintaining exceptional and serious risks of fire and explosion in their factory; (b) that, by reason of such exceptional and serious risks of fire, a fire was likely to occur; (c) that, if a fire did occur, members of the fire service were likely to enter the premises to deal with it in the course of their duty; and (d) that, if members of the fire service did enter the premises to deal with the fire in the course of their duty, they would be exposed to an exceptional and serious risk of being injured by explosion? Putting those questions to myself in the absence of a jury I answer all of them in the affirmative, and I hold that such answers entitle me to give judgment, as I intend to, for the plaintiff against the first and second defendants.

As to authority, in *M'Alister (or Donoghue) v. Stevenson* (7) LORD ATKIN said ([1932] A.C. 580):

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

These well-known words seem to me to fit the present facts very closely, but I am, of course, aware that the principle there expounded must be applied with caution. I cannot, I think, derive any help from cases where the duty was plain and the real point was whether the damage was a sufficiently foreseeable consequence of the breach of duty. The last sentence of s. 120, para. 4, of SALMOND ON THE LAW OF TORTS, 10th ed., p. 435, in connection with *Hay (or Bourhill) v. Young* (8) points out this distinction. In *Haynes v. Harwood* (4) GREER, L.J., pointed out ([1935] 1 K.B. 152) that:

"Negligence in the air will not do; negligence, in order to give a cause of action, must be the neglect of some duty owed to the person who makes the claim."

In that case the court found a plain duty owed to users of the highway not to leave horses unattended, and from that starting point discussed and decided questions of *novus actus interveniens*, foreseeability, and *volenti*.

In this case I must decide whether there existed a duty on the part of the first and second defendants not to have their factory in this dangerous condition, and whether, in all the circumstances, that duty was owed by them towards the firemen. *D'Urso v. Sanson* (3), is superficially much nearer to the present case than *Haynes v. Harwood* (4), and would, indeed, have provided me with an authority if D'Urso had been a fireman and not a night watchman, but the relation of master and servant may be said to make all the difference, since an employer is plainly liable to an employee for the reasonable safety of the factory where he works, whether as night watchman or in any other capacity, and whether as regards fire or any other danger. I must, therefore, rely, as I have said, on principle and not on authority, since no really relevant case has been cited to me. I have already pointed out and emphasise again that my judgment depends on the particular facts of this case and will not provide the wide authority for which leading counsel for the plaintiff, in his opening, appeared to be hoping. Counsel also desired to rest his case on an alleged breach by the first and second defendants of the Factories Act, 1937, s. 28 (1). He thought that it would be an advantage not to have to establish negligence as regards the dust and to have a statutory breach with which to meet the defence of *volenti*. There is authority that the defence of *volenti* is not available to a master as against his servant in respect of a statutory breach (see *Wheeler v. New Merton Board Mills, Ltd.* (9)) because, I think, the servant cannot contract out of the protection provided for him by Parliament. In the view which I have taken of the facts the plaintiff does not need either of those advantages, but counsel on his behalf wishes to keep the allegation of a statutory breach open. I am by no means certain that this was a process *eiusdem generis* with grinding or sieving. I think that something more than the mere escape of dust was necessary to make it liable to explode on ignition, and for these reasons, among others, I doubt whether the section applies. If it does apply, a further and very formidable point arises whether the plaintiff can rely on it. It has been settled for a very long time that a workman can rely on a breach of the Factories Acts as giving him a claim against his employer, and in two recent cases, both based on the language of s. 26 (1) of the Act, which deals with "safe means of access to every place at which any person has at any time to work", the benefit of that section has been extended to an employee of an independent contractor: see *Whitby v. Burt, Boulton & Hayward, Ltd.* (10) and *Lavender v. Diamints, Ltd.* (11). In the latter of those cases TUCKER, L.J., did say generally ([1949] 1 All E.R. 535) that Part II of the Act of 1937 had, in his opinion, "not the limited application contended for by the defendants," but as regards sections other than s. 26 this remark was obiter. To hold that s. 28 (1) operates for the benefit of firemen fighting a fire would be going far beyond any previous decision, and I prefer respectfully to leave the questions arising under s. 28 (1) to be decided if necessary elsewhere. [HIS LORDSHIP assessed the damages at £14,000, in addition to the special damages agreed at £1,000, and gave judgment for the plaintiff against the first and second defendants for the sum of £15,000.]

Judgment for plaintiff against first and second defendants.

Solicitors: W. H. Thompson (for the plaintiff); William Charles Crocker (for the first defendants); Adler & Peroune (for the second defendants); Sharpe, Pritchard & Co., agents for G. C. Godber, clerk of Salop County Council (for the county council).

[Reported by MISS GWYNEDD LEWIS, Barrister-at-Law.]

GILLINGHAM CORPORATION v. KENT COUNTY COUNCIL.

[CHANCERY DIVISION (Danckwerts, J.), November 28, 1952.]

Education—Transfer of property from “former authority” to county education authority—“Former authority”—Dispute whether property liable to transfer—Question for determination by Minister—Education Act, 1944 (c. 31), s. 6 (3), s. 96 (2), s. 114 (1).

A By s. 3 (1) (b) of the Education Act, 1921 (which was repealed by the Education Act, 1944, s. 121, and sched. IX), the council of a non-county borough with a population of over ten thousand according to the census of 1901 were the local education authority for the purposes of elementary education, and by s. 3 (2) (a) the county council were the local education authority for higher education. In 1937 the borough council granted a lease of property, known as the G. technical institute, to the county council for the purposes of higher education. By the Education Act, 1944, s. 6 (1), the county council became the local education authority for the county, and by s. 6 (3) all property which immediately before Apr. 1, 1945 (the date on which Part II of the Act came into operation), was held by the council of any county district for the purposes of any functions exercisable by them under the Education Acts, 1921 to 1939, was to be transferred to the local education authority for the county. The borough council having issued a writ in an action against the county council for a declaration that the G. technical institute had not been transferred to the county council by virtue of s. 6 (3) of the Act of 1944, the county council sought to set aside the service of the writ on the ground that, under s. 96 (2) of the Act, the question was one for the determination of the Minister of Education.

HELD: the borough council were a “former authority” within the definition in s. 114 (1) of the Act of 1944 even though under the Act of 1921 they had been a local education authority only for certain purposes; therefore, they were “a former authority” within the meaning of s. 96 (2) of the Act of 1944; and, as that sub-section provided that the question whether property had been transferred by virtue of the Act from a former authority to a local education authority was to be determined by the Minister, the court had no jurisdiction to entertain the action and the writ should be set aside.

FOR THE EDUCATION ACT, 1944, s. 6 and s. 96, see HALSBURY'S STATUTES, Second Edn., Vol. 8, pp. 151 and 222.

Cases referred to:

(1) *Crisp v. Bunbury*, (1832), 8 Bing. 394; 1 L.J.C.P. 112; 131 E.R. 445; 3 Digest 135, 98.

(2) *Crosfield (Joseph) & Sons, Ltd. v. Manchester Ship Canal Co.*, [1904] 2 Ch. 123; 90 L.T. 557; 68 J.P. 421; *on appeal*, H.L., [1905] A.C. 421; 74 L.J.Ch. 637; 93 L.T. 141; 69 J.P. 441; 42 Digest 740, 1637.

MOTION by the defendants, Kent County Council, applying for an order to set aside the service on them of a writ issued by the plaintiffs, Gillingham Corporation, and, alternatively, to stay the proceedings in the action commenced by the writ.

H On Jan. 6, 1937, the plaintiffs granted to the defendants a lease of property, known as Gillingham Technical Institute, for the purposes of higher education. By the writ in the action commenced by them against the defendants they claimed a declaration that the property had not been transferred to the defendants by virtue of the Education Act, 1944, s. 6 (3). On their application to have the service of the writ set aside, the defendants contended that the court had no jurisdiction in the matter, as, under s. 96 (2) of the Act, the question was to be determined by the Minister of Education.

Sir Andrew Clark, Q.C., and Wilfrid Hunt for the defendants.
Milner Holland, Q.C., and J. A. Armstrong for the plaintiffs.

DANCKWERTS, J.: This is an application by Kent County Council to set aside the service of a writ issued against them by Gillingham Corporation, and, alternatively, to stay proceedings in the action begun by the writ.

The dispute concerns the vesting of property for the purposes of the Education Act, 1944. Section 6 (1) of the Act provides:

A

"Subject to the provisions of Part I of sched. I to this Act, the local education authority for each county shall be the council of the county, and the local education authority for each county borough shall be the council of the county borough."

Gillingham is not a county borough, and, consequently, there is no doubt that for the present purpose the county council are the local education authority for the purposes of the Education Act, 1944. Section 6 (3) provides:

B

"All property which immediately before the date of the commencement of this Part of this Act was held by the council of any county district solely or mainly for the purposes of any functions exercisable by them under the Education Acts, 1921 to 1939, and all rights and liabilities, whether vested or contingent, to which any such council were entitled or subject immediately before the said date by reason of the exercise of such functions shall, save as may be otherwise directed by the Minister under the powers conferred on him by this Act, be transferred by virtue of this section to the local education authority for the county in which the county district is situated."

C

D

By s. 119 Part II of the Act came into operation on Apr. 1, 1945. Section 1 of the Act shows that the Minister for all material purposes is the Minister of Education. Section 96 (1) provides:

"If upon the application of a former authority the Minister is satisfied with respect to any property which was immediately before the date of the commencement of Part II of this Act held by that authority for the purposes of functions exercisable by them under the Education Acts, 1921 to 1939, that, although the property was so held, it was held upon trust for purposes of such a nature that the transfer thereof to a local education authority would be inexpedient, the Minister may by order direct that the property shall be deemed not to have been transferred by virtue of s. 6 of this Act to the local education authority for the county in which the area of the former authority is situated."

E

F

That sub-section is not material for the question which I have to decide, but it shows that the Minister was given a power of exclusion. Section 96 (2), which is the material sub-section, provides:

"Where any question arises as to whether any officers, property, rights, or liabilities, have been transferred by virtue of this Act from a former authority to a local education authority, that question shall be determined by the Minister."

G

By s. 96 (4):

"Where it appears to the Minister that having regard to any such transfer it is desirable that any such adjustment as aforesaid (including any payment by either of the authorities concerned) should be made, he may, subject to any agreement made under [s. 96 (3)], by directions make provision for that adjustment."

H

Thus, the Minister is able to make adjustments in certain cases.

The present action has been begun by the corporation for a declaration that the property known as Gillingham Technical Institute has not been trans-

ferred to the county council by virtue of s. 6 (3) of the Act of 1944, and there is also a claim for rent which is dependent on the decision in respect of the declaration. It is contended by the county council that the action is started without any jurisdiction as, by s. 96 (2) of the Act, the dispute which is sought to be litigated in the action is a matter to be determined by the Minister of Education. Perhaps the decisive words in s. 96 (2) are "former authority", a definition of which appears in s. 114 (1) of the Act:

A

" 'Former authority' means any authority which was a local education authority within the meaning of any enactment repealed by this Act or any previous Act."

B

The Education Act, 1902, s. 1, and the Education Act, 1921, s. 3, show that the borough council were the local education authority for the purposes of those Acts, but only as regards elementary education and not as regards higher education. They are the council of a non-county borough, with a population of over ten thousand according to the census of 1901, and, accordingly, by s. 3 (1) (b) of the Act of 1921 they were the local education authority for the purposes of elementary education. By s. 3 (2) of the Act of 1921:

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"For the purposes of higher education—(a) the council of a county as respects their county; and (b) the council of a county borough as respects their borough; shall be the local education authority, but the councils of non-county boroughs and urban districts, though not local education authorities for higher education, shall have the powers as respects higher education given under this Act."

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The Act of 1921 was repealed by s. 121 and sched. IX of the Act of 1944.

The Gillingham Technical Institute was not used by the borough council for elementary education, but was leased by them to the county council for the purposes of higher education, and, therefore, it is contended by the corporation that the borough council were not a local education authority in respect of the

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property and that the matter is not determinable by the Minister under s. 96 (2) of the Act of 1944. It is, however, plain that the borough council were a local education authority for some purposes. If the clear effect of s. 96 (2) is to refer the dispute to the decision of the Minister, there is authority that the jurisdiction of the court is ousted and is transferred to the tribunal provided for by the statute: see *Crisp v. Bunbury* (1), which was decided in 1832 and approved

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by the Court of Appeal in *Joseph Crossfield & Sons, Ltd. v. Manchester Ship Canal Co.* (2), per VAUGHAN WILLIAMS, L.J. ([1904] 2 Ch. 135). There is no doubt that the principle has often been recognised, but it is argued on behalf of the borough council that I ought to have regard to the purpose of this statutory provision and the nature of the council with which it is concerned and that it cannot have been intended to give to the Minister power to decide what is really a question of the construction of s. 6 (3), and, therefore, a matter of law. But if I am satisfied on the precise terms of s. 96 (2) of the Act of 1944 that the question is referred to the Minister for decision, it seems to me that I have no choice in the matter.

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It is plain that the dispute concerns property and whether or not that property has been transferred to the county council by s. 6 (3) of the Act of 1944. In my opinion, a local education authority for the purposes of the provisions of former Acts is "a former authority" for the purposes of the Act of 1944 even though under the former Acts the council was only a local education authority for certain purposes, and, therefore, the borough council is a "former authority" within the meaning of s. 96 (2) of the Act of 1944. It seems to me that the words of s. 96 (2) are perfectly plain and that this is a matter which is not open to consideration by this court because by that sub-section it must be referred to the decision of the Minister. Accordingly,

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it seems to me that this motion succeeds and that I should set aside the service of the writ.

Order accordingly.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *W. L. Platts*, clerk of the county council, Maidstone (for the county council); *Wilkinson, Howlett & Moorhouse* (for the corporation).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

GENERAL CLEANING CONTRACTORS, LTD. v. CHRISTMAS.

[HOUSE OF LORDS (Earl Jowitt, Lord Oaksey, Lord Reid and Lord Tucker), November 10, 11, 12, December 10, 1952.]

Master and Servant—Duty of master—Provision of safe system of working—

Window cleaner—Defective window sash—No safety appliances provided.

The respondent, a window cleaner, was employed by the appellants, a firm of contractors, to clean the windows of a club. While, following the practice usually adopted by employees of the appellants, he was standing on the sill of one of the windows to clean the outside of the window and was holding one sash of the window for support, the other sash came down on his fingers, causing him to let go and fall to the ground, suffering injury. On a claim by him against the appellants for damages,

HELD (LORD TUCKER, dubitante): even assuming that other systems of carrying out the work, e.g., by the use of safety belts or ladders, were impracticable, the appellants were still under an obligation to ensure that the system that was adopted was as reasonably safe as it could be made and that their employees were instructed as to the steps to be taken to avoid accidents; the appellants had not discharged their duty in this respect towards the respondent; and, therefore, they were liable to him in respect of his injury.

Per LORD REID: Where a practice of ignoring an obvious danger has grown up it is not reasonable to expect an individual workman to take the initiative in devising and using precautions. It is the duty of the employer to consider the situation, to devise a suitable system, to instruct his men what they must do, and to supply any implements that may be required.

Dictum of VISCOUNT SIMON, L.C., in *Colfar v. Coggins & Griffith (Liverpool), Ltd.* ([1945] 1 All E.R. 328), explained by LORD OAKSEY and referred to by LORD TUCKER.

Decision of COURT OF APPEAL ([1952] 1 All E.R. 39), affirmed.

AS TO MASTER'S DUTY TO PROVIDE A SAFE SYSTEM OF WORK, see HALSBURY, Hailsham Edn., Vol. 22, pp. 187-190, paras. 313-317; and FOR CASES, see DIGEST, Vol. 34, pp. 194-198, Nos. 1583-1623.

Case referred to:

- (1) *Colfar v. Coggins & Griffith (Liverpool), Ltd.*, [1945] 1 All E.R. 326; [1945] A.C. 197; 114 L.J.K.B. 148; 172 L.T. 205; 2nd Digest Supp.

APPEAL by the defendants from an order of the COURT OF APPEAL (DENNING and HODSON, L.JJ., and LLOYD-JACOB, J.), dated Nov. 29, 1951, and reported [1952] 1 All E.R. 39, affirming a decision of JONES, J., dated May 10, 1951, awarding £3,500 damages to the respondent in an action brought by him in respect of personal injuries.

JONES, J., found that the occupiers of premises where the respondent, a window cleaner, received his injuries were guilty of negligence in failing to warn him, as an invitee, of an unusual danger of which they ought to have known, viz., a defective window which did not provide a safe hold for the

respondent when cleaning the windows. The judge further found that the appellants, the respondent's employers, were also guilty of negligence in failing to take reasonable care to provide a safe system of work. The Court of Appeal held that where a window was safe for ordinary purposes a defect in it which might render it dangerous for a window cleaner to hold was not an "unusual" danger of which the occupier was bound to warn the window cleaner (he being an invitee), and so the occupiers of the premises were not liable to the respondent, but it was for the appellants, as the respondent's employers, to take reasonable care to see that the premises were safe or else to take proper steps to protect him from the dangers to which he was sent. The Court of Appeal further held that on the facts the appellants had not taken proper steps so to lay out the work as to protect the respondent from the dangers of his employment and that they were liable to him in respect of his injury.

Nelson, Q.C., and *Stephen Chapman* for the appellants.

Ryder Richardson, Q.C., and *Fortune* for the respondent.

The House took time for consideration.

Dec. 10. The following opinions were read.

EARL JOWITT: My Lords, the respondent was a window cleaner, who had been for twenty years in the employ of the appellants, a company whose business it was to contract with the occupiers of buildings for the cleaning of their windows. On Dec. 8, 1948, the appellants sent the respondent to clean the library windows of the Caledonian Club. The system which the appellants adopted involved the window cleaner standing on the sill outside the window to clean those panes which could not be reached from the inside. There had been some complaint that some of the windows in the club had been defective in that the weights did not properly balance the sash with the result that the sash occasionally moved at the slightest touch, but there had been no complaint relating to the windows of the library. The respondent first cleaned such part of the window in question here as could be reached from the inside, and then, following his employers' usual practice, he got out on the sill, which was only 6½ inches wide and was twenty-nine feet above the basement. Having finished cleaning the top sash, he pushed it up, the bottom sash then being a few inches open. It was necessary, if the top sash was to be pushed right up, that the bottom sash should remain open for two reasons. The first was that this particular window was a self-locking window, so that, if the top sash was right up and the bottom sash right down, the window automatically locked. The result of the window becoming locked was that it was impossible to open it from the outside, and any man standing on the sill would thus have found himself locked out. The second reason was even more important, because the only way in which a man standing on the sill could support himself if the top sash was up, was to grip the bottom edge of the top sash by putting his fingers round it from underneath. It follows, of course, that he could not put his fingers in this position unless the bottom sash was open, for if the bottom sash were completely closed, then the woodwork forming the bottom of the top sash and the woodwork forming the top of the bottom sash would be immediately opposite each other and there would be no space behind which he could put his fingers. I should add that the top sash was on the outside of the bottom sash. While the respondent was standing on the sill in this position, the bottom sash for some reason closed, the woodwork at the top of the bottom sash coming down on to the fingers of the respondent so that he lost his balance and fell, sustaining serious injuries.

The action was originally brought by the respondent both against the present appellants and against the club, and judgment was given in the respondent's favour against both defendants. The decision against the club was reversed in the Court of Appeal, and from that decision there has been no appeal to

this House. It remains, therefore, only to consider the position as between the workman (the respondent) and his employers (the appellants). In the statement of claim it was alleged that the appellants were negligent in that they failed to provide hooks, or safety belts, or ladders, and there was a further allegation, which was not particularised, stating that they had failed to take any proper precautions for the safety of their workmen. The appellants in their defence alleged that the respondent was himself negligent in failing to equip himself with a safety belt, in taking no steps to wedge or secure the window, and in taking no steps to ascertain whether it was safe to rely on the sashes of the window for hand-hold. They further relied on the defence which is conveniently expressed in the maxim *volenti non fit injuria*.

The evidence before the trial judge made it clear that it was the regular practice adopted by the appellants' workmen to clean windows by standing on the sill and holding on to the woodwork of one of the sashes of the window, and the respondent himself stated that his real complaint was that the window was defective in that it had not stayed in the position in which it was put. He further stated that he had had experience, when working on a window, of finding the bottom sash slowly running down, and added that this happened more frequently in dry weather. He stated that he had no reason to suppose that the particular window was unsafe, and he asserted that the accident would not have occurred if the window had not been defective in that it was improperly balanced. A Mr. Harrington was called on behalf of the respondent. He was an associate of the Royal Institute of Chartered Surveyors and stated that he had investigated accidents to window cleaners on hundreds of occasions. His evidence was that the only proper system of window cleaning was to see that the men should wear safety belts when standing on the sill. It is obvious that a safety belt is of no value unless some secure hook or staple is provided to which the safety belt can be fastened. The evidence was that it was very rare for such hooks to be affixed to buildings and the evidence did not suggest that there was any other safe method of affixing hooks. The trial judge stated in the course of his judgment that a safety belt would have been useless, as there was nothing to which it could have been attached and he proceeded as follows:

"I find that when they [the appellants] sent [the respondent] to clean the windows of this club they knew that in the case of the windows in the library he would have to clean the outside of the window standing on a sill 6½ inches wide twenty-nine feet above the ground without any hand-hold except the top or bottom of one of the sashes of the window, and that he might have to move that sash in the course of cleaning the window, and I find also that they knew that window sashes do occasionally move, and if they move are liable to cause the hand of the cleaner to be caught between the two sashes or to be knocked off the sash which he is holding. The conclusion that I have come to is that the system of work provided for the [respondent] on this occasion was an unsafe system of work and that the [appellants] were negligent."

The trial judge further found that the respondent had not himself been guilty of any contributory negligence, and that he had not expressly or impliedly agreed to do the job at his own risk so as to make the maxim *volenti non fit injuria* applicable.

In the Court of Appeal, DENNING, L.J., thought that the appellants had failed to take proper steps to protect the respondent. He said ([1952] 1 All E.R. 42):

"They should have laid out the work more carefully. One way would have been to do the cleaning from a ladder instead of from a sill. Another way would have been to ask the householder to allow the firm to insert

hooks into the brickwork so as to attach a safety belt. It is said by the employers that these suggestions are not practicable, and that it is the usual thing for the men to clean windows by standing on the sill. That answer does not satisfy me. If employers employ men on this dangerous work for their own profit, they must take proper steps to protect them, even if they are expensive. If they cannot afford to provide adequate safeguards, they should not ask them to do the work at all. That seems to be the view of the London County Council, for they have made regulations forbidding a man to stand or kneel on a sill adjoining a highway unless he is hooked on by a safety belt. At the hearing of the appeal it was suggested that the accident might have been avoided if the man had put in a chock to prevent the bottom sash coming right down as it did. This was, in effect, a suggestion of contributory negligence. This was negatived by the judge and I agree with him. You cannot blame the man for not taking every precaution which prudence would suggest. It is only too easy to be wise after the event. He was doing the work in the way which the employers expected him to do it, and, if they had taken proper safeguards, the accident would not have happened."

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I agree with DENNING, L.J., that there was no sufficient ground for disturbing the finding of the trial judge that the respondent had not been guilty of contributory negligence, but I cannot think that this consideration is sufficient to dispose of the suggestion that a chock might have been inserted. HODSON, L.J., considered that the appellants should have provided either hooks or ladders. LLOYD-JACOB, J., put the matter on a different ground. After stating that the only question was whether the appellants had taken reasonable care to provide a safe system of work for their servants, he proceeds as follows:

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"They admittedly required him to stand upon a ledge 6½ inches wide and twenty-nine feet from the ground with no protection from a fall other than a hand-hold under the bottom edge of a top sash which must necessarily be ineffective should the lower sash become closed. If the suggestion that alternative dispositions of the window cleaner (such as those on a ladder, a cradle, or held by a safety belt) are impracticable, a suggestion which I should not be taken as accepting, it would appear to be incumbent upon the employer to ensure that the . . . closure of the lower sash during the cleaning operation was impossible. No such step was taken and the failure of the employers in this respect is, in my judgment, a failure to take reasonable care."

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There was no evidence that the danger to the workman occasioned by the use of a ladder would have been less than the danger of standing on the sill, or that accidents were more frequent by the adoption of the system of cleaning which involved standing on the sill than by the use of the ladder system. It may well be that each system has its own particular risks, and, in the absence of any such evidence, the trial judge was clearly entitled to disregard the allegation that the appellants were at fault in not providing a ladder. Nor was it suggested in the evidence that there was any available method of fastening the rope attached to a safety belt except to a hook inserted into the brickwork, and it was stated, as I have said, that it is most unusual to find such hooks inserted in buildings in London. It may be, in some other case, that evidence will be called to prove that there is some other method of securing the end of the safety belt, or, indeed, that there is some safer method of cleaning windows for which no hook is available than standing on a narrow sill, such, for example, as the provision of a plank projecting on the outside of the window and in some way secured on the inside. There was no such evidence called in the present case, and, this being so, I am not prepared to

differ from the conclusion reached by the trial judge that the appellants were not guilty of negligence in failing to provide hooks to which safety belts could be fastened, or in failing to see that the work was carried out by means of a ladder. If, however, they are not liable thus to secure the safety of their workers they are under an obligation to make the system which they do employ as safe as it can be made without resorting to these means. It is an undoubted fact that a sash does occasionally move down at the slightest touch, and the system of work adopted by the appellants made the workers' safety entirely dependent on the sash not moving. It does not appear that the appellants had given any instructions to their workers to test the windows before cleaning them, or that they had applied their minds to the provision of wedges or chocks to prevent the window becoming closed. It is clear that any obstruction placed at the bottom of the window would have prevented the lower sash from closing, and would thus have avoided the jar on the fingers which caused the respondent to let go of his hold and thus produced the accident. That seems to have been the view of the trial judge, and was certainly the view of LLOYD-JACOB, J., and with this view I am in agreement. I think the trial judge was entitled to find that the appellants were to blame in not taking all reasonable steps to see that the system of work which they required their men to adopt was made as safe as possible. My Lords, I am in agreement with the reasoning of the Court of Appeal in reaching their conclusion that the maxim "*volenti non fit injuria*" does not avail the appellants, and in these circumstances I would dismiss the appeal.

LORD OAKSEY: My Lords, I agree that this appeal ought to be dismissed. I agree with JONES, J., that it was an unsafe system of work to employ window cleaners to work outside high self-locking windows on a sill 6½ inches wide twenty-nine feet above ground steadying themselves solely by a hand-hold without giving them any orders to keep one sash open or any appliance to prevent both sashes closing. I agree with your Lordships that it was not proved in the circumstances of the present case that it was negligent not to have provided ladders or safety belts.

In my opinion, it is the duty of an employer to give such general safety instructions as a reasonably careful employer who has considered the problem presented by the work would give to his workmen. It is, I think, well known to employers, and there is evidence in this case that it was well known to the appellants, that their workpeople are very frequently, if not habitually, careless about the risks which their work may involve. It is, in my opinion, for that very reason that the common law demands that employers should take reasonable care to lay down a reasonably safe system of work. Employers are not exempted from this duty by the fact that their men are experienced and might, if they were in the position of an employer, be able to lay down a reasonably safe system of work themselves. Workmen are not in the position of employers. Their duties are not performed in the calm atmosphere of a board room with the advice of experts. They have to make their decisions on narrow window sills and other places of danger, and in circumstances in which the dangers are obscured by repetition. The risk that sashes may unexpectedly close, as the sashes in this case appear to have done, may not happen very often, but when it does, if the workman is steadying himself by a hand-hold, his fall is almost certain. If the possibility is faced, the risk is obvious. If both sashes are closed, there is no longer the hand-hold by which the workman steadies himself. If either sash is kept open, the hand-hold is available, and, on the evidence in this case, is, in my opinion, reasonably safe. But the problem is one for the employer to solve and should not, in my opinion, be left to the workman. It can be solved by general orders and the provision of appropriate appliances. The risk is undeniable and was not denied by the appellants' director, Mr. Mahony. The risk could be eliminated or lessened

by orders that one sash must always be kept open where the hand-hold system is adopted, and suitable wedges could be provided. The appellants, knowing the risk, did nothing and have appealed to your Lordships' House with the avowed object of having this system declared to be reasonably safe. In my opinion, the system as carried on by the appellants is not reasonably safe, and the appellants did not take reasonable care to ensure that it was.

A In the course of the argument questions were raised as to the adequacy of the pleadings and attention was called to the dictum of VISCOUNT SIMON, L.C., in *Colfar v. Coggins & Griffith (Liverpool), Ltd.* (1) ([1945] 1 All E.R. 328) that a plaintiff in such a case as the present must prove that the system adopted is not reasonably safe and also prove what system is safe, but, in my respectful opinion, what the noble and learned viscount was dealing with was the evidence which would go to show that the system adopted was unsafe, that is to say, by proving a possible safe system. It cannot, in my opinion, be that as a matter of law a plaintiff cannot succeed in such a case unless he proves the particular system in which the work can be performed safely. However this may be, the present case had been decided on the pleadings and evidence as they stood at the trial, no point was taken in the notice of appeal or in the printed Case before your Lordships' House on the pleadings, and the absence of the very element in the system the provision of which, in my opinion, ought to have been adopted was alleged by the appellants as evidence of contributory negligence. For these reasons I think the appeal should be dismissed.

D LORD REID: My Lords, it appears that it has for long been the general practice of window cleaners to clean the outsides of ordinary two-sash windows while standing on the window sill outside the window. When the sill is narrow, as it often is, the window cleaner must have something to hold on to, and it is unusual for there to be anything for the cleaner to grasp except part of the window itself. If the window is completely closed there is nothing to grasp, but if either the top or bottom sash is even slightly open there is room for the cleaner to insert his fingers between the wooden bar which forms the bottom of the top sash and the panes of glass in the lower sash. It might seem that even with this hold the cleaner's position is precarious and unsafe, but the evidence in this case is not to that effect. A window cleaner with this hold does not appear to be in greater danger than men who work in many other trades in exposed places high above the ground with apparently little to assist them to keep their balance. But a peculiar danger in window cleaning arises from the fact that sometimes a sash moves down unexpectedly so as to deprive the man of his hold, and the evidence shows that it is not very uncommon for this to happen and to cause a serious accident. The respondent in this case was severely injured by an accident of this kind.

G The main case made for the respondent in his pleadings and at the trial was that this method of cleaning windows is in itself so unsafe that a master who requires his servants to adopt it is in breach of his duty to provide a safe system of working. Two other methods of doing this kind of work were advocated. In the first place it was said that it could be done by men standing on ladders. It was proved that it would have been practicable and reasonably safe to use this method to clean the outside of the window where this accident happened: this window was on the first floor. But there was no evidence about the general applicability of this method, and it seems fairly obvious that it would not be practicable in a large number of cases. The main objection to using it where it is practicable is that it takes longer and is more expensive to clean windows in this way than by standing on the sill. The other method advocated is to support the man on the sill by a safety belt. Such a belt must be attached to two hooks—one on either side of the window—and these hooks must be firmly attached to the building so as to support his whole weight if

he slips. It was not disputed that to get sufficient strength the shaft of the hook must be driven right through the wall of the building from the outside and then anchored in some way on the inside of the wall. No evidence was led about the cost or difficulty of doing this, but it is plainly an operation which could not be carried out by a window cleaner, and, if this is to be the only alternative to using ladders, I think that I must assume that vast numbers of these hooks would be needed. The evidence shows that such hooks have only been provided in a very small proportion of existing buildings. The evidence is that even where hooks are available the men generally do not use them.

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A plaintiff who seeks to have condemned as unsafe a system of work which has been generally used for a long time in an important trade undertakes a heavy onus. If he is right, it means that all or practically all the numerous employers in the trade have been habitually neglecting their duty to their men. The evidence in this case appears to me to be quite inadequate to establish either that the window sill method is so inherently dangerous that it cannot be made reasonably safe by taking proper precautions, or that the ladder method or the safety belt method are as a general rule reasonably practicable alternatives. That brings me to what I have found to be the most difficult part of the case. The evidence does prove that the window sill method is often dangerous if no precautions are taken and in this case no precautions were taken, and if the respondent is to succeed it must, I think, be on the ground that it was the duty of the appellants to devise for the window sill method a proper system of precautions and instruct their servants to follow that system, and that, if they had done so and their orders had been obeyed, this accident would, or at least would probably, have been prevented. No such case is made in the pleadings and no attempt was made to prove it at the trial. The best that can be said is that the pleadings can, perhaps, be read so as not to exclude it, and there are a number of bits of evidence which, if eked out with common knowledge, lend support to it. I would not think it proper or fair to the appellants to consider this case were it not for the fact that the appellants' counsel, in effect, asked us to treat the case as a test case and enlighten employers in the trade as to their duty. In the circumstances I think that I can properly consider this case on such evidence as there is to support it.

The need to provide against the danger of a sash moving unexpectedly appears to me to be so obvious that, even if it were proved that it is the general practice to neglect this danger, I would hold that it ought not to be neglected and that precautions should be taken. It is at this point that lack of evidence causes difficulty, for there is no evidence as to what would be reasonably practicable or effective precautions. But I cannot believe that there would be any great difficulty in devising a simple method of preventing the lower sash from closing. I do not know what the best method would be. Generally, the plaintiff ought to put forward some method which can be tested by evidence. But in this case I am assisted by the fact that the appellants in their defence allege negligence against the respondent

"if he knew of the said defect [the tendency of this window to move easily], in taking no or no adequate steps to wedge or secure the said window; if he did not know of the said defect, in taking no or no adequate steps to ascertain whether it was safe to rely on the sashes of the said window for hand-hold."

This is in line with the impression which I get from the evidence that a simple test would show whether a sash is loose or not and that if it moved at all easily it could be wedged or something could be placed across the window sill which would prevent the sash from closing fully. It does appear from the evidence that very simple tests after the accident showed that this sash was loose and ran down very easily. I think that this ought to have been discovered before

the accident, and I think that I am entitled to assume that if it had been discovered some simple and effective precaution could have been taken. But I must confess that even in this case I make this assumption with some reluctance in the absence of evidence, and I would not be prepared to do so in a less clear case.

A The question then is whether it is the duty of the appellants to instruct their servants what precautions they ought to take, and to take reasonable steps to see that those instructions are carried out. On that matter the appellants say that their men are skilled men who are well aware of the dangers involved and as well able as the appellants to devise and take any necessary precautions. That may be so, but, in my opinion, it is not a sufficient answer. Where the problem varies from job to job it may be reasonable to leave a great deal to the man in charge, but the danger in this case is one which is constantly found and it calls for a system to meet it. Where a practice of ignoring an obvious danger has grown up I do not think that it is reasonable to expect an individual workman to take the initiative in devising and using precautions. It is the duty of the employer to consider the situation, to devise a suitable system, to instruct his men what they must do, and to supply any implements that may be required such as in this case wedges or objects to be put on the window sill to prevent the window from closing. No doubt, he cannot be certain that his men will do as they are told when they are working alone. But, if he does all that is reasonable to ensure that his safety system is operated, he will have done what he is bound to do. In this case the appellants do not appear to have done anything as they thought they were entitled to leave the taking of precautions to the discretion of each of their men. In this I think that they were in fault, and I think that this accident need not have happened if the appellants had done as I hold they ought to have done. I, therefore, agree that the appeal should be dismissed.

LORD TUCKER: My Lords, the respondent's claim in this action, so far as the appellants are concerned, was based on an alleged failure to take reasonable care to provide a reasonably safe system of work for the respondent, who was engaged on their behalf with one other in cleaning the windows of the Caledonian Club in London. It is, perhaps, more accurate to say that this is what he had to prove in order to succeed, because para. 3 of his statement of claim alleged a breach of duty "to provide a safe system of work and effective supervision of the said cleaning" or negligence in certain specified respects. This form of action is frequently spoken of as being based on "a failure to provide a safe system of work", but this language is misleading since it omits what is an essential element in the cause of action, viz., negligence. Window cleaning is obviously a hazardous operation and—except in the case of the absolute obligations imposed in certain circumstances under the Factory Acts—there is no absolute obligation on employers to devise a system for their employees which will be free of risk. Their only duty is to take reasonable steps to provide a system which will be reasonably safe, having regard to the dangers necessarily inherent in the operation. In deciding what is reasonable, long-established practice in the trade, although not necessarily conclusive, is generally regarded as strong evidence in support of reasonableness.

H It was said by GODDARD, L.J., in the Court of Appeal and by VISCOUNT SIMON, L.C., in this House in *Colfar v. Coggins & Griffith (Liverpool), Ltd.* (1) that in these cases the plaintiff must allege and prove specifically what is the defect in the system of which he complains. In other words, it is not sufficient that the system adopted was in fact unsafe; he must show something which could reasonably have been done or omitted which would have made the system reasonably safe and that this failure was the cause of his accident. In the present case the respondent went to trial relying on two specific allegations, viz. (i) the failure to supply safety belts and hooks to which they could be

attached; (ii) the failure to supply ladders. He called as a witness in support of his case a chartered surveyor who had inspected the window in question. He was allowed, without objection, to give "expert" evidence—based on his experience gained from giving evidence in similar cases—to the effect that the "proper" method was to use safety belts. He agreed, of course, that unless proper attachments were fixed to the building such a method was useless, and that in the absence of such attachments, which were very rarely found on buildings, it was customary in the trade for windows to be cleaned from the sill by hand-hold as in the present case. He said nothing about the use of ladders, and, in fact, there was very little evidence in the case as to the circumstances in which ladders are used in the trade. The respondent stated that ladders were only used on this building for those windows which could not be opened. He had had more than twenty years' experience of window cleaning, but gave no evidence as to when it is customary to use ladders for external cleaning. Ladders were referred to in three places in the [appellants'] evidence. Mr. O'Gorman, the appellants' manager, was asked, in cross-examination:

"Q.—Do you ever consider the provision of ladders for your men for such windows where there are no hooks for safety? A.—Not unless they are all windows which require the use of ladders. With an ordinary window with what is a reasonably safe sill to stand on, we allow him to clean it in that fashion."

In the cross-examination of Mr. Mahony, a director of the [appellant] company, the following appears:

"Q.—On that view, it is possible to send a lorry with two or three ladders and cleaners for each ladder? A.—Yes, but we would not get a job. Q.—Why not? A.—We would have to price our job according to whether long or short ladders . . . Q.—Would you agree that it would be much safer on a high building to clean the windows by ladder than by putting men up on sills with no safety belts and no hooks? A.—I agree, but we do not price for a job with long ladders if it is not necessary. If the windows call for long ladders all our competitors . . ."

Dealing with the report which had been made when the building was inspected prior to the contract for periodical cleaning, and what such report should have contained, he was asked:

"Q.—And, accordingly, that this was a building where safety belts or ladders were essential for safety? A.—No. Q.—No? A.—Because these windows are sash windows opening in the normal way, and any window cleaner sent, even with long ladders, will still go and clean them by standing outside on the sill."

There were clearly matters in this evidence which might have been further investigated. So far from this being done, the witness was interrupted at vital points, and the position with regard to the circumstances in which ladders are customarily used and the comparative safety and cost of the different methods was never investigated.

In this state of the evidence, JONES, J., the trial judge, said:

"It is conceded that the [appellants] did not provide the [respondent] with any ladder and that, though he might have equipped himself with a safety belt provided by them, such a belt would have been useless as, to the knowledge of the [appellants], there was no hook or other place to which the belt could have been attached. It is not suggested that the [appellants], provided any other safety apparatus, and I find that when they sent the [respondent] to clean the windows of this club they knew that in the case of the windows in the library he would have to clean the outside of the window standing on a sill 6½ inches wide twenty-nine feet

above the ground without any hand-hold except the top or bottom of one of the sashes of the window . . . and I find also that they knew that window sashes do occasionally move, and if they move are liable to cause the hand of the cleaner to be caught between the two sashes or to be knocked off the sash which he is holding. The conclusion that I have come to is that the system of work provided for the [respondent] on this occasion was an unsafe system of work and that the [appellants] were negligent."

A Now, I do not read this as amounting to a condemnation of the appellants' system on the ground of failure to supply safety belts or ladders which were the issues on which the parties had gone to trial, but as a finding that in the absence of ladders or safety belts the appellants should have done something else. The question at once arises: What precisely should they have done and
B where was the evidence about it? These cases must be decided on evidence, and the evidence should be confined to the specific allegations in the pleadings so that defendants can know what is the case with which they have to deal before their system is condemned. In the present case they asked for further and better particulars, under para. 3 (c) of the statement of claim, "of the allegation that the defendants failed to supply proper or safe apparatus by specifying what apparatus the defendants should have supplied but did not."
C The particulars delivered were as follows:

"The plaintiff says that as the defendants failed and neglected to provide or see that any of the apparatus specified under (a), (b) and (c) of this paragraph [which related to safety belts and ladders] was provided it was the duty of the defendants to provide some other proper or safe apparatus
D for the purpose but such other apparatus is unknown to the plaintiff."

The nature of this further apparatus was not elucidated by the evidence at the trial, nor was it specified by the learned judge. In this connection it must, however, be noted that in para. 3 (d) of the statement there was a general allegation that the appellants had "failed to take any or any proper precaution for the safety of the [respondent]". Further particulars of this
E allegation were not asked for.

In the Court of Appeal, DENNING, L.J., upheld the judgment on the ground of failure to use ladders or to ask the owner of the premises to allow the appellants to insert hooks into the brickwork so as to attach a safety belt. HODSON, L.J., took the same view and so interpreted the judgment of JONES, J. LLOYD-JACOB, J., who was the third member of the Court of Appeal, said:
F

"If the suggestion that alternative dispositions of the window cleaner (such as those on a ladder, a cradle, or held by a safety belt) are impracticable, a suggestion which I should not be taken as accepting, it would appear to be incumbent upon the employer to ensure that the . . . closure of the lower sash during the cleaning operation was impossible. No such
G step was taken and the failure of the employers in this respect is, in my judgment, a failure to take reasonable care."

My Lords, I am quite unable to accept the proposition that it was reasonably practicable for the appellants to insist on being allowed to insert hooks into the brickwork of the building. They would have no right to do so without permission, and to insert and properly secure the number of hooks required
H for the windows of a building of this size would be an undertaking quite beyond what could reasonably be expected of a firm of window cleaners. There was no evidence that any window cleaners had ever undertaken such a task. With regard to ladders, the evidence was not, in my opinion, sufficient in this case to justify a finding against the appellants based on their failure to supply ladders for the particular operation on which the respondent was engaged. Such being the position with regard to the matters pleaded and relied on in evidence at the trial, can the judgment in favour of the respondent be upheld?

My Lords, I have felt considerable doubt on this matter. It is true that in some cases there may be precautions which are so obvious that no evidence is required on the subject, but in a case like the present it is eminently desirable before condemning a system in general use that it should be clearly established by evidence that some other and safer system is reasonably practicable and that its adoption would have obviated the particular accident which has occasioned damage to the plaintiff. The provision of a block or wedge for insertion in defective windows would not, on the respondent's evidence, have prevented this accident, since he had not discovered that the window in question was in any way defective, and, accordingly, would have had no occasion to use the wedge, unless he had been instructed that wedges must be used in all windows of this type whether defective or not. Notwithstanding my doubts, I am not prepared to dissent from the view that the operation of cleaning this particular type of self-locking window from a sill 6½ inches wide was so dangerous that it was incumbent on the appellants to ensure that the closure of the lower sash would be impossible before any employee was allowed to clean such windows from the sill by the hand-hold method. In fact, the appellants' inspection of the premises had not even revealed the existence of this self-locking device, and, consequently, they had given no special instructions or taken any other step to minimise what should have been a very obvious peril. This was, I think, the basis of the judgment of LLOYD-JACOB, J., and on this ground—and this ground alone—I agree that this appeal should be dismissed. I desire to add that, in my opinion, there is nothing in this case to justify the inference that in all circumstances the cleaning of windows from the sill by the hand-hold method is always to be condemned as constituting a breach of the duty to take reasonable care to provide a reasonably safe system of work. On the other hand, this case does illustrate the necessity for planning the work on a job of this kind, and adopting a system appropriate to the different types of window and sill which may have to be dealt with, having regard to the tendency of windows to stick or "creep" in varying weather conditions even if they may not be "defective" for ordinary purposes.

Appeal dismissed.

Solicitors: *L. Bingham & Co.* (for the appellants); *Wedlake, Letts & Birds* (for the respondent).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

BAUMAN v. HULTON PRESS, LTD.

[QUEEN'S BENCH DIVISION (Streatfeild, J.), November 19, 20, 21, 25, 26, 27, 1952.]

Master and Servant—Contract of service—Remuneration by retaining fee and payment for work done—Servant's duty to give master first offer of all work—No work to be done for rivals—Availability for work at all reasonable times.

In 1948 the plaintiff, a journalist and photographer, entered into a contract with the defendants, publishers of a weekly periodical, under which he was to receive a retaining fee of £10 a week and payment at the rates provided for work done, and undertook to offer all his "ideas, stories, and so on" to the defendants first, not to accept any commission from any other British weekly periodical, and to be available to undertake any commissioned work from the defendants at all reasonable times. In February, 1951, the defendants informed the plaintiff that they no longer required his work, that the agreement would have to come to an end, and that they proposed to terminate the payment of his retainer at the end of the month. In an action against the defendants for wrongful dismissal,

HELD: the contract was a contract of service and was determinable only after reasonable notice and six months was a reasonable notice; to give the contract business efficacy a term must be implied that throughout the duration of the contract the defendants would give the plaintiff sufficient work to enable him to earn what the parties must be taken to have contemplated he should earn; and on that basis the plaintiff was entitled to damages for loss of salary and remuneration.

Turner v. Goldsmith ([1891] 1 Q.B. 544) and *Devonald v. Rosser & Sons* ([1906] 2 K.B. 728), applied.

Rhodes v. Forwood (1876) (1 App. Cas. 256) and *Northey v. Trevillion* (1902) (7 Com. Cas. 201), distinguished.

AS TO SERVICE OR AGENCY, see HALSBURY, Hailsham Edn., Vol. 1, p. 193, para. 345; and FOR CASES, see DIGEST, Replacement Vol. 12, pp. 698-702, Nos. 5344-5364.

Cases referred to:

(1) *Turner v. Goldsmith*, [1891] 1 Q.B. 544; 60 L.J.Q.B. 247; 64 L.T. 301; 12 Digest, Replacement, 431, 3312.

(2) *Rhodes v. Forwood*, (1876), 1 App. Cas. 256; 47 L.J.Q.B. 396; 34 L.T. 890; 12 Digest, Replacement, 700, 5355.

(3) *Devonald v. Rosser & Sons*, [1906] 2 K.B. 728; 75 L.J.K.B. 688; 95 L.T. 232; 12 Digest, Replacement, 702, 5364.

(4) *Northey v. Trevillion*, (1902), 7 Com. Cas. 201; 18 T.L.R. 648; 12 Digest, Replacement, 701, 5357.

ACTION for damages for wrongful dismissal, for payment for work done, and for the return of negatives and transparencies of photographs and damages for their detention.

The plaintiff was a photographer and from 1938 to 1944 he was employed by the defendants as the chief photographer on the staff of a periodical entitled "Picture Post", of which they were proprietors and publishers. In 1947 he was doing work for the defendants as a free-lance journalist and photographer. In 1948 the defendants were anxious to develop colour photography in "Picture Post", and proposed that the plaintiff should undertake that work. In the course of discussions he suggested that he should receive from the defendants a retaining fee in addition to individual payments for "picture stories" which he produced. On Sept. 15, 1948, he wrote to the defendants:

"With regard to a retaining fee, as I suggested, I think that £520 per annum would bring up my present earnings with you to a level that I

could give my full time to Hulton Press. You may not need this at the very present moment, but, thinking of the future, I may prove once more a success."

On Sept. 27, 1948, the defendants wrote in reply:

"The directors . . . are willing that we should pay you a retaining fee of the amount you mentioned, that is £10 per week, on the following conditions: (i) That it should be in the first place for twelve months only, terminable without further notice, to see how the idea works out. (ii) The project will only be worth while for us if it produces a real flow of colour pictures from your camera—that is, we should regard the sum of money as being paid to encourage you to devote yourself increasingly to colour photography and to reproduce in colour those qualities as an artist and a journalist which you have shown so often in black and white. (iii) You would undertake to offer all your ideas, stories, and so on, to us first; you would not accept any commission from any other British weekly; and you would be available to undertake commissioned jobs for us at all reasonable times. (iv) This retainer would not cancel my proposal to pay you £100 to enable you to undertake colour experiments on your holidays. We should, in fact, pay you that as well, but we should keep to our original colour rate of £60 for a double spread of colour pictures, instead of the increased rate which I mentioned to you as a possibility."

The rate of £60 was subsequently increased to £80 for a "double spread" and other amounts were increased in proportion. The plaintiff wrote in reply: "I fully agree".

On Nov. 15, 1948, the plaintiff began working for the defendants on the basis of the contract and in due course he received the retaining fee, of £10 a week. He was sent on commissions, including one to Switzerland, Italy and France, and, later, one to the West Indies, and was expected to collect matter not necessarily for immediate publication. He was paid at the full rate when the matter was published and at lower rates, such as one-half, two-thirds, or three-quarters of the full rate, when it was accepted but not published, or even the full rate if non-publication was not due to his fault. Only in rare instances was the matter not accepted. On Dec. 13, 1949, the contract was renewed for a further year on the same conditions, and at the end of that year the plaintiff continued to work for the defendants. In February, 1951, the defendants curtailed or abandoned temporarily their colour pictures, and on Feb. 15 they informed the plaintiff that the agreement would have to come to an end and that he was no longer required to act as their colour photographer. On Feb. 16 they wrote informing him that they proposed to terminate the payment of his retainer at the end of the month.

For the plaintiff it was contended that his contract with the defendants was a contract of service which bound him to the defendants and that he was entitled to reasonable notice to terminate it, notwithstanding the change of policy by the defendants which made it unprofitable, undesirable or uneconomical for them to continue on the same scale with colour photography. He claimed damages for the loss of salary and of payments which he said he would have been able to earn under an implied term in the contract that the defendants were bound to give him a reasonable amount of work. The defendants denied that the contract was a contract of service and contended: (i) that the £10 retaining fee was paid in consideration of an undertaking by the plaintiff to offer the defendants his work first, not to accept any commission from any other British weekly periodical, and to be available to accept their work at all reasonable times; (ii) that the real remuneration under the contract was the payments made in respect of the plaintiff's actual work; and (iii) that the plaintiff had continued to be still a free-lance journalist and was a mere agent entitled to be paid only by way of commission.

Salmon, Q.C., and S. B. R. Cooke for the plaintiff.

Levy, Q.C., and Milmo for the defendants.

STREATFEILD, J., stated the facts and continued: The plaintiff relies on *Turner v. Goldsmith* (1) in which the defendant, a shirt manufacturer, entered into a contract to employ the plaintiff in that case as his agent, canvasser and traveller for five years on certain terms as to the payment to the plaintiff of commission. It was held by the Court of Appeal that an action for damages for breach of contract was maintainable by the plaintiff and that he was entitled to substantial damages on the ground that the defendant had not fulfilled the agreement and that the fact that his manufactory had been destroyed did not excuse him from performing it. The court implied a term into the contract of service in order to give it the business efficacy for which the parties would have themselves provided had they considered the matter at the time of making the contract. **LINDLEY, L.J.**, distinguished the other line of cases, of which *Rhodes v. Forwood* (2) is one, on the ground that in those cases there was no express contract to employ the agent whereas in *Turner v. Goldsmith* (1) there was. The term which the court implied in the latter case enabled the contract to be carried out in the sense that it enabled the plaintiff to earn his commission, which was the basis of the contract. In the other case relied on by the plaintiff, *Devonald v. Rosser & Sons* (3), the plaintiff was a workman employed by the defendants on terms that he was to be paid by piece work. The defendants, finding that the state of trade did not enable them to keep their works running at a profit, closed them and gave the plaintiff a month's notice. In an action by the plaintiff to recover damages for breach by the defendants of an implied agreement to find the plaintiff work during the period between the closing of the works and the expiration of the notice, it was held that there was in that contract an implied undertaking by the defendants to provide the plaintiff with a reasonable amount of work so long as the employment lasted, the measure of what was reasonable being the average amount of the plaintiff's earnings prior to the stoppage of the works, and that, therefore, he was entitled to the damages he claimed. In both these cases there was a contract of employment.

On the other side, the defendants rely on certain cases which depended on the construction of the particular contract involved. I have to apply the principles to quite a different set of circumstances. In *Rhodes v. Forwood* (2) the plaintiff had been appointed the sole agent of a business at a certain place, and he had contracted to act for no other principal in that place. It was held that, as there was no contract of employment, but he was a mere agent, no condition could be implied that the business on the continuance of which he relied to earn his commission should continue to be carried on during the period of the contract. The court refused to imply into that agreement any such term. In *Northey v. Trevillion* (4) it was held that where there is a contract to employ another merely as an agent, but with no service or subordination, there is no implied undertaking that the agent is to be supplied with the means of earning his commission, but, if the contract is one of service, the commission is merely intended to be in the place of salary, and the contract cannot be determined without compensation to the servant. In that case it was held on the facts that there was not a contract of service or subordination, but simply an agency, and, accordingly, that there was no implied contract that the defendant would continue to carry on his business for the term of ten years so as to enable the plaintiff to be supplied with orders. **PHILLIMORE, J.**, said (7 Com. Cas. 203):

"The first question is whether it was implied by the contract between the plaintiff and defendant that the defendant would continue to find the plaintiff employment for the whole period of ten years. Looking at the agreement, I have to find whether there was any contract, express

or implied, that Trevillion & Co. would keep their business going for the purpose of giving orders to the plaintiff, so that the plaintiff can recover damages in the event of a breach. The plaintiff did not receive a salary, and it was not an exclusive agreement, and there was nothing to prevent the plaintiff from employing himself in any other way, or buying for other people who might be the defendant's rivals in business, and in that respect this case looks extremely like *Rhodes v. Forwood* (2). The plaintiff, on the other hand, contends that this case comes within the principle laid down in *Turner v. Goldsmith* (1). I think the distinction between *Rhodes v. Forwood* (2) and *Turner v. Goldsmith* (1) is very fine. As I am bound by the two cases, I have to consider which case this is like. I think it is like *Rhodes v. Forwood* (2). Messrs. Forwood in that case were the agents of Mr. Rhodes at Liverpool for seven years for the sale of coals produced at the Risca Collieries, and were to be paid a commission of £3 per cent. The House of Lords said that there was no agreement or promise that the colliery owner would continue to send coals to Liverpool. In *Turner v. Goldsmith* (1) the court, in considering *Rhodes v. Forwood* (2), relied on certain expressions in the contract. LINDLEY, L.J., in giving judgment in *Turner v. Goldsmith* (1), said, 'In the present case we find an express contract to employ him'. The distinction seems to be that if it is a mere contract of agency with no service or subordination, the court will hold that there is no implied contract that the agent is to be supplied with the means of earning his commission. If the contract is one of service, then the commission is merely intended to be instead of salary, and the contract cannot be determined without compensation."

In the present case the payment was not to be only in reference to specific work done, and it was not to be salary only. It was clearly intended to be partly one and partly the other. Applying the tests which PHILLIMORE, J., suggests in *Northey v. Trevillion* (4), it cannot be said that the plaintiff in the present case did not receive a salary or that the agreement was not a service agreement or that there was nothing to prevent the plaintiff from employing himself in another way or dealing with other people who might be the defendants' rivals in business. In its very terms this agreement is made purely exclusive. It binds the plaintiff to offer his work first to the defendants. It binds him not to accept work from any other British weekly periodical. It binds him, moreover, to hold himself in readiness at all reasonable times to undertake commissions for the defendants. It is said that in those circumstances there is no service and no subordination. I cannot agree. It is true that the plaintiff, as a highly skilled technician, could not be told by the defendants how to do his work. That is why they employed an expert to do it for them, but he was bound, so long as it was reasonable, to hold himself in readiness to go wherever they chose to send him on different commissions. To that extent, it seems to me, he was clearly subordinate to their commands and was bound to them by the terms of the contract. Just as in different circumstances PHILLIMORE, J., in choosing between the fine distinctions in *Rhodes v. Forwood* (2) and *Turner v. Goldsmith* (1), thought that *Northey v. Trevillion* (4) was more like *Rhodes v. Forwood* (2), in considering the facts of this case I must make my choice on the other side of the line. I think that this case is like *Turner v. Goldsmith* (1). Accordingly, in my judgment, this was a contract of service in which the servant was to be paid partly by way of salary and partly by way of remuneration at the rates provided for the work which he was to carry out. In those circumstances it seems to me that, to give business efficacy to the agreement, there is no difficulty in implying the term that throughout the duration of the contract, whatever it was, the defendants were bound to give the plaintiff a reasonable amount of work to enable him to earn that which the parties must be taken to have contemplated. I so hold, and imply such a term.

[His LORDSHIP held that, after the expiration of the second year of the contract, it was terminable on reasonable notice and that six months' notice was such reasonable notice. The defendants were, therefore, in breach of their contract in terminating it by a fortnight's notice, and the plaintiff was entitled to damages on the basis that six months' notice should have been given. He assessed the damages for loss of salary at £240, for loss of remuneration at £750, and for work done at £1,865, a total of £2,855. On the claim for the return of photographs (which had been returned to the plaintiff since the issue of the writ) he assessed the damages for detinue at £50, and gave judgment for the plaintiff for £2,905 in all.]

Judgment for plaintiff.

Solicitors: *Evill & Coleman* (for the plaintiff); *Theodore Goddard & Co.* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

FROST v. FROST.

C [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), December 2, 1952.]

Legal Aid—Costs—Taxation—No order made as to costs—Power to make order for taxation—Legal Aid and Advice Act, 1949 (c. 51), sched. III, para. 4 (1)—Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), reg. 18 (3).

D Where, in a case in which one of the parties is an "assisted person" under the Legal Aid and Advice Act, 1949, no order for costs is made, the court has power to make an order for the taxation of the costs of the assisted person under reg. 18 (3) of the Legal Aid (General) Regulations, 1950.

Brown v. Brown ([1952] 1 All E.R. 1018), followed.

Metcalf v. Wells ([1952] 2 All E.R. 889), considered and not followed.

FOR THE LEGAL AID AND ADVICE ACT, 1949, sched. III, para. 4 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 566.

FOR THE LEGAL AID (GENERAL) REGULATIONS, 1950, reg. 18 (3), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 5, p. 218.

F Cases referred to:

(1) *Metcalf v. Wells*, [1952] 2 All E.R. 889; [1952] W.N. 516.

(2) *Brown v. Brown*, [1952] 1 All E.R. 1018; [1952] W.N. 204.

APPLICATION by the wife for orders for costs and taxation of costs.

G On July 12, 1950, the wife filed a petition for judicial separation. On Mar. 27, 1952, Mr. Registrar KINSLEY ordered the payment of £25 as security for the wife's costs. On Dec. 1, 1952, the petition was dismissed by WILLMER, J., and the wife, being an "assisted person", now applied (i) for an order for costs against the husband, and (ii) for an order that her costs be taxed as between solicitor and client in accordance with the provisions of the Legal Aid and Advice Act, 1949.

H *L. N. Williams* for the wife.

I. S. Warren for the husband.

WILLMER, J.: In my judgment, this is not a proper case in which to make any order for costs between the parties. I am informed that there is £25 security in court, but, bearing in mind that the wife is an assisted person under the legal aid scheme, I do not think that her solicitors need the protection of an order for costs, even up to the amount of the security. Indeed, with the arrival of the legal aid scheme it may be said that the most important

reason for ordering security for a wife's costs has disappeared.* At any rate, I do not propose to make any order against the husband in this case. That being so, as between the parties there will be no order as to costs.

I have been a little troubled by a decision of ROXBURGH, J., in *Metcalf v. Wells* (1), where, it would appear, the learned judge decided that, where no order for costs inter partes is made in a case to which the Legal Aid and Advice Act, 1949, applies, the result is that reg. 18 (3) of the Legal Aid (General) Regulations, 1950, is not brought into force. He seems to have expressed the view that, apart from that regulation, there is no other regulation requiring or empowering the court to make an order for taxation of the assisted person's costs against the fund. In the case before him he refused an order, but his attention does not seem to have been called to the decision of the Court of Appeal in *Brown v. Brown* (2), which I have had the opportunity of considering. That decision makes it quite plain that, even where no order for costs inter partes is made, the court, if the whole purpose of the Legal Aid and Advice Act, 1949, is not to be defeated, must at least have power to order a taxation against the fund. BIRKETT, L.J. ([1952] 1 All E.R. 1021), took the view that "no order as to costs" amounts to the same thing as an order for the payment of costs so as to bring reg. 18 (3) into operation and make it obligatory to order a taxation. It is not necessary for me to express any opinion whether that is the right view, or whether the proper view is that the court is merely empowered to make an order, i.e., has a discretion to do so. Assuming the latter view to be correct, I am satisfied that this is a case in which I ought to make an order.

I made some comments in the course of my judgment yesterday, to the effect that a great amount of costs had been expended over this case for a very small result; because the effect of the relief asked for, even if obtained, would make very little difference to the position of the parties. I pointed out that the relief claimed did not involve any change of status. Even so, I think the reply of counsel for the wife to that comment is unanswerable; namely, that his client had a legal right to bring her case before this court. It is not a case in which one could say she never had any grounds for taking proceedings; and if she had grounds for taking proceedings, the matter could only be determined by fighting the action and obtaining the finding of the court. That being so, I certainly cannot say the solicitors were guilty of anything in the nature of improper conduct in continuing to present the petition, even though it failed; it is only right, therefore, that they should have the protection of the Act, and should be given their appropriate opportunity of recovering their costs.

Accordingly, I direct that there shall be the usual taxation as between solicitor and client, according to sched. III to the Act. There will be an order for payment out of the £25 security to the husband's solicitors.

Order accordingly.

Solicitors: *J. N. Nabarro & Sons* (for the wife); *Nutt & Oliver* (for the husband).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

* Cf. *Vincent v. Vincent*, ante, p. 978.

THE D'VORA. SOCONY BUNKER OIL CO., LTD. v.
OWNERS OF SS. D'VORA OF HAIFA.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), December 1, 1952.]

A Ship—"Necessaries"—"Equipping" a ship—Supply of fuel oil—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 22 (1) (a) (vii) (x).

A claim for the supply of fuel oil to an oil-burning ship is not a claim for "equipping . . . a ship" within the meaning of s. 22 (1) (a) (x) of the Supreme Court of Judicature (Consolidation) Act, 1925.

B On June 30, 1952, the plaintiffs supplied fuel oil to a ship at Haifa, the port at which she was registered. On July 13, 1952, they supplied further fuel oil to the ship at Algiers. On Oct. 20, 1952, they issued a writ claiming the price of the fuel thus supplied. On that date the ship was under the arrest of the court. On a motion for judgment in default of appearance,

C HELD: the claim for the supply of fuel oil at Algiers was a claim for "necessaries supplied to a ship elsewhere than in the port to which the ship belongs" within the meaning of s. 22 (1) (a) (vii) of the Supreme Court of Judicature (Consolidation) Act, 1925, and there would be judgment for the sum claimed, but the claim in respect of the oil supplied at Haifa was not a claim for "equipping . . . a ship" within the meaning of s. 22 (1) (a) (x) of the Act, and that part of the claim would not be allowed.

D AS TO ADMIRALTY JURISDICTION OVER CLAIMS FOR NECESSARIES, see HALSBURY, Hailsham Edn., Vol. 1, pp. 88-90, paras. 112-114; and FOR CASES, see DIGEST, Vol. 1, pp. 126-129, Nos. 318-342.

FOR THE SUPREME COURT OF JUDICATURE (CONSOLIDATION) ACT, 1925, s. 22 (1) (a) (x), see HALSBURY'S STATUTES, Second Edn., Vol. 5, p. 352.

MOTION for judgment in default of appearance.

The facts appear in the headnote.

E S. Knox Cunningham for the plaintiffs.

WILLMER, J.: On this unopposed motion I am prepared only to give the plaintiffs judgment for the sum of £580 13s. 1d. in respect of the fuel oil supplied to the D'Vora at the port of Algiers.

F In case counsel for the plaintiffs should feel disposed to take the matter to a higher tribunal, I will briefly state my reasons for coming to that conclusion. The Supreme Court of Judicature (Consolidation) Act, 1925, s. 22 (1) (a) (vii), confers Admiralty jurisdiction on the court, which may be exercised in rem or in personam, in respect of necessaries supplied (subject to certain provisions) to a ship elsewhere than in the port to which she belongs. The part of the plaintiffs' claim which I am rejecting is in respect of fuel oil supplied to the ship at Haifa, at which port she was registered. It is, however, contended by counsel that under s. 22 (1) (a) (x) of the Act the price of the fuel oil delivered to the ship at Haifa can be recovered as a claim for the "building, equipping or repairing" of the ship, having regard to the fact that at the time of the institution of this suit the ship was under the arrest of the court.

H The sole question to be determined, therefore, is whether fuel oil supplied to an oil-burning ship comes within the words "building, equipping or repairing". If it does, I have jurisdiction to give judgment for the plaintiffs for the whole amount claimed in this suit; if it does not, then it seems to me that I have no jurisdiction in respect of the fuel oil supplied to the ship at Haifa, but that the plaintiffs must be left to such remedy as they are able to exercise in the ship's own country, namely, Israel. Clearly, the supplying of fuel oil could hardly come within the words "building" or "repairing". The argument, however, is that it comes within the word "equipping". To

my mind, there is, *prima facie* at least, a wealth of difference between the meaning of the word "equipping" and the meaning of the word "supplying". At my suggestion reference has been made to the OXFORD DICTIONARY, but I confess that a perusal of that work has not thrown any great light on the problem which I have to determine. It is to be observed, however, that when I look through the synonyms given for "supply" in the OXFORD DICTIONARY the one word which I do not meet is "equip". In my judgment, the important difference between "equip" and "supply" is that "supply" is a word which is appropriate for use in connection with consumable stores, such as fuel oil, whereas "equip" connotes something of a more permanent nature. I can well understand that anchors, cables, hawsers, sails, ropes, and such things, may be said to be part of a ship's equipment, although they may have to be renewed from time to time, but such things as fuel oil, coal, boiler water, and food appear to me to be in quite a different category. Counsel conceded that he can find no authority in support of his proposition that the word "equipment" is wide enough to cover such supplies or that the word "equipping" is wide enough to cover the supplying of consumable stores, such as fuel oil.

I cannot help reflecting on what consequences might follow from a decision that the word "equipment" is wide enough to cover the supply of consumable stores. If I were to lay that down as a matter of law in this context, I can well imagine that it might have wide repercussions in quite different fields of the law. Had it been the intention of the legislature that the supply of consumable stores should be included in the jurisdiction conferred under s. 22 (1) (a) (x) of the Act, it would have been easy for them to say so in unambiguous terms, but, as I have already pointed out, they have not done so. Unless the supply of consumable stores can be included under the word "equipping", they are not within the ambit of s. 22 (1) (a) (x) of the Act.

In the result, I am not satisfied by counsel's argument that the supply of consumable goods, such as fuel oil, is covered by s. 22 (1) (a) (x) of the Act, and, for the reasons I have stated, I cannot allow so much of his claim as is referable to the fuel oil delivered to the ship at Haifa.

Order accordingly.

Solicitors: *Allen & Overy* (for the plaintiffs).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

J. (orse. B.) (by her next friend) v. J.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood, J.), December 3, 1952.]

Practice—Parties—Proceeding by next friend—Party said to be “of unsound mind, not so found by inquisition”—Reasonable ground for thinking party capable of managing affairs—Dismissal of proceeding.

A On June 9, 1952, the petitioner, described as “a person of unsound mind, not so found by inquisition”, by her next friend filed a petition for nullity. On a summons by the respondent for leave to amend the appearance to an appearance under protest on the ground that the petitioner was not a person of unsound mind or suffering from any incapacity necessitating or justifying the proceedings being brought by the next friend,

B HELD: the respondent was entitled to have the suit dismissed if it could be shown that there was reasonable ground for supposing that the petitioner was capable of managing her own affairs, and the summons would be adjourned to enable further evidence to that effect to be adduced.

C EDITORIAL NOTE. In the present case the proceeding by next friend was under the Matrimonial Causes Rules, 1950, r. 64 (1), which entitles a petitioner to sue by her next friend. The corresponding R.S.C. is Ord. 16, r. 17, a note to which in the ANNUAL PRACTICE sets out the procedure to be adopted by a defendant in order to challenge the next friend's authority, and says: “It is not competent to a defendant so sued to plead that the plaintiff is not in fact of unsound mind. If the defendant desires to challenge the authority of the next friend to sue, his proper course is to apply in a summary way for the stay or dismissal of the action, as in cases in which the authority of the plaintiff's solicitor to bring the action is challenged.”

D AS TO PERSONS OF UNSOUND MIND AS PARTIES TO PROCEEDINGS IN THE DIVORCE DIVISION, see HALSBURY, Hailsham Edn., Vol. 10, p. 699, para. 1039; and FOR CASES, see DIGEST, Replacement Vol. 27, pp. 457, 458, Nos. 3924-3935.

E Cases referred to:

(1) *Ray v. Sherwood & Ray*, (1836), 1 Curt. 173, 193; 163 E.R. 58, 65; *affd. P.C., sub nom. Sherwood v. Ray*, (1837), 1 Moo. P.C.C. 353; 12 E.R. 848; 27 Digest, Replacement, 448, 3799.

F (2) *Turner v. Meyers*, (1808), 1 Hag. Con. 414; 161 E.R. 600; 27 Digest, Replacement, 35, 127.

(3) *Fry v. Fry*, (1890), 15 P.D. 25, 50; 62 L.T. 501; *sub nom. Routh (otherwise Fry) v. Fry*, 59 L.J.P. 14, 43; 27 Digest, Replacement, 458, 3929.

G (4) *Richmond v. Branson & Son*, [1914] 1 Ch. 968; 83 L.J.Ch. 749; 110 L.T. 763; 33 Digest 236, 1526.

SUMMONS adjourned into court.

Syms for the petitioner.

P. A. Harmsworth for the respondent.

Cur. adv. vult.

H Dec. 3. COLLINGWOOD, J., read the following judgment. On June 9, 1952, a petition for nullity was presented. The petitioner is E.J.J. (otherwise B.) a person of unsound mind, not so found by inquisition, by her next friend K.E.F.K. On July 24, 1952, a summons was taken out before the registrar on the respondent's behalf for leave to amend the appearance to an appearance under protest on the ground that the petitioner, E.J.J., is not a person of unsound mind or suffering from any incapacity necessitating or justifying the proceedings being brought by K.E.F.K. as next friend. On that summons

no order was made save that the cause be stayed pending an application under r. 27 of the Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), for directions. On July 30, 1952, the matter came before me on an application to stay, or alternatively, to dismiss the cause on the same ground. Counsel for the respondent took the view that r. 27 did not apply to the question in issue, namely, the petitioner's sanity at the date of the institution of the proceedings, and with this view I concurred. I was, accordingly, asked to stay, or dismiss, the proceedings as being an abuse of the process of the court. No evidence had been filed by the other side, and I, therefore, adjourned the summons to enable evidence to be produced. On Nov. 3, 1952, the matter came before me again, and a number of affidavits were read on behalf of the respondent. The first was that of the petitioner herself, who stated that she had never requested the next friend or any other person to bring an action for the annulment of the marriage, that she did not desire the marriage to be annulled, and that the proceedings had caused her anxiety and distress. She further stated that the reason for her marriage was to protect her from the unwelcome visits of her relatives, which, she considered, were paid for the purpose of obtaining information as to her estate. Affidavits by the respondent and the respondent's mother were to the same effect. There were two affidavits by medical practitioners stating that the petitioner is a person of sound mind and not in any sense a mental defective, and one by her solicitor as to interviews with her which satisfied him as to her mental capacity.

It was contended, however, by counsel for the petitioner (who admitted that he was really appearing in the interests of the next friend) that all that was necessary to entitle a person to institute proceedings such as the present suit in the capacity of next friend was to show a sufficient interest, and that, as the next friend in the present case was the petitioner's niece and had a pecuniary interest, this concluded the matter. In support of this contention I was referred to *Ray v. Sherwood & Ray* (1). In that case it was held that a father qua father had sufficient interest to enable him to bring a suit in the ecclesiastical court in what was known as the civil form for the purpose of annulling the marriage of his daughter as being void on the ground of consanguinity. But the father in that case was not acting in the capacity of guardian or next friend. The daughter was of age, and the father was himself the petitioner in his own right, and his title to sustain the suit lay in his having a pecuniary interest owing to his possible liability under the Poor Relief Act, 1601, to maintain the issue of the marriage. In the present case the petition is that of the petitioner herself and the issue before me is the authority of the next friend to institute proceedings, and it was contended on behalf of the respondent that he had a right to have a summary end put to the proceedings if no such authority existed. In my opinion, the authorities make it clear that he has such a right.

Turner v. Meyers (2) was a suit to annul a marriage on the ground of insanity. The proceedings were first brought by the husband's father, to which it was objected on the part of the wife that the father had no right to bring such a suit, the son being of age and sui juris, unless appointed committee of his person. The court held (1 Hag. Con. 414n.)

"That the suit was brought by the father to annul the marriage of a party of competent age, without setting up any special interest, but averring the insanity of the son at the time . . . the only question is, whether the person before the court is the proper person to plead it. It is not alleged that the son is now insane [i.e., at the institution of the suit] . . . he is then to be presumed sane, and, as such, capable of bringing suits proprio jure . . . no one can be attorney or procurator for him, but by his own appointment."

In fact, the husband had taken no steps to annul the marriage, but rather

adhered to it. It was held that, therefore, the father had not a *persona standi* before the court, and his suit was dismissed.

In *Fry v. Fry* (3) the facts were that the parties were married in June, 1889, and in November of that year a son of the wife by a former marriage obtained from the registrar an order under what was then r. 196 of the Rules and Regulations of the Divorce Division assigning him to be his mother's guardian ad litem for the purpose of promoting a suit declaring her marriage with the respondent to be void on the ground that she was insane at the time of its being solemnised. Counsel for the wife moved to rescind this order, adducing evidence to show that she was of sound mind. BUTT, J., discharged the order, holding that an order under the rule assigning a guardian ad litem to a person alleged to be of unsound mind should not be made where there is a bona fide and substantial dispute as to the insanity of the party. On an appeal COTTON, L.J., said (15 P.D. 51):

"This is an appeal from an order of BUTT, J., discharging an ex parte order of the registrar assigning a guardian ad litem to a person alleged to be of unsound mind. I will not give any opinion on the question whether, on the evidence before us, she was of unsound mind at the date of her marriage, or whether she is so now, for I go upon this ground, that an order ought not to be made under r. 196 for assigning a guardian ad litem where there is a bona fide dispute whether at the time of the application the party is of unsound mind. The question is whether the court shall give to some other person the conduct of a suit, on the ground that this lady is incapable of acting for herself, and I think the court ought not to do so where there is a bona fide dispute whether she is not capable of acting for herself. I do not at present feel disposed to assent to the view of LOPES, L.J., that this rule only applies to the case of a person found lunatic by inquisition. The rule applies equally to a party suing and to a party defending, and it would be very serious to hold that, if a person of unsound mind is sued, no defence can be put in till he has been found lunatic by inquisition; but, where there is a bona fide dispute as to the sanity of the party, I think that an order for a guardian ad litem ought not to be made. The medical evidence adduced in support of the application to discharge the registrar's order shows that there is reasonable ground for contending that this lady is capable of managing her own affairs. I think, therefore, that the appeal must be dismissed, not on the ground that the registrar was wrong in making the order on the materials before him, but on the ground that the evidence adduced before the judge showed that the case was not one in which such an order ought to have been made."

LINDLEY, L.J., gave judgment to the same effect, and, after stating shortly the facts, he said (*ibid.*, 52):

"It would be monstrous if a self-appointed guardian was allowed to go on with such a suit when a defence like that is made. The son may apply for an inquisition, and if she is found lunatic by inquisition the committee can sue, and if no committee is appointed a suit may be promoted by a guardian ad litem."

LOPES, L.J., at the end of his judgment, said (*ibid.*, 53):

"As regards the other point, assuming the rule to apply to the case, I agree with the lords justices that the power given by it ought not to be exercised where there is a bona fide dispute as to sanity."

The question arose in a different form in *Richmond v. Branson & Son* (4). This was an action by a plaintiff described as "of unsound mind not so found" by her next friend against a firm of solicitors for delivery up of certain deeds and documents of title deposited by her with them as her solicitors, it being alleged that she was, and had for many years been, insane. By their defence

the defendants admitted possession of the documents, but pleaded that the plaintiff was not at any material time a person of unsound mind. On a motion by the plaintiff to strike out so much of the defence as did not admit the unsoundness of mind of the plaintiff and for judgment on the admissions in the defence, WARRINGTON, J., held that the defendants, by raising the issue as to unsoundness of mind, were in effect denying the authority of the plaintiff's solicitors to bring the action, and that was not an issue which it was competent to them to raise at the trial of the action. The important part of the judgment, so far as the present question is concerned, is where WARRINGTON, J., says ([1914] 1 Ch. 973):

"If there were nothing else, the plaintiff would, in my opinion, upon these admissions, plainly be entitled to judgment against the defendants for delivery up of those documents to the person she indicates as the person to receive them. The defendants, however, set up . . . as an issue in the action the question whether or not the plaintiff is in fact of unsound mind. In other words, they dispute the authority of the solicitors instructed by the next friend, and that of the next friend himself, to institute the action. Now is that an issue which it is competent to the defendants to raise at the trial? In my opinion it is not. The action, in whatever form it is brought, is the action of the plaintiff. If a solicitor is acting without authority in an action brought by a plaintiff who is not alleged to be of unsound mind, either the plaintiff or the defendant is entitled to have that action summarily stayed, and to an order that the solicitor should pay the costs of the action as between solicitor and client. There is really, in principle, no distinction between an action brought by a plaintiff of unsound mind, or alleged to be of unsound mind, by her next friend, and an action brought by an ordinary plaintiff. In both cases the real question, if there is any question at all, is that of the authority of the solicitor. Of course, in the case of a person suing by a next friend there is the further question of the authority of the next friend, and in those cases it is competent either to the plaintiff himself, that is to say the person who is assumed to be non compos mentis or not sui juris, or to the defendants to put a summary end to the proceedings, and, in the case of a next friend, he also would be subject to an order to pay the costs."

In my opinion, therefore, the respondent is entitled to have the suit dismissed if it can be shown that there is reasonable ground for supposing that the petitioner is capable of managing her own affairs. At the present moment the evidence as to this is all one way, but I was informed that the petitioner's legal advisers were under a misapprehension as to the necessity of bringing evidence at the adjourned hearing, and I will, therefore, afford them an opportunity of filing affidavits in answer to those which have been filed on behalf of the respondent.

Summons adjourned.

Solicitors: *Donald, Darlington & Nice* (for the petitioner); *Long & Gardiner*, agents for *Norman F. Steward*, Wolverhampton (for the respondent).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

COLLINS v. COLLINS AND ANOTHER.

[COURT OF APPEAL (Singleton and Morris, L.J.J.), October 27, 28, December 1, 1952.]

Divorce—Damages—Order for investment for benefit of child—Death of child while an infant—Further order regarding application of fund—Form of original order—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 189 (3).

In 1935 a husband obtained a decree of divorce against his wife on the ground of her adultery, and damages were awarded against the co-respondent. The court, acting under s. 189 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925, ordered that part of the damages should be paid to the husband and that the balance of £2,000, which had been paid into court, should be invested for the benefit of the child of the marriage, the interest to be paid to the husband during the child's infancy. The order did not state what was to be done with the money on the child's attaining the age of twenty-one years or on his death under that age. The child died when he was nineteen years of age. The husband applied to the court for an order for payment out to him of the £2,000, but the wife claimed that the money belonged to the child and passed to her and the husband equally on the death of the child, he dying intestate.

HELD: it was open to the court to make an order further to that of 1935, and the proper order was for the payment of the money to the husband subject to payment of costs and to his undertaking to meet any claims against the infant and his estate.

Per curiam: An order under s. 189 (3) of the Act of 1925 directing the investment of damages for the benefit of an infant should provide for payment out on or after the date the infant attains the age of twenty-one years.

FOR THE SUPREME COURT OF JUDICATURE (CONSOLIDATION) ACT, 1925, s. 189, see **HALSBURY'S STATUTES**, Second Edn., Vol. 11, p. 830.

Case referred to:

(1) *Clark v. Clark & Bouck*, (1861), 2 Sw. & Tr. 520; 31 L.J.P.M. & A. 61; 6 L.T. 659; 164 E.R. 1098; 27 Digest, Replacement, 670, 6358.

APPEAL by the wife, Ellen Collins, against an order of PEARCE, J., sitting in chambers, ordering the payment out of court to the husband, Charles Clifford Collins, on his undertaking to meet any claims against the infant and his estate up to the amount paid out, of a sum of money representing damages paid by the co-respondent, Joseph Holland Goddard, in an action for divorce by the husband against the wife, which damages had been invested for the benefit of the infant by an order made on Nov. 18, 1935.

Bickford-Smith for the wife.
Crispin for the husband.

SINGLETON, L.J.: This is an appeal from an order of PEARCE, J., made in chambers on Oct. 2, 1952. In 1935 the husband was granted a decree of divorce from his wife on the ground of her adultery with the co-respondent who was ordered to pay into court the sum of £2,500 damages. He paid that sum into court, and thereafter a question arose as to what should be done with it.

Under s. 33 of the Matrimonial Causes Act, 1857, the court had power

" . . . to direct in what manner such damages shall be paid or applied, and to direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife."

That was the first time provision was made under which the court was enabled to take control of the damages awarded to a petitioner, but, though the court took control, the damages were virtually damages awarded to the petitioner. The position is now regulated by s. 189 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925, which is in these terms:

"The court may direct in what manner the damages recovered on any . . . petition are to be paid or applied, and may direct the whole or any part of the damages to be settled for the benefit of the children, if any, of the marriage, or as a provision for the maintenance of the wife."

On Nov. 18, 1935, on a summons under s. 189 (3) LANGTON, J., made an order in these terms:

"Upon hearing counsel for the petitioner and co-respondent and reading the petitioner's affidavit sworn Nov. 6, 1935, I do order that of the sum of £2,500 damages herein paid into court £500 be paid out to the petitioner and that the balance be invested for the benefit of the child by the Accountant-General in manner specified in the payment schedule signed by the registrar. Certificate for counsel. Liberty to apply."

Counsel for the wife, in opening this appeal, spoke of that which had been done by LANGTON, J., as an apportionment of the damages. Strictly, I do not think that is the right term to apply.

The order was made on an affidavit of the husband, who had desired that £1,500 of the damages be invested for the benefit of the child in such manner and on such trusts as the court might direct. A change took place in the amount, and the order dealt with the sum of £2,000, which was to be invested for the benefit of the child in manner specified by the payment schedule. The payment schedule dealing with the sum of £2,000 has in the left-hand column:

"Invest the sum of £2,000 in 3½ per cent. war stock in the name of Charles William Michael John Collins an infant born Aug. 2, 1932. Pay the interest during the minority of the said infant to Charles Clifford Collins":

that is the husband, who was looking after the boy and supporting him. I think it is quite likely, judging by the terms of the order, and the provision in the payment schedule as to investing the money in the name of the infant, that the intention was that the money should be the boy's money; but the order does not provide, nor does the payment schedule provide, what shall be done when the boy reaches the age of twenty-one, nor does it provide what shall happen if he dies before he reaches that age. In fact, the boy was killed in a motor accident when he was nineteen years of age.

Thereupon the husband took out a further summons, which was heard before PEARCE, J., by which the husband sought an order varying the order of LANGTON, J., made seventeen years earlier. It was argued by counsel for the wife on the hearing of this appeal that there could not be any such variation, though it seems doubtful whether that point was taken before PEARCE, J.

PEARCE, J., having heard the application, ordered:

"that the order of LANGTON, J., dated Nov. 18, 1935, be varied and the sum of £2,000 lodged in court for the benefit of Charles William Michael Collins the child issue of the marriage between the petitioner and the respondent be re-apportioned to the petitioner and that the said sum be paid out of court to the petitioner, the petitioner undertaking to meet any just lawful claims against the infant and his estate up to the amount paid out. Liberty to petitioner or respondent to apply, to PEARCE, J. Costs of the petitioner and the respondent in and about to be paid out of the funds of the petitioner's estate."

I would point out that there is not the sum of £2,000 remaining. Owing to the fall in the value of securities there was a good deal less at the time the summons was heard, and, of course, there is considerably less after costs have

been paid out of the fund. What PEARCE, J., intended, I have no doubt, was that the balance of the fund should be paid out to the husband. The wife appeals to this court against the order of PEARCE, J.

A The case for the wife was that the money was the boy's, that there was an intestacy, and, therefore, as the boy died intestate with both parents living, the residuary estate of the intestate should be held in trust for the father and mother in equal shares absolutely. It was pointed out that, in the event of the wife's claim succeeding, she would be receiving damages which the co-respondent paid into court as a result of his adultery with her, and that that would hardly be right. I should add that the affidavit of the husband at the time the matter was before LANGTON, J., showed that the co-respondent had either settled, or had agreed to pay, a certain sum of money weekly to the wife. Counsel for the wife submitted that she would be getting the money, not through her own adultery, but by reason of the death of her son who had some property. Counsel for the husband submitted that the money was not the boy's money at all, that the court had made an order under s. 189 (3) of the Act of 1925 which was not in any sense a final order, and that it was open to the court under that sub-section to make an order dealing with part of the fund or to deal with the fund up to a particular date and to make another order thereafter. He submitted, indeed, that this was not an apportionment, but that under the sub-section the court had power to direct, and to direct from time to time, what should be done in the events which had happened.

C We thought it right to obtain some information from the Accountant-General as to what the position is in cases of this kind, and certain questions were put to him which he was good enough to answer. The one which is most material is this:

D "Is the order of LANGTON, J., (coupled with the payment schedule) in common form? If so, what is the practice as to payment out if, and when, the infant attains the age of twenty-one years?"

E The Accountant-General answered that question in this way:

F "The payment schedule to the order of Nov. 18, 1935, was in the usual form so far as divorce matters are concerned. As a result, payment out on majority can only be made if another order of court is obtained. The Accountant-General would prefer that the first order directing investment of damages allocated to infants should also provide for payment out on or after the date the infant attains the age of twenty-one years. This is the agreed practice in all cases of Queen's Bench infants."

G I quite agree with the Accountant-General's desire that the first order directing the investment of damages allocated to infants should provide for payment out on or after the date when the infant attains the age of twenty-one years. I see no reason why there should be a distinction between the practice in two Divisions of the High Court. Of old these matters were often carried out by means of a settlement. In *Clark v. Clark & Bouck* (1) the judge ordinary directed, on a motion to make a decree nisi absolute and to direct application of damages, that all the petitioner's interest in the damages be assigned by him to a trustee for the use of the only child of the marriage, and in case of the child's death under twenty-one and unmarried, for the use of the petitioner. H He suspended the decree till such assignment was made. That was in accordance with the old practice. Nowadays the money is usually invested for the child or children under an order of the court instead of there being a settlement. In the Queen's Bench Division, where damages are awarded to a child they are usually dealt with under s. 164 of the County Courts Act, 1934, and the order which is made includes a direction for payment out when the infant attains the age of twenty-one years. The payment out then is but a matter of formality on proof that the child is alive.

I am inclined to think that when LANGTON, J., made the order in 1935 he thought that the money was to be the child's money, or else he would not have directed that it was to be invested in the name of the child. It is claimed on behalf of the husband that the order is at large and that in such a case as this anyone interested can appear before the judge on an application, if the child attains the age of twenty-one years, and ask that the money should be paid out to someone else, for example, to the husband if the child was living with the mother. Those alterations could be made, it is claimed, under s. 189 (3) of the Act of 1925. It may be that they could, but I shudder at the idea of a parent, who has agreed to a fund going to his child, appearing before a judge on a summons in a case such as this when the child has attained the age of twenty-one years and saying: "Give me the money. I have changed my mind." In any event, on the order as drawn up there is the necessity for a further summons before a judge to deal with payment out when the child attains twenty-one years of age, and that involves some expense. It is for those reasons that I agree with the Accountant-General's wish that the practice should be changed. Further, there is no such provision in the order of 1935 as there was in the old practice where there was a settlement for what is to happen if the infant should die under the age of twenty-one years. I cannot see why such a provision should not be inserted in the order. True, it is for the party asking for the order to say what he wants, but there ought to be a regular practice in these matters, and the natural thing would be to provide what should be done with the fund in the event of the child dying before he or she reaches twenty-one years of age. The damages were awarded to the husband, and provision might well have been made for the fund to be transferred to him if the child died under the age of twenty-one years. I feel that the practice of the Queen's Bench Division is both simpler and less costly.

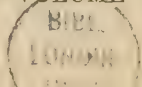
I have reached the conclusion that the order of PEARCE, J., is right. I think, by reason of the terms of s. 189 (3) of the Act of 1925, that in the circumstances it is open to the husband to come before the court and to ask the court to direct what shall be done with the damages which are in court. The order of LANGTON, J., was that the money was to be invested for the benefit of the child by the Accountant-General in manner specified in the payment schedule, and the payment schedule provided that the income from the money was to be paid to the father during the child's minority. There is no further provision. The result is that no question as to intestacy arises. It is simply a case in which the order of 1935 did not deal fully with the matter, and in the events which have happened it is proper for the husband to apply to the court, within the words of the sub-section, to direct what shall be done. It is not a case of varying the order or of re-apportioning the damages; it is a case of asking for the direction of the court in what manner the damages recovered are to be paid or applied. PEARCE, J., decided that the money should be paid to the husband, he undertaking to meet any just lawful claims against the infant and his estate up to the amount paid out. I am satisfied that PEARCE, J., had power to make that order, and, moreover, it is in accordance with justice. As this money was part of the damages awarded to the husband, it would scarcely appear to be right that the wife should receive any part of it, but that would not act as a bar against her if there was an intestacy in regard to the fund. For the reasons I have given, I do not think there was. In my view, this appeal should be dismissed.

MORRIS, L.J.: I agree.

Appeal dismissed.

Solicitors: *William A. Crump & Son* (for the wife); *Denton, Hall & Burgin*, agents for *Herbert Simpson, Son & Bennett*, Leicester (for the husband).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]





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